

MASTER'S THESIS

**PROTECTION OF THE SACRED LANDS AND CULTURE OF THE WIXÁRIKA
PEOPLE. DOMESTIC AND INTERNATIONAL LEGAL PERSPECTIVE OVER
THE WIXÁRIKA MINING CASE.**

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1.- Introduction.

The mining industry has been active in Mexico since the second half of XVI century. The then existing New Spain had mining as one of its most important and profitable activities for the Spanish crown. This was favored due to the abundance of ore deposits in Mexico and vast indigenous manpower, both for excavation and extraction.¹

Mining is one of the most profitable extractive industries. During the last 8 years it has been boosted mainly due to ore findings and high global prices of commodities and metal ores, as a consequence of an industrial demand for metals, especially by Asian countries for economic growth.² Following said re-boom, Mexico mining concessions have also increased; thus representing a notable shift in its profits from 1,661,000 million USD to 2,119,000 million USD.²

On the other hand, it is also well-known that mining industry's adverse effects include environmental, social and cultural effects. This is why the present master's thesis examines the relationship between cultural and natural protection, human rights and indigenous peoples' rights, and development and management policies.

It is through this thesis written in response to a mining project intended to be developed in Wirikuta - a sacred site from the Wixárika people of Mexico – that I call for a better protection and respect of indigenous peoples' rights to property, self-determination and free, prior and informed consent. This can be achieved through an increase of consciousness about the cultural and natural importance that sacred sites represent, both to world's indigenous peoples and international community. It is after these measures that a wider recognition, protection and management of the sacred sites of indigenous peoples in Mexico could be improved.

In order to contribute with these protection measures of Mexican culture and biodiversity heritage, I analyze the evolution and development of Mexican and International Law that over the last three decades has shown an integral approach between human rights and environment that has benefited the rights and status of the world's indigenous peoples. Throughout the next chapters, I examine the relationship between the background,

¹ El Colegio de México, Centro de Estudios Históricos (1994): *Historia General de México 1 / Obra preparada por el Centro de Estudios Históricos*. 4A ed. México: El Colegio de México, Centro de Estudios Históricos. pp. 420-421

² Secretaría de Economía (Ministry of Economy): *Mining*. Available at: http://www.promexico.gob.mx/es_us/promexico/Mining [accessed October 2013]

objectives and means of implementation among Mexican legal framework and the International Covenant on Civil and Political Rights, the ILO Convention No. 169, the Rio Summit follow-up activities, the American Convention on Human Rights, the Inter-American Commission and the Inter-American Court of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples.

Lastly, I analyze the existent paradox between conservation and development policies, since the Wixárika people's claims reflect an antagonism before the current Mexican economic trends – mining industry – and its obligation for promoting and achieving an environmental, social and economic development. Hence, if reconciliation in this regard is to be achieved, both domestic and international compromises towards indigenous peoples rights shall be reinforced and understood from a holistic worldview, due to the intrinsic connection and dependency between biodiversity and sociocultural systems of indigenous peoples; in other words, the existent relationship between their traditional lands and resources with traditional livelihood and customs.

2.- Indigenous Peoples and their definition.

According to the UN Office of the High Commissioner for Human Rights, the estimated population regarded as indigenous people all around the world is over 300 million. Even though most indigenous peoples share the fact of having been conquered, colonized, occupied, or settled by people of different cultures or ethnic origins which with the pass of time became dominant,³ it is also true that each of them – the Indigenous and Tribal peoples – are unique and have retained their own social, cultural, economic and political characteristics which differentiates them between each other.

The diversity of indigenous peoples has not allowed uniformity between international community and world's indigenous peoples regarding the establishment of a legal definition for indigenous peoples, it has rather created polemic and discrepancy. Hence, in light of said scenario, there is no internationally accepted definition of indigenous peoples,⁴

³ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 9 (Rev.1), The Rights of

Indigenous Peoples, July 1997, No. 9 (Rev.1), available at: <http://www.refworld.org/docid/4794774d0.html> [accessed June 2013]pp. 1-2

⁴ UN Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, The Concept of Indigenous Peoples, January 2004. available at:

since the establishment of it could result in an unfair confinement of several possibilities and characteristics that have been evolving and adapting for thousands of years, peculiarities which grant the uniqueness of each indigenous people and community. That is why a universal definition would limit their own existence and in the future could entail legal consequences, since it would not be precise and inclusive.⁵

For instance, if we refer to ILO Convention No. 169, in a broad sense, we can find within its article 1 that Indigenous and Tribal Peoples in independent countries are those whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. Furthermore, it points as its scope of application to all those who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁶

On the other hand, during the 80s decade we can already note a clear shift within the development and scope of indigenous peoples' definition, mainly due to a development and better understanding of individual and collective rights of indigenous peoples. World Bank's definition of indigenous peoples takes into account their isolation and cultural modification as a consequence of adapting to or borrowing traits from another culture, and it also considers the loss of their own cultural and environmental integrity. Its aim is to widen said definition to one which truly analyzes and focus on their uniqueness and differences in their socio-cultural systems, modes of production, and forms of ecological adaptation, both different from dominant societies and among other world's indigenous peoples.⁷⁸ In this sense, World Bank's main aim with said approach is to be able to identify

<http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc> (accessed January 2014).

⁵ Heinämäki, Leena, 2010, pp.1-2.

⁶ C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), Convention concerning Indigenous and Tribal Peoples in Independent Countries. Entry into force: 05 Sep 1991, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

⁷ World Bank, Report No. 25754, Implementation of Operational Directive 4.20 on Indigenous Peoples: An

and ensure that development projects intended to be implemented, already launched or to be Bank-financed, within indigenous' traditional lands and natural resources located within those, foster their full inclusion and total respect for the dignity, human rights and cultural uniqueness, in order to be equally implemented. For instance, implementation of the Indigenous Peoples Development Plan aims to mitigate the potential adverse project effects on indigenous peoples' rights – self-determination; prior consultation; right to cultural identity, enjoy one's own culture; free, prior and informed consent - and to ensure that beneficiaries “receive culturally compatible environmental, social and economic benefits.”⁹ Furthermore, Special Rapporteur of the Sub-Commission, José Martínez Cobo, formulated a "working definition" in his Study of the Problem of Discrimination against Indigenous Populations. It states as follows: “**Indigenous communities, peoples and nations** are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”¹⁰

2.1. Indigenous People in Mexico.

The history of indigenous peoples in Mexico is quite ancient. Mexico is a legacy of Mesoamerica, an area which used to be comprised of the present region of the State of Sinaloa, and the limited area by the rivers Lerma and Pánuco, until the present region of Costa Rica. It goes back approximately to the year 1200 B.C. with the Olmec Civilization, which used to inhabit the southeast of Mexico, near the coast of the Gulf of Mexico, in the present region of the states of Veracruz in the south, and Tabasco in the north; the Olmec

Evaluation of Results, April 2013, available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182

/Rendered/PDF/257541OD04.20.pdf [accessed January 2014] pp. 5 -7

⁹See supra Note 7, p. 5

¹⁰ Martínez Cobo report (E/CN.4/Sub.2/1986/Add.4) in regard to the concept of “indigenous”.UN Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, The Concept of Indigenous Peoples, January 2004. p. 2 11 See supra Note 1, p. 129.

metropolitan area used to cover approximately 18,000 km².¹¹¹² As time goes by, all around the territory of present-day Mexico, we can find vestiges of many other cultures, some examples being the Mayans, Toltecs, Aztecs, Chichimecas and Wixárika.

In this regard, Miguel León-Portilla states that the anthropological meaning of “civilization” differs from “culture”, since the former is more developed and extensive.

Within a civilization there is an urban life, which may include cities and a more complex social, political, economic and religious organization; a specialized labor force, and even such creations as calculation of time, written language, an education system and developed art.¹³

According to the National Commission for Indigenous Peoples Development in Mexico (CDI) and to the “II General Census of Population and Housing” made in 2005 by the National Institute of Statistics and Geography (INEGI), the estimated indigenous population in Mexico is 10,103,571. This represents 9.8% of the total population of Mexico¹⁴ There are 62 different Indigenous Peoples and 89 different Indigenous languages¹⁵ as part of the Indigenous heritage and cultural richness of Mexico.

2.2. The Indigenous Wixárika People.

Even though the origin of Wixárika people is uncertain, there are some hypotheses which indicate that they descended from the Náhuatl. They are currently distributed in twelve rural municipalities in the mountainous region of Gran Nayar and the Sierra Madre

¹¹ See supra Note 1, p.129

¹²Arqueología Mexicana. Revista Bimestral, Septiembre-Octubre Volumen XV, Número 87 (2007): Cultura Olmeca, Cultura Olmeca, available at: <http://www.arqueomex.com/S2N3nDOSIER87.html> [accessed June 2013]

¹³ Arqueología Mexicana. Revista Bimestral, Mayo-Junio Volumen XIV, Número 79 (2006): Los Huastecos,

Mesoamérica: una civilización originaria, available at: <http://www.arqueomex.com/S2N3nMesoamerica79.html> [accessed June 2013]

¹⁴ Comisión Nacional para el Desarrollo de los Pueblos Indígenas (2006): Indicadores Sociodemográficos de la Población Indígena 2000-2005, available at: http://www.cdi.gob.mx/cedulas/sintesis_resultados_2005.pdf pp. 2, 4, 5 and 11 [accessed June 2013]

¹⁵ Instituto Nacional de Estadística y Geografía (2012): Conociendo México, available at: http://www.inegi.org.mx/prod_serv/contenidos/espanol/bvinegi/productos/integracion/pais/mexico/foleto_nacional_pliegos_baja.pdf [accessed June 2013] pp. 44-45

Occidental, in the states of Jalisco, Durango, Nayarit and Zacatecas, within an area of approximately 90,000 km².¹⁶¹⁷¹⁸¹⁹

The native Wixárika language belongs to the Yuto-Aztec family which has origins dating back 5,000 years. It was also spoken as far north as the present-day states of Oregon, Idaho, Wyoming, Oklahoma, Texas, Arizona and California in the United States of America. In Mexican territory, it is spoken in 15 states - including the aforementioned Wixárika - and even as far south as El Salvador, with some variants spoken in Guatemala, Honduras, Nicaragua and Costa Rica.²⁰

According to data from the last censuses, Wixárika population rises to 43,929 native speakers of this indigenous language. A significant part of them reside in the municipalities of Bolaños and Mezquitic, belonging to the state of Jalisco, as well as the municipality of La Yesca, located in the state of Nayarit. The “XII General Census of Population and Housing” made in 2000, reports that there are 16,932 native speakers of Wixárika in Nayarit, 10,976 in Jalisco, 1,435 in Durango, and 330 in Zacatecas.²¹

The Wixárika People’s territory has been classified on 3 macro-ecological zones. The first one extends from the north of the Lagoon of “Aguas Bravas” to the zone of “Varas”. One more is comprised of the nearby valleys and hills from the regions of Ruíz and Acaponeta in Nayarit. Lastly, the third region and considered as the most important, is located along the Chapalagana river, where most of the Wixárika population can be found. Most of this zone is located within Jalisco and Nayarit, and it is comprised of the territories of San Andrés Cohamiata, Guadalupe Ocotán, Santa Catarina Cuexcomatitlán, San Sebastián Teponahuatlán and Tuxpan de Bolaños.²² Since the area is semi-desert, mountainous and

¹⁶ Comisión Nacional para el Desarrollo de los Pueblos Indígenas (2010): Informe final de la Consulta sobre los Lugares Sagrados del Pueblo Wixarika, 28 ed. - México: CDI. p. 9

¹⁷ ODAPI (no date): Los Huicholes. El pueblo – La Historia, available at:<http://www.odapi.org/espanol/huicholes/huicholes-histoire.htm> [accessed June 2013]

¹⁸ ODAPI (no date): Los Huicholes. El pueblo – La Localización, available at:<http://www.odapi.org/espanol/huicholes/huicholes-localisation.htm> [accessed June 2013]

¹⁹ Comisión Nacional para el Desarrollo de los Pueblos Indígenas (2009): Huicholes - Wirraritari o Wirrárika, available at:http://www.cdi.gob.mx/index.php?option=com_content&task=view&id=596&Itemid=62 [accessed June 2013]

²⁰ UNAM, Estudios de Cultura Nahuatl, Volumen 16 (1982): Investigaciones etno-lingüísticas entre hablantes de náhuatl y otras lenguas yuto-aztecas, available at: <http://www.historicas.unam.mx/publicaciones/revistas/nahuatl/pdf/ecn15/226.pdf> [accessed June 2013], pp. 11-15.

²¹ See supra Note 15, p.2

²² See supra Note 16, p. 23

sloping ground, agricultural conditions are poor; productive activities are mainly for self-consumption, such as subsistence farming, which includes corn, pumpkin, amaranth, beans, peppers and fruits; fishery and hunting.²³

At present, there are five ceremonial centers where the traditional governments of the Wixárika People are located: San Andrés Cohamiata, Santa Catarina Cuexcomatlán, San Sebastián Teponahuatlán and Tuxpan de Bolaños in Jalisco, and Guadalupe Ocotán in Nayarit.²⁴

A core element within the traditions of the Wixárika People is the existent connection of time and space with an agricultural calendar. This is the celebration of certain rituals, like the route of pilgrimage to Wirikuta, in accordance to the seasons of the year, which are dry and wet. Such synchronization can be found within their culture associated with corn, since the value given to the plant goes beyond economic value, due to the fact that it represents a core cultural characteristic which is reflected throughout their traditions, rituals and spiritual beliefs.²⁵

Furthermore, one of the main characteristics of the Wixárika people's religion is the relation between corn, deer and peyote. Usually, their mythology refers to all these elements; rituals, celebrations and, temporal and material organization of life itself turn around them. On one hand, corn and deer represent their main physical support; on the other, peyote is the principal way for transcending the material world and represents the manifestation of sacredness, the medium between man and Gods.

One of their most important agricultural rituals celebrated year after year is called "mitotes". It consists of three agricultural events: The first is related to sowing and beginning of rainy season, which coincides with summer solstice (within some communities it is considered the beginning of the year). The second ritual is "mitote de los elotes o primeros frutos" (ritual of corn, or of first fruits) celebrated at the end of rainy season. Finally, the third ritual named "fiesta del maíz tostado" o "del esquite" (ritual of the toasted corn), is related to the seed that has been sowed and stored, and it is performed

²³ Ibid.

²⁴ Ibid.

²⁵ Comisión Nacional para el Desarrollo de los Pueblos Indígenas, Alvarado Solís, Neyra Patricia (2009): *Sistemas Normativos Indígenas Huichol, Cora, Tepehuano y Mexicanero*, Antropología Social 97 - México: CDI. p. 25

during dry season. During these rituals we can find the union between the three central elements of their religion: corn, deer and peyote.²⁶

2.3. Socio-political structure of the Wixárika people.

Social structure of the Wixárika people has been historically based on a patriarchy and the “tukíte”.²⁷ Its basis is formed around the ceremonial centers and the familiar yard named “xirikite” (singular = xiriki), and it is integrated by members who have blood ties. The minor unit is represented by the “kiíte” (singular = ki) or ranches, integrated by nuclear families. On the top, we find the ceremonial center named “tukite” (singular = tuki), which is integrated by a certain amount of xirikite and recognizes a common ancestor (mythical), even though there is no blood tie between them. Lastly, the Wixárika people are integrated by the “tukite” located in the States of Jalisco, Nayarit and Durango, which keeps an exchange nexus between them through a complex system of offices, ceremonies, pilgrimages, chants, dances (neiya) and rituals that assure the unity of the group.²⁸ Every “tuki” arranges a pilgrimage and share peyote (híkuri), deer or beef meat, with some other “tukite”. This is how their nexus are strengthened. It is believed that the more híkuri that it is collected, the more likely the offering ritual that is organized by the tuki will be successful. Upon returning from the pilgrimage, the Xukuri´+kate Wawa+te (jicareros) mention they have obtained the "wixarika niukiyari", which means that they have spoken with their ancestors about the re-creation of the “*Wixaritari*”.²⁹³⁰

Hence, as it can be noted, pilgrimages of the Wixárika People not only help with the initiation process, where their cultural heritage is acknowledged and assimilated through traditions, but also to their continuity as a People. Therefore, if any of their sacred sites interconnected through the pilgrimage is affected or altered, their social and cultural development would face irreversible harm.

²⁶ Artes de México, Número 78 (no date): Los Rituales de México, available at:http://artesdemexico.com/adm/09/index.php/adem/cont-ed/la_boda_del_maiz/ [accessed June 2013]

²⁷ Durín, Sèverine, 2002, and Comisión Nacional para el Desarrollo de los Pueblos Indígenas, Alvarado Solís, Neyra Patricia (2009): Sistemas Normativos Indígenas Huichol, Cora, Tepehuano y Mexicanero, Antropología Social 97 - México: CDI p. 32

²⁸ See supra Note 16, p. 13

²⁹ Ibid., pp. 28-30

³⁰ See supra Note 25, p. 33

Nowadays, among the authorities of the Wixárika People, according to their location and lineage, we can find: the Patriarch, the Traditional Government, the Authorities from the Common Goods, the Council of the Elders and the Huichol Indigenous Communities Union (UCIH).³⁰

The Wixárika People have five sacred sites and it is through constant pilgrimages to their sacred sites that these indigenous people ensure their cultural and social reproduction. However, it is important to point out that such sacred sites must not be understood as geographies but as an expression of the Wixárika people's worldview. The sacred sites are as follows:

- a. Wirikuta is located in the east, where the sun rises and within the region of San Luis Potosí- semi-desert, in the Municipalities of Catorce, Villa de La Paz, Matehuala, Villa de Guadalupe, Charcas and Villa de Ramos.
- b. Tatei Haramara is the Mother of the five colored corn. It is located in the west and is the sacred entrance to the fifth world which is represented by two white rocks: Tatei Waxieve and Tatei Yukawima, located on Isla del Rey in San Blas, Nayarit. This is the place where the Sun has to fight fiercely before hiding to be reborn every day through Wirikuta, where the virtuous elders walked.
- c. Xapawiyeme – Xapawiyemeta is the place where Watakame, chosen by Takutsi Naakawe the Mother of the Universe, touched the ground after the flood. This sacred site is located in Isla de Los Alacranes, in the Lake of Chapala, Jalisco.
- d. Hauxamanaka, which means “Place where it was stranded”. This is the sacred site where Watakame's canoe came to rest after the flood. Located on the hill El Gordo within the community of Q'dam in Saint Bernardino Milpillas Chico, Pueblo Nuevo and Durango.
- e. Tee'kata which means “Place of the prime fire”, where the Sun was born and it is located within the heart of the Wixárika territory in Santa Catarina Cuexcomatitlán, Municipality of Mezquitic and Jalisco.³¹

2.4. The important role of Wirikuta within Wixárika people's genesis.

During the dry season, the Wixárika people perform a pilgrimage to Wirikuta, a sacred site where the gods can be found. This location has an important place within their worldview since it is where the great ancestral spirits “The Kaka-yarixi” went on the first deer hunt.

After each of their footprints, the peyote, “hikuri”, grew and this was also where the sun, “Taka-ye o Tawexik-a”, arose and shone for the first time.

The route of pilgrimage to Wirikuta and the location of Wirikuta itself, represent a core element within the traditional livelihood of the Wixárika People, since according to their cosmogony, this place takes part in the balance of the celestial and natural dimensions that give power to life. The terrestrial life, “*heriepa* or *huriyepa*”, happens in the underworld before birth, “*Wuatetüapa*”, the celestial dimension, “*Taheimá*”, and between the four cardinal points which harmoniously combine in the middle. The forces that keep the balance of life are the feminine elements of water and soil, which along with the masculine powers of wind and fire, allow growth. The land of the sunrise, “*Paritecüa*”, is located in the east, where Our Father, “*Tayau*”, the sun rises. This birth is celebrated with the morning hunting of the “Our Older Brother”, the Blue deer, “*Tamatsi Maxayawi*”, which turns into “Our Mother Peyote”, “*Tatéi Hikuri*”, when it is reached by the arrows of the hunters in the desert. That is the place where their ancestors painted the faces of the pilgrims, and that is why it is called “*Wirikuta*”. The hunting of the deer, which is represented by the finding of the peyote, is followed by climbing to a hill called “Cerro Quemado”, “*Leunxü*”, where “Our Father the Sun” came out from the underworld to light the sky. At the beginning of times, the dew arose on the west and was changing into different creatures and things that their descendants would need to live, as soon as words came out from its interaction with the sun, “Our Creator”, “*Tahueviécame*”, on its peak.³¹ Some of these things are fresh water, deer and other hunting animals, corn and other edible plants, and ritual plants, such as tobacco and peyote.³²

In this sense, attending to the cultural facts mentioned above, the World Heritage Office of the INAH, Mexico's National Commission for UNESCO (CONALMEX), submitted the route of pilgrimage to Wirikuta for Inscription on the List of Intangible Cultural Heritage in

³¹ Negrín, Juan (2007): Sitios Sagrados, available at: http://artesdemexico.com/adm/09/index.php/adem/cont-ed/la_boda_del_maiz/ [accessed June 2013]

³² Neurath, Johannes y Pacheco Bribiesca, Ricardo Claudio (no date): Atlas de Culturas del Agua en América Latina y el Caribe, Pueblos Indígenas de México y Agua: Huicholes (Wixárika). Instituto Nacional de Antropología e Historia available at: http://www.unesco.org/uy/ci/fileadmin/phi/aguaycultura/Mexico/05_Huicholes.pdf [accessed June 2013] p.3

need of Urgent Safeguarding in 2013, under the nomination number 00862.³³³⁴ Within this nomination, it is important to note that some of the unique and intangible cultural heritage characteristics of the pilgrimage which were pointed out are the oral traditions and expressions, including language as a vehicle of the intangible cultural heritage, performing arts, social practices, rituals and festive events, and knowledge and practices concerning nature and the universe. These elements that have been mentioned represent a powerful social mechanism which reproduces an ancestral worldview and an agricultural production system based on corn and seasonal cycles, which assure the continuity of their traditional livelihood and their existence as a people.

2.5. The role of Wirikuta as an environmental sanctuary.

There are some other facts about the location of Wirikuta which increase its preeminence, both geographically and within the cosmogony of the Wixárika people, due to its location in the east. It represents the place where the sun rises, it is the place where the peyote grows and the first rains arrive from the same direction as the sunrise, east.³⁵ As it has been stated before, each year, after their harvest is finished and they have completed their seasonal ceremonies, the Wixárika People embark on a 550 kilometers pilgrimage that runs from the region of Gran Nayar, located on the coast of the State of Nayarit to their most sacred mountain, Wirikuta, situated in the State of San Luis Potosí.³⁵ The mountain, also called “Cerro Quemado” or Burnt Mountain, is the birthplace of their ancestors – the pillar of their cosmogony since it represents the place where the universe began and where the ancient ones emerged. Along the pilgrimage route they collect hikuri (peyote) that they use for their prayers and ceremonies. Therefore, it is essential for them to return to this place every year to allow their shamans to seek spiritual guidance for the good of their people and their culture.³⁶

Furthermore, it is important to point out that Wirikuta’s relevance is not only due to its historical, cultural and spiritual facts, but also to its biological, geographic and social meanings, both to the Wixárika People and Mexico. Therefore, as an attempt to grant and to

³³ UNESCO, Intangible Cultural Heritage, Files under process available at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00553> [accessed June 2013], pp. 9-10

³⁵ See supra Note 32.

³⁶ Sacred sites, International blog (2013): Save Wirikuta – The Wixarika Sacred Mountain. available <http://sacred-sites.org/wordpress/tag/wixarika-huichol/> [accessed June 2013]

promote an integral protection, and to assure the future existence of the aforementioned, the pilgrimage to Wirikuta was submitted to the United Nations Educational, Scientific and Cultural Organization (UNESCO) on December 6th 2004, to be considered to be added to the World Heritage List under the reference number 1959.

Under the name of “*Huichol Route through the sacred sites to Huiricuta (Tatehuari Huajuye)*”, the National Institute for Anthropology and History (INAH) described some of the spiritual and environmental meanings of Wirikuta, both as a sacred site and as a geographic location. The pilgrimage route runs along a variety of ecosystems, whose cultural attributes are linked to agricultural periods, crop gathering or hunting as part of a ritual cycle. The constellation of sanctuaries and traditional routes constitute the Wixárika People’s scenery as the cultural resonance of a community that, together with the ritual cycle, manifests itself as a continuous, dynamic and complex system.³⁷

This legacy, in addition to shamanic, religious or medical knowledge, includes the diversified use of ecosystems or the conservation of the genetic variety of the species they cultivate.³⁸ Hence, in order to grant their individual and collective human rights, and to help the Wixárika People to keep on maintaining the use of such knowledge and promote their oral traditions, it is also necessary to understand the Traditional Knowledge (TK) and Traditional Ecological Knowledge (TEK) that it is implied within its route of pilgrimage.

This is mainly considering that Wixárika’s language has no written form and pilgrimages perform a very particular function identified as an “itinerant Mesoamerican university”, main axis of a knowledge system based on nature, which gives the Wixárika people their identity. This pilgrimage is the only way in which the Mesoamerican legacy of this ancestral culture can be kept.³⁹

TK refers to the knowledge, innovations and practices of indigenous and local communities around the world. An essential component is the knowledge pertaining to their lands and environmental conditions on these lands. It is experience gained over centuries, transmitted orally from generation to generation, taking the form of stories, songs, folklore, proverbs,

³⁷ UNESCO, Submitted by: World Heritage Office (INAH) Mexico's National Commission for UNESCO

(CONALMEX) (2004): *Huichol Route through the sacred sites to Huiricuta (Tatehuari Huajuye)* available at: <http://whc.unesco.org/en/tentativelists/1959/> [accessed June 2013]

³⁸ Ibid.

³⁹ See supra Note 37.

beliefs and culture, community laws, local language, and agricultural practices, including the development of plant species and animal breeds.^{40,41,42}

Meanwhile, TEK or Indigenous Knowledge refers to all the knowledge of indigenous and aboriginal people about the ecosystem surrounding them and the utilization of their resources. TEK can be defined as information about humans and other living beings and their connection with one another and their environment. On one side, it is keeping traditions alive; on the other, it is the key of survival for many groups of people whose existence truly depends on their relationship with land and water.⁴³ This knowledge is vital for the conservation of plants and animals, their genetic diversity and for managing the local environment. It can make a solid contribution to sustainable development and allows a sustainable future for all humans.

Following the aforementioned, it is easy to understand the diversity and complexity of the protection of the Sacred Site of Indigenous Wixárika People, both as cultural heritage and due to its environmental relevance. This is because the route of pilgrimage runs through two relevant regions that are important because of their contribution to biodiversity: the Sierra Madre Occidental and the Chihuahua Desert. The complex topography and the spectacular altitude ranges of the south of the Sierra Madre Occidental, allow the existence of a wide range of habitats that include tropical forests of deciduous and sub-deciduous trees, spiny forests, thickets and grasslands, gallery forests, pine forests and oak trees. The Chihuahua Desert is one of the top three most biologically rich semi-desert areas in the world. The habitats included in the southeast of this region such as xerophilous vegetation, thickets, grasslands and pine forests, lodge a notable wealth as far as diversity and endemic characteristics.⁴⁴

Nevertheless, like other indigenous peoples all around the world, the Wixárika people face several threats and violations. The principal problems are human rights violations, and non-

⁴⁰ Arctic Centre, EU Arctic Information Centre Initiative. Available at: <http://www.arcticcentre.org/InEnglish/SCIENCE-COMMUNICATIONS/Arctic-region/Arctic-Indigenous>

Peoples/Traditional-knowledge [accessed June 2013]

⁴¹ Convention on Biological Diversity. Traditional Knowledge and the Convention on Biological Diversity. available <http://www.cbd.int/traditional/intro.shtml> [accessed June 2013]

⁴² Arctic Centre, Arctic Environmental Impact Assessment. available <http://arcticcentre.ulapland.fi/aria/about.asp> [accessed June 2013]

⁴³ U.S. Fish & Wildlife Service, Traditional Ecological Knowledge for Application by Service Scientists.

available <http://www.fws.gov/nativeamerican/pdf/tek-fact-sheet.pdf> [accessed June 2013]

⁴⁴ See supra Note 33.

inclusion in national, regional or global development plans. Others include segregation and the absence of free, prior and informed consent before planning, authorization and construction of economic projects within their traditional lands and thereby affecting their natural resources. Lastly, they must deal with loss of cultural heritage, irresponsible and unsustainable tourism, and looting of altars and peyote.

Unfortunately, there is one more threat that the Wixárika people has to face and which was noted in the Report of the UN Special Rapporteur on Indigenous Peoples (August 22nd, 2011), James Anaya. In November 2009, the Canadian company First Majestic Silver Corp obtained 22 mining permissions for silver exploration from the Mexican government. These permits cover the area of the Sacred Site Wirikuta.⁴⁵

According to the nomination file number 00862⁴⁷, such concessions were granted by the Mexican Government to the company Minera Real de Bonanza S.A. de C.V., a subsidiary company of the Canadian firm, First Majestic Silver Corporation, which is officially listed in United States and Canada's markets. The 35 concessions granted, between 1982 and 2009, authorize exploration and exploitation of 6,327 hectares in the Catorce municipality in San Luis Potosí, where important gold and silver deposits are located. However, the franchised polygon embraces a significant portion of the "Cerro del Quemado", which represents the most important place of the Wixárika's symbolic geography and the culminating site of their pilgrimage to Wirikuta. It is estimated that more than 60 percent of the granted surface is located in the natural protected area, where springs and topographic elevations constitute a cultural reference – Sacred Sites- for the Wixárika people. Hence, if such springs and sacred sites are affected, both the cultural heritage loss and the environmental harm would be irreversible.

3. The mining case in Wirikuta.

3.1. The mining industry in San Luis Potosí.

San Luis Potosí State has a historical significance which can be traced back to the year 1592. After this year, several ore deposits of great relevance were discovered, such as

⁴⁵ UN, General Assembly, Human Rights Council (2011): Report number A/HRC/18/35/Add.1, by the Special Rapporteur on the rights of indigenous peoples, James Anaya. available at: http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add-1_en.pdf [accessed June 2013] 47 See supra Note 33.

Sierra de Pinos and Ramos.⁴⁶ Particularly within Real de Catorce, the estimated historic production of recovered silver, between 1773 and 1990, was about 230 million ounces.⁴⁷ A recent study designed by the General Direction for Mining Development, from Ministry of Economy of Mexico (the SE), states that there are 287 companies with foreign capital⁴⁸ which are currently operating a total of 857 projects throughout Mexico. A noteworthy point out is that from such a number of companies, 72% of them (205) have their headquarters in Canada. Lastly, from the 24 states of Mexico where the mining industry is developed, San Luis Potosí State has 17 projects.^{49,50}

Furthermore, from the projects developed by companies with foreign capital within Mexico's territory, 78.19% - 668 - are currently in the **exploration stage**; 10% - 83 - in the **production stage**; 4.3% - 37 - in the **development stage**, and 8.05% - 69 - **under a postponement criteria "stand-by" or "suspension"**, for their later reactivation in financially reasonable time.⁵¹

Due to the re-boom of the global mining industry, Mexico has notably increased its mining concessions in all stages. It has been estimated that the mining industry had an increase of 27.6% during 2010, moving from a profit of 1,661,000 million USD to 2,119,000 million USD.⁵²

For Mexico's Gross Domestic Product, the mining industry represents an important income. During the year 2011, as an extractive industry and extended mining, it represented 2% and the 5.0% of the Mexican GDP, respectively.⁵³ The latter, refers to the whole industry which

⁴⁶See supra Note 1 p. 419

⁴⁷First Majestic Silver Corp. Projects. Available at: <http://www.firstmajestic.com/s/LaLuz.asp> [accessed October 2013]

⁴⁸Secretaría de Economía, Directorio de Compañías de Capital Extranjero. Available at: http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/empresas_capital_extranjero.pdf [accessed October 2013]

⁴⁹Secretaría de Economía, Proyectos Mineros de Empresas con Capital Extranjero. Available at: http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/mapa_proyectos_mineros_empresas_capital_ext.pdf [accessed October 2013]

⁵⁰Secretaría de Economía, Diagnóstico de Empresas Mexicanas con Capital Extranjero en la Industria Minero Metalúrgica del país.. Available at: http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/informacionSectorial/minero/diagnostico_empresas_mineras_capital_extranjero_1erQ_0713.pdf [accessed October 2013]

⁵¹Ibid.

⁵²See supra Note 2.

p.55

⁵³Ibid.

works as a metal and ore provider for the manufacturing and construction industry; including its extraction, benefits and transformation processes of ore, including the mining itself.⁵⁴

Depending on its metal or nonmetal ore deposits, San Luis Potosí is divided into 14 mining regions. It is important to point out that 3 of said regions comprise municipalities which are located within what has been proclaimed as State-created Natural Protected Area, under the title of Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People. These municipalities are Sierra de Catorce Region, Charcas Region and Villa de Ramos Region.⁵⁵

According to the System for Mining Administration (SIAM) from the SE, San Luis Potosí has not been the exception before such development of the mining industry. As we can extract from its mining grants records, from year 2006 to 2012, the Federal Government, through SE, has granted a total of 292 mining grants for San Luis Potosí State, 34 of which have been granted within the region that contains the Natural Protected Area (NPA) named “Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People.”⁵⁶

Moreover, from regions stated before, it is important to remark that two of them are located within the area where the pilgrimage to Wirikuta takes place, which is also a sacred site for the Wixárika People. These are Sierra de Catorce and Charcas Regions. Due to their relevance as ore deposits, cultural integrity of Wixárika people and environmental protection of their traditional lands that they have been occupying and protecting in order to perform their traditional livelihood has been continuously jeopardized. As it has been mentioned above, this situation can be confirmed by the report issued by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya⁵⁷; and once more, through

⁵⁴ Instituto Nacional de Estadística y Geografía (2011): Censos Económicos (2009). La industria minera ampliada: Censos Económicos 2009 / Instituto Nacional de Estadística y Geografía.-- México : INEGI, c2011. Available at: http://www.inegi.org.mx/est/contenidos/espanol/proyectos/censos/ce2009/pdf/Mono_Industria_Minera.pdf [accessed October 2013] p. 3

⁵⁵ Secretaría de Economía, Panorama Minero del Estado de San Luis Potosí, 2011. Available at: http://www.sgm.gob.mx/pdfs/SAN_LUIS_POTOSI.pdf [accessed October 2013], pp. 17-23)

⁵⁶ Expedición de Títulos de Concesión Minera 2006 – 2012 (Mining grants records 2006- 2012) Available at: http://www.siam.economia.gob.mx/swb/es/siam/p_Titulos [accessed October 2013]

⁵⁷ See supra Note 45

the SE records, where we can find that during the last five years, 22 mining concessions have been granted within the municipalities of Catorce, Villa de la Paz, Matehuala, Villa de Guadalupe, Charcas, Salinas de Hidalgo and Villa de Ramos in San Luis Potosí.⁵⁸⁵⁹

3.2. Mining as a threat for the Wixarika people.

Wixárika people's claims about the insufficient protection of their cultural and environmental rights - the safeguarding of their sacred sites, protection of their right to realize the pilgrimage to Wirikuta and protection of their natural resources located within their traditional lands – began to have legal consequences after 1989. It was after this year when their concerns in said regards fostered the elaboration of new laws in order to protect Waurika's sacred sites, examples of these are the three Decrees that have proclaimed the region that contains the pilgrimage to Wirikuta as a State-created Natural Protected Area (1994, 2000 and 2001), Wirikuta's NPA Management Plan (the NPA Plan) and the “Hauxa Manka Pact” (both from the year 2008), signed by the Durango, Jalisco, Nayarit, Zacatecas and San Luis Potosí States, as we will see later in chapter 4.2.3 concerning environmental and indigenous legislation.

However, if we follow the evolution of the economic/mining development in Mexico, particularly within the NPA of Wirikuta, we can see that the scenario that Wixárika people have been watching for the last three decades is neither the most rewarding, nor the most promising. They have been fighting for their rights since the eighties. This is because, as it has been stated, Mexico's government reaction and actions to the present case contradict each other.

The National Commission of Human Rights of Mexico (the Commission), is the highest national institution in such matters. It is through its Recommendation No. 56/2012, “about the violation of collective human rights to consultation, use of their traditional lands, cultural identity, to a healthy and clean environment, water and sanitation, and to health of the Wixárika people in Wirikuta” (the Recommendation) issued on September, 28th, 2012,⁶⁰

⁵⁸ See supra Note 33

⁵⁹ Secretaría de Economía, Proyectos Mineros de Empresas con Capital Extranjero. Available at: http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/proyectos_mineros_operados_comp_capital_ext_2012.pdf [accessed October 2013]

⁶⁰ National Commission of Human Rights of Mexico (Comisión Nacional de los Derechos Humanos en México): Recommendation No. 56/2012, “about the violation of collective human rights to consultation, use of their traditional lands, cultural identity, to a healthy and clean environment, water and sanitation, and to health of the Wixárika people in Wirikuta”. available at:

that it strengthens the aforementioned, and recognizes the current situation in Wirikuta as an environmental and cultural threat for the Wixárika people.

The Recommendation let us see that throughout the Commission's investigation process, the acts and omissions from Mexican authorities, mainly through the Ministry of Economy (SE) and Ministry of Environment and Natural Resource (SEMARNAT), including its deconcentrated agencies, are far from achieving its functions as a protector and security provider. In the lines below, I intend to explain how the Mexican government failed to do so, either due to a misuse of its powers, a lack of due homogenization among its three levels of government regarding the applicable legal framework for the protection of the NPA of Wirikuta, and lastly, a noncompliance of its obligations.

3.3. The La Luz Silver project.

The La Luz Silver Project (the Light) is owned by First Majestic Silver Corporation (First Majestic), which is officially listed in United States and Canada's markets, through the Mexican company Real de Bonanza S.A. de C.V. The property was acquired in 2009 from Normabec Mining Resources and it is located in the Catorce municipality, where Wirikuta – a sacred site for the Wixarika people - is located. The project consists of 22 mining concessions that cover an area of 6,327 hectares in San Luis Potosí.⁶³

Currently, First Majestic owns and operates five producing silver mines in Mexico: La Parrilla silver Mine, San Martin Silver Mine, La Encantada Silver Mine, La Guitarra Silver Mine, and Del Toro Silver Mine.

As a foreign firm, First Majestic has had to accomplish what it is stated by articles 10 and 11 of the Mining Act of Mexico (referring to the corporations which act as grantees of mining concessions that include foreign capital); therefore, since September 30th, 2010, Minera Real de Bonanza S.A. de C.V., acts as its subsidiary.⁶¹

According to the Mining Prospect of San Luis Potosí, there were 78 mining concessions granted in 2011 – covering a surface of 577,766 hectares – among which Minera Real de Bonanza S.A. de C.V. is found as a Grantee, and located it within the top mining companies which possesses one of the most important and biggest ore deposits (mainly

http://www.cndh.org.mx/sites/all/fuentes/documentos/Recomendaciones/2012/REC_2012_056_0.pdf [accessed October 2013] 63 See supra Note 49

⁶¹ Secretaría de Economía, Directorio de la Minería Mexicana (Mexican Mining Directory) Available at:

http://sgm.gob.mx/directorio/Empresa_b.jsp [accessed October 2013]

silver, gold, lead and zinc) in the State.⁶² The aforementioned can be confirmed by the company's Technical Reports where the Reserves/Resources inventories from the ores are reported.⁶³⁶⁴ However, as the report of the UN Special Rapporteur on Indigenous Peoples indicates, around 70% of the territory - 4,107 hectares - under concession for the La Luz Silver Project is located within the NPA of Wirikuta, which as was stated before, is one of the most important sacred sites for the Wixarika people.⁶⁵ If we attend to the corporate objectives of First Majestic, it is assumed that the Wixarika people is facing one of its biggest and most dangerous challenges (legal, social, cultural and environmental). This is due to that within the corporation's goals we can find that "*...is committed to building a senior Silver producing mining company based on an aggressive development and acquisition plan with a focus on Mexico.*"⁶⁶ Previous situation clearly shows intentions to keep on developing existing projects, both of exploring and exploiting, in Mexico. To reinforce such intentions, we can also find a straight and strong commitment for encouraging investment in mining projects. The aforementioned obeys to the re-boom in the mining industry which keeps on rising and to a dramatic bull market in precious metals that it is expected over the coming years.⁶⁷ This certainly encourages the creation of new projects and fosters an increase in the production, but moreover boosts the expansion of First Majestic, through research into new and more interesting ore deposits and future projects in Mexico.

Furthermore, the response from the Mexican government is not proving to be the fastest and most effective way for achieving full protection for the Wixarika people and its pilgrimage to Wirikuta. Intentions for environmental and cultural protection have been taken through federal and state legal framework, and State-created NPA's decrees. Also, among the three levels of government, we can find that a legal framework with such a spirit

⁶² see supra Note 55, p. 14

⁶³ First Majestic Silver Corp. Reserves/Resources. Available at: <http://www.firstmajestic.com/s/ReservesResources.asp> [accessed October 2013]

⁶⁴ Mineral Industry Consultants, (2008): Updated ni 43-101 Technical Report and Mineral Resource estimate

for the Real de Catorce property San Luís Potosí State, Mexico. Available at: <http://www.firstmajestic.com/i/pdf/NI43-101RealdeCatorce.pdf> [accessed October 2013]

⁶⁵ See supra Note 45

⁶⁶ First Majestic Silver Corp. Home. Available at: <http://www.firstmajestic.com/s/Home.asp> [accessed October 2013]

⁶⁷ First Majestic Silver Corp. About the Company. Available at: <http://www.firstmajestic.com/s/Company.asp> [accessed October 2013]

has been enacted – even though as most of the legislation in such regards is needed of more amendments to reach its complete effectiveness – as we will see in chapter 4. Nevertheless, as it has been stated within the present chapter, we can see that the economic/mining development in Mexico, particularly within the NPA of Wirikuta, not only opposes but jeopardizes the cultural integrity of Wixárika people and the environmental protection of the area where the pilgrimage to Wirikuta takes place. Hence by interfering with or affecting any of them, their traditional livelihood, customs and future existence as people would be in jeopardy since these elements are interconnected and interdependent, representing both an inherent part of its traditional livelihood.

On the other hand, we can also find that in use of its exclusive powers, regarding the domain and control of the activities related to the exploration, exploitation and benefits of all kind of ores, the federal government, through the Ministry of Economy of Mexico has taken an opposite direction and during the last five years has granted 22 mining concessions within the NPA⁶⁸⁶⁹⁷⁰; and attending to the same Ministry records, it is supposed that Minera Real de Bonanza S.A. de C.V. will start the silver extraction process in 2014, specifically within the common land called “Potrero”.⁷¹

3.4. The Universo Gold-Silver project.

The Universo Gold-Silver project (the Universo) is owned by Revolution Resources Corporation (the RR Corporation), which similar to First Majestic, is another Canadian corporation which has important economic/mining interests in Mexican territory. The property was acquired through a purchase and sale agreement entered into the RR Corporation and its Mexican subsidiary, Minera Revolution S.A. de C.V. (the Revolution) on January 30th, 2013, with Lake Shore Gold's Mexican Portfolio (formerly West Timmins Mining).⁷² As the project mentioned in the previous chapter, the Universo is located within the area that encompasses the NPA of Wirikuta. The property area consists of 315,000

⁶⁸ See supra Note 37

⁶⁹ See supra Note 59

⁷⁰ See supra Note 60

⁷¹ See supra Note 46

⁷² Revolution Resources Corporation. Information circular for the annual general meeting of shareholders to be held on Tuesday, April 30, 2013: APPROVAL OF ISSUANCE OF SHARES TO LAKE SHORE GOLD CORP. UNDER PURCHASE AGREEMENT. Available at: http://revolutionresourcescorp.com/_resources/filings/circular.pdf [accessed October 2013] pp. 25-26

hectares, and is located in the middle of a 300 kilometer long trend of significant precious and base metal mines and deposits in San Luis Potosí.⁷³

The RR Corporation acquired four properties located within two of Mexico's most prolific mining districts: the Universo and the Montaña de Oro projects (Montaña de Oro includes: La Bufa, Lluvia de Oro and Montaña de Oro). However, for the purposes of this thesis we shall focus on the Universo project, since this is the most threatening to the Wixárika people.

Before said purchase agreement - as in First Majestic's case - Lake Shore Gold Corp. also had to accomplish what is stated by articles 10 and 11 of the Mining Act of Mexico; therefore, Minera Golondrina S.A. de C.V. used to act as its subsidiary.⁷⁴⁷⁵

Moreover, as we can find in the Report issued by the Special Rapporteur on the Rights of Indigenous Peoples and in several press reports, for its exploration prospects, the Universo is mainly focused on three areas: the "Navarro" area within the Cinco Estrellas mine, near the Santa Gertrudis Dam, on the border of the Wirikuta's NPA where the Harakuna Mutima sacred site is located; La Perdida, 10 kilometers northwest of the Santa Gertrudis Town, with the concessions named La Concepción y la Guadalupe; and lastly, the Lindo Día area, with the concessions named La Lira and El Bernalejo, where Kauyumarie Muyehue is located (one of the main altars for the Wixárika people).⁷⁶⁷⁷⁸

Similar to the Light Project, the Universo project brings to the forefront the existent antagonism between the right and urgent need for the Wixárika people to stand-up for the protection and promotion of their human rights, respect of their cultural integrity as a people and protection of their traditional lands, - including sacred sites and natural resources located within them - since as we have seen, world's indigenous people surface

⁷³Revolution Resources Corporation. News, September 2011. Available at: http://revolutionresourcescorp.com/news/2011/index.php?&content_id=81 [accessed October 2013]

⁷⁴ See supra Note 72.

⁷⁵Secretaría de Desarrollo Económico del Estado de San Luis Potosí (San Luis Potosi State's Ministry of Economic Development): Industrial Tendencies of San Luis Potosi State "Mining". Available at: <http://www.sdeslp.gob.mx/estudios/perfiles/Estado%20de%20SLP.pdf> [accessed February 2014]

⁷⁶La Jornada del Campo (2012): Mensaje de los Dioses: Unirse para defender la cuna del Sol, dated on March 17th, 2012 Available at: <http://www.jornada.unam.mx/2012/03/17/cam-dioses.html> [accessed October 2013]

⁷⁷Frente en Defensa de Wirikuta (2012): Decreto de la Reserva Minera Nacional no toca proyectos lesivos para Wirikuta, dated on August 27th, 2012 Available at: <http://www.frenteendefensadewirikuta.org/?p=3287> [accessed October 2013]

⁷⁸La Jornada, Guerrero (2011): Cascabel y Golondrina; ahora el Gold Corp contra Wirikuta, dated on October 14th, 2012 Available at: <http://www1.lajornadaguerrero.com.mx/2011/10/14/index.php?section=opinion&article=006a1pol> [accessed October 2013]

and subsurface resources have been in the process of appropriation by non-indigenous people.⁷⁹ In most of the cases this has happened without any compensation to them, neither economic, political, cultural nor legal.

Hence, before said scenario there is an urgent need to strengthen and to make binding the international community's promise to grant and promote such protection, as well as the efforts taken by the government of Mexico in this regard; particularly against the granting of 40 mining concessions which are threatening nearly 50 percent of Wirikuta's NPA, principally in the "Navarro" area where exploration and drilling activities have been recently realized by the Revolution.⁸⁰

Furthermore, as the Revolution prospects reflect, the project's tendency is quite aggressive since several gold and silver deposits have been identified throughout the Universo area; therefore, it is one of the highest priorities of the corporation to move onwards from the sampling, mapping and ground geophysics stages, to the drill stage in the short term within the discovered areas, as well as to commence drilling on ready targets, just as the diamond drilling is already underway at the Universo Project. A few more examples of this statement are the drilling stage that will initially test the Navarro area, centered on the Cinco Estrellas mine, the Esquivel mine, located around 1,000 meters east of Cinco Estrellas, as well as two drills that will target the La Perdida zone, located 12 kilometers northwest of Navarro. According to Revolution's own reports, in addition to drilling, a widespread soil sampling grid which covers the northern 180,000 hectares of the Universo property is being completed.⁸⁴

It is also stated that the Company has been taking actions to establish dialogue and cooperation actions with the community and local stakeholders in the Universo area which

⁷⁹ Permanent Council of the Organization of American States, COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples (2002): Report of the Rapporteur for the OAS Working Group on Indigenous Rights, and Advisor "ad honorem" to the General Secretary, Osvaldo Kreimer, "Traditional Forms of Ownership and Cultural Survival, Right to Land and Territories" p. 7

⁸⁰ See supra Note 37, 49, 56 and 73

⁸¹ Secretaría de Economía, Proyectos Mineros operados por Compañías de Capital Extranjero, 2013. Available at: http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/informacionSectorial/minero/directorio_proyectos_mineros_0713.pdf [accessed October 2013]

⁸² Revolution Resources Corporation. News, November 2011. Available at: http://revolutionresourcescorp.com/news/2011/index.php?&content_id=97 [accessed October 2013]

⁸³ Ibid.

⁸⁴ Ibid.

includes surface access agreements recently signed with several groups.⁸⁵ However, there is no document or report proving that such “actions” have been taken; in this regard the international and Mexican legal framework establish that at least the right to consultation and inclusion within the development project shall be considered for indigenous peoples about any kind of project which is intended to be developed within their traditional lands, or related with the natural resources located within them. Also, the current sociopolitical situation shows us a very different perspective of the case, since there is a clear attitude of rejection of any type of mining project that is developing, or intended to be developed, in Wirikuta. Examples of this are the social movements supporting the Wixárika’s movement, mobilizations in front of the offices of different Mexican authorities, the Canadian Embassy, and even a delegation of representatives of the Wixárika people who traveled to Vancouver, Canada, where the headquarters of the mining company, First Majestic, is located.⁸⁶

3.5. (Some) attempts and (many) failures of the State to recognize indigenous peoples’ rights in Mining.

According to the applicable legal framework on mining matters, the control of the activities related to the exploration, exploitation and benefits of all kind of ores, and its possible effects over the ecological balance and the environment, are a federal power. By executing said powers, the federal government has granted mining concessions within the NPA of

⁸⁵ Revolution Resources Corporation. News, November 2011. Available at: http://revolutionresourcescorp.com/news/2011/index.php?&content_id=97 [accessed October 2013]

⁸⁶ La Jornada (2011): Minera canadiense pone en riesgo a pueblos indígenas, dated on March 6th, 2011 Available at: <http://www.jornada.unam.mx/2011/03/06/estados/028n3est> [accessed October 2013]

El Universal (2011): El Avatar Mexicano, dated on March 14th, 2011 Available at: <http://www.eluniversal.com.mx/columnas/88739.html> [accessed October 2013]

El Colegio de México, Center for Demographic, Urban and Environmental Studies (2011): Wirikuta o el fin del mundo, dated on March 12th, 2011 Available at: <http://www.joseluislezama.com/index.php/columnasemana/9-uncategorised/24-reforma> [accessed October 2013] Ibid. at 100.

La Jornada (2011): Marchan huicholes en el DF en defensa de las tierras sagradas de Wirikuta, dated on October 28th, 2011 Available at: <http://www.jornada.unam.mx/2011/10/28/sociedad/045n1soc> [accessed October 2013]

IC Magazine (2011): Conference targets Canadian Mining Firms Operating Abroad, dated on May 26th, 2011 Available at: <http://intercontinentalcry.org/conference-targets-canadian-mining-firms-operating-abroad/> [accessed October 2013]

La Jornada (2011): Piden a embajadora de Canadá interceder para evitar la destrucción de Wirikuta, dated on February 17th, 2012 Available at: <http://www.jornada.unam.mx/2012/02/17/estados/037n1est> [accessed October 2013]

La Jornada (2011): Huicholes salen en defensa de sus sitios sagrados, dated on May 21th, 2011 Available at: <http://www.jornada.unam.mx/2011/05/21/index.php?section=sociedad&article=040n1soc> [accessed October 2013]

Wirikuta; from 257 mining allotments settled in the municipalities of Catorce, Cedral, Charcas, Matehuala, Salinas de Hidalgo, Villa de Guadalupe, Villa de la Paz and Villa Hidalgo, 68 of them are located inside or at the boundaries of the polygon of Wirikuta and its different zoning areas.⁸⁷ Likewise, we can find an express recognition from the federal government that from 35 concessions, 19 were granted before the publication of the NPA Plan, 9 during its publication and 7 after the publication of the mentioned Plan, published in 2008.⁸⁸

As we can see in both cases, the Mexican government has made use of its powers, but on the other hand it has also left aside its obligation of granting an economically sustainable development, which should guarantee the protection of natural resources and allow the right to a healthy and clean environment. Furthermore, if we consider the fact that we are talking about mining concessions that have been granted over ore deposits located within an NPA, the State has been jeopardizing the cultural and environmental protection of said area.

It is necessary to remark that none of the 35 mining concessions mentioned before have had a solid base for being granted, not even as the SE has intended to justify that 28 of them were granted before the NPA Plan was published. In this sense, it is important to point out that such confusion – conveniently adopted - might be originated by a misinterpretation from the authorities, and said argument might try to find its reasoning by following a legal logic over the steps for the creation of an NPA and the consequent design of its Plan or Program, since the latter “shall” be designed after the NPA has been proclaimed; in other words, without the establishment of an NPA, the design of the Plan would not happen or its existence would be void.

As we can see, both the establishment of an NPA itself and the design of its Plan are connected and together. It is their compliance which allow an effective and efficient protection of a delimited area; thus, independently that they have different roots and scopes of creation and enforcement, it is not valid nor legal defense to state that since the plan was not designed, nor authorized and published, there was a lack of knowledge about the cultural and environmental importance of the region. Contrary to the above, it was in 2001 when the enactment of the most recent Decree through which the NPA of Wirikuta was proclaimed, that the urgent need and intention for protection of said region was already

⁸⁷ See supra Note 60, pp. 23-24

⁸⁸ Ibid., pp. 20-21

existent and recognized; therefore, no matter the NPA Plan was designed 7 years later, the authorities should have refrained from granting any kind of mining concessions within said Area and observe to the mentioned Decree.

In order to strengthen the stated above, it is necessary to analyze what it is stated in articles 44 and 45 of the General Act for Ecological Balance and Environmental Protection (LGEEPA). These articles state that among the objectives pursued for the establishment of an NPA are the preservation of the representative natural environments from different biogeographic and ecologic regions and most fragile ecosystems, as well as their functions and services, in order to ensure the balance and continuity of the evolutionary and ecologic processes. If we go further, it also pursues the protection of zones, monuments, and archeological, historical and artistic sites, as well as touristic zones, for the identity, recreation and culture of the nation and **indigenous peoples**. On the other hand, article 3, section XI of the Regulation of the LGEEPA about matters involving NPAs, clearly establishes that the NPA's Management Program/Plan is the ruling tool for planning and regulation through which the activities, actions and basic guidelines for the management and administration of the NPA are established.

This is why the express recognition from the SE about the time when the mining concessions were granted is counterproductive, since if we follow what has been stated above there is a big, but clear, difference between proclaiming an NPA, and on the other hand the design of the ruling tool which plans and lays down rules over the activities, actions and basic guidelines for the management and administration of it; in other words the enactment of the three Decrees through which the NPA of Wirikuta was proclaimed and its NPA Plan designed in 2008. Therefore, the SE should have stopped granting mining concessions since the first Decree was enacted, no matter that the NPA Plan was published 7 years later. Furthermore, such a lapse of time and loopholes do not exempt the authorities from attending what it is stated by law, which in the present case is clearly directed to protect the cultural integrity of the Wixárika people, and the environment and natural resources located within their traditional lands through the enactment of a State-created Natural Protected Area Decree. Moreover, if we concede the fact about said loophole, there is still a misuse of the powers of the SE, since even after the publication of the NPA Plan in 2008, it kept on granting mining concessions within the NPA of Wirikuta, seven to be specific.

In this regard, it is important to point out that regarding the NPA Plan, San Luis Potosí ignored its obligation for designing the NPA Management Plan after the enactment of the Decree dated on June 9th, 2001, entered into force. According to articles 65 of the LGEEPA and Third transitory of said Decree, this was supposed to happen within a term of 365 working days.⁸⁹ This situation besides hindering the protection of Wirikuta as an NPA, also left it environmentally and culturally unprotected, and led to a misuse and non-execution of powers from the authorities among all three levels of government.

The aforementioned leads us – in my opinion – to another mistake committed by the Mexican government. This is the lack of due homogenization among its three levels of government, regarding the environmental policies and applicable legal framework for the protection of the NPA of Wirikuta. As we have seen, there have been several international and local actions which can be used to protect, culturally and environmentally, the Wixárika people, actions where the federal government has clearly shown its positive intentions towards indigenous peoples' rights and environmental protection. However, when we refer to the NPA of Wirikuta, such intentions get confusing, since there is no compatibility between what it is done by the SE and SEMARNAT, particularly the latter through the National Commission of Natural Protected Areas (CONANP), National Commission of Water (CONAGUA) and Federal Attorney for Environmental Protection (PROFEPA). Neither among what it is stated by the rules established within the LGEEPA; nor the actions taken by the government of San Luis Potosí regarding the Wixárika people, their traditional livelihood, customs and traditional lands.

Regarding its powers, also considered as obligations, for granting an environmental and cultural protection of the Wixárika people, San Luis Potosí has proclaimed as an NPA the region of Wirikuta and its pilgrimage three times (1994, 2000 and 2001). Likewise, it took part on the design of the Wirikuta's NPA Management Plan in 2008, a document that expressly acknowledges in its section 7.1.5. "Mining", about the current mining situation in the region. This last document emphasizes that in order to preserve ecological balance it is

⁸⁹ Periódico Oficial del Gobierno del Estado Libre y Soberano de San Luis Potosí (Official Gazette of San Luis Potosi State): Decree named "Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People", dated on June 9th, 2001 Available at: <http://189.208.101.162/bitacora/documentos/2.%20Reformas%20al%20decreto%20de%20Creaci%C3%B3n%20de%20Wirikuta.pdf> [accessed October 2013].

necessary to control all kinds of mining activities that have become or could become an environmental risk.⁹⁰

Despite all this, actions taken by the federal government have not shown the same direction, since the NPA of Wirikuta, so far only has the nomination as an NPA by San Luis Potosí, a fact that in the present case has led to a lack of action due to misinterpretation and incongruity among the national environmental legal framework. As we can see within the Recommendation submitted by the Commission, the own federal environmental authority in matters of NPAs, the CONANP, issued an official communiqué in 2011, in which it stated that the NPA of Wirikuta is not an NPA of federal competence.⁹¹ Hence, after said consideration, its applicable legal framework and scope of protection becomes different, for instance changing the competences for the application/authorization/granting processes of licenses, permits and concessions; the faculties of inspection, surveillance and enforcement of law, among others. In this regard, said circumstance turns the environmental and cultural protection of the Wixárika people and their sacred sites, weaker and narrower before the mining industry and its environment, particularly within Wirikuta.

By analyzing the above stated, we can notice a lack of homogenization among the three levels of government of Mexico regarding the applicable legal framework for the protection of the NPA of Wirikuta, as well as an incongruity in the NPAs policies. This is because the SE continues on granting mining concessions within the region due to the fact that the NPA of Wirikuta is not a “federal” NPA; hence there is no legal instrument, such as a Federal Declaration of NPA and its Management Plan, regulating or prohibiting any type of extractive activities – particularly in the present case, from the mining industry - within the NPA of Wirikuta.

The aforementioned brings into the front one of the main topics treated within the current master’s thesis, this is the antagonism that has not allowed the reconciliation between cultural and natural protection, human rights and indigenous peoples’ rights, and development and management policies. This could be understood from the perspective that the respect and protection of indigenous people’s rights and NPA’s value – not economic –

⁹⁰ Gobierno del Estado de San Luis Potosí, Secretaría de Ecología y Gestión Ambiente (2008): Plan de

Manejo, Área Natural Protegida, Sitio Sagrado Natural, Huiricuta y la Ruta Histórico-Cultural del Pueblo

Huichol (Wirikuta's Natural Protected Area Management Plan.), dated on January, 2008, p. 224

⁹¹ See supra Note 60 p. 7

have been diminished; and as a consequence, its scope for protection is not a priority for the nation, putting the national economic development and exploitation of natural resources, above the indigenous peoples' rights and NPA policies.

Following the actions taken by the SE and CONANP, it is easy to understand the (miss) interpretation given to the federal mining and environmental laws, in particular to the Mining Act, LGEEPA and its Regulation in the matter of NPAs, which establish that the whole administration of an NPA - including the guidelines, programs, policies and actions for the conservation, preservation, protection and restoration of the ecosystems; sustainable use of natural resources, domain and control of the activities related to the exploration, exploitation and benefits of all kind of ores; and all concerning the inspection and surveillance of every NPA - correspond directly to SEMARNAT, and secondarily to the states and municipalities.

Nevertheless, contrary to what has been understood by Mexican authorities, the spirit and logic of policies in matters of NPAs – no matter its “federal” or “state” category – is to recognize the environmental or cultural importance and urgent need of protection of certain territory, and not its legal status and the authorities’ actions towards them.

In the particular case of Wirikuta and its pilgrimage, said confusion and misinterpretation is threatening the rights of indigenous peoples and jeopardizing the ecological balance of Wirikuta, since through the use of their powers, the SE has kept on granting mining concessions under the legal argument of non-existence of any legal instrument that declares Wirikuta as an NPA of federal competence nor a Management Plan which expressly prohibits any type of mining activities within the region. This demonstrates a lack of compatibility among national NPAs policies since, so far, San Luis Potosí is the one who has proclaimed the mentioned area as an NPA, but the Federal government has not done the same.

Additionally, as we can find within the Recommendation submitted by the Commission, rather than considering the cancellation or revocation of any mining concession granted within the NPA of Wirikuta, the SE has continued granting mining concessions within the region, from which 63 were granted within its dampening zone and 5 within its core area.⁹² This has been reflected over and triggered the current legal and social situation - conditions that have not changed at all in the region for almost thirty years – due to said mining

⁹² See supra Note 60 pp. 23 - 24

concessions ignoring environmental, technical and socioeconomic reports, which have clearly shown that the exploration and exploitation of ore resources in Wirikuta have been – and still are – representing, both an environmental and cultural damage and menace. Moreover, during the years 2011 and 2012, the Commission points out that during its visits to some zones of the NPA of Wirikuta it could confirm the existence of exploration activities within the Municipality de Catorce⁹³ It has also acknowledged that the CONAGUA neither has a monitoring network in the Vanegas-Catorce aquifer, which could establish the quality of the water within the region, nor has performed any inspection with the aim of dismissing the existence of contamination in the bodies of water located within the NPA of Wirikuta, due to the wastes originated by mining activities performed in the past.

As is supported by some inspection actions taken in 2011, PROFEPA visited few properties located in the Municipality de Catorce, in order to verify the possible existence of environmental damages as a consequence of mining activities. Nevertheless; it based its reasoning to determine the non-existence of violations to the environmental legal framework within said area on what follows: a. non presence of any visible environmental harm; b. nor the presence of any heavy machinery which could have shown any intention for the performance of mining activities; and c. according to the party inspected (without any further investigation), neither the existence and disposal of waste, nor the performing of any mining activities during the last three decades.⁹⁴

Consequently, we can see that with such actions, PROFEPA only “fulfilled” its duty by the performance of said inspection and attended society’s complaints for environmental damages, but without taking any further investigation and inspection actions with the aim of truly determining the existence of current or past environmental damages and adverse effects, as a consequence of the mining activities performed within the region of Wirikuta. Which in the present case, examples of this adverse effects are erosion, loss of wildlife protected by the NOM-059-SEMARNAT-2010, contamination of ground water, among others.

⁹³See supra Note 60, pp. 26-27

⁹⁴ Ibid. pp. 45-48 The administrative procedures referred above can be found as follows: PFPA/30./2C.28.2/0020-11 and PFPA/30.7/1C.28.1/0011-11.

Lastly, in this sense, with the aim of continuing with the administrative actions taken by PROFEPA, the Commission also visited the properties inspected by the environmental authority on November, 2011, and what this authority found was next:

- a. At the property known as “Pueblo Fantasma”, there was no presence of recent mining activities; however, there was the existence of a landscape without any “cover and highly stony”, due to the massive deforestation that had happened in the past as a consequence of the mining industry, which led to such secondary environmental effects as erosion;
- b. At Santa Gertrudis, in the Municipality of Charcas, there was the existence of mining activities. Even though such activities were found out of the NPA polygon, due to the well-known environmental adverse effects of these, the Commission requested through official communiques to PROFEPA and CONANP, the execution of preventative measures in order to avoid greater environmental harm within the region.⁹⁵⁹⁶

Likewise, due to the existence of society’s complaints referring to the existence of groundwater contamination within Wirikuta, PROFEPA directed an official communique to CONAGUA with the aim of verifying the possible existence of environmental damages. In this sense, CONAGUA just mentioned that it was not possible to practice such inspections, neither to the springs nor bodies of water located in the region, since they had not detected an environmental impact due to mining exploitation on the underground bodies of water, mainly on the supply sources of the area.⁹⁷

With such actions, half actions indeed, we can clearly find grave violations to the environmental rights of both the Wixárika people and the Mexican people, due to the adverse effects on the environment, health, and water bodies and their easy way of propagation as a consequence of the mining industry. Both authorities just based their conclusions on visits to the mentioned places and through what was stated by the inspectors, without having provided any absolute proof for the non-existence of

⁹⁵ See supra Note 60, p.47

⁹⁶ National Commission of Human Rights of Mexico (Comisión Nacional de los Derechos Humanos en México): Official Press Communiqué (2012): Protection to Indigenous Peoples and Environment. available at: http://www.cndh.org.mx/sites/all/fuentes/documentos/Comunicados/2012/COM_2012_019.pdf [accessed October 2013]

⁹⁷ See supra Note 60, p. 47-48 The actions from both authorities can be found as follows: PFPA/5.3/2C.28.5.1/03841/10 and BOO.00.02.03.08373

environmental damages within the NPA of Wirikuta. In this regard, before the scenario of facing possible violations to human rights, the burden of proof should have been taken until the last resources by the competent authorities, which in the present case could have been (just to mention one), a scientific and technical study/report practiced, both on site and with laboratory tests, either by any competent authority, or through a well-known and wide recognized national or international private institution, which could have worked as a third and impartial part; in other words, as an arbitrator.

As we will see in the lines below, two more threats that have been jeopardizing the protection and preservation of the NPA of Wirikuta, and the balance in the existence and cosmogony of the Wixárika people are the non-execution of powers from the authorities (federal and state), and lack of commitment and noncompliance of agreements signed between the Wixárika people and the government of different states of Mexico. The “Pact of Hauxa Manaka” (the Pact) signed on April 28th, 2008, could be settled down as our first example for the aforementioned. This Pact was taken as a base for protecting the rights of the Wixárika people, with special emphasis on the NPA of Wirikuta, their sacred sites and its route of pilgrimage.⁹⁸

In this regard, it is important to examine and compare the dates on which the mining concessions were granted, the signature of the Pact and the Recommendation submitted by the Commission. After we analyze these dates, we can easily see that despite the actions taken on behalf of the indigenous peoples rights (the enactment of the NPA’s Decrees, design of the NPA Plan and the Recommendation), the Ministry of Economy (the SE) has not stopped granting mining concessions. The legal logic to grant the cultural integrity of the Wixárika people, continuity of their traditional livelihood and environmental protection of their traditional lands would have been that the SE stopped granting mining concessions within Wirikuta.

Nevertheless, 4 years after the Pact was signed, we can still find a lack of commitment that could grant said protection, since the mentioned agreement hasn't had any real power to guarantee the federal protection of the NPA, nor has stopped the granting of mining concessions within the region. Lastly, we can also notice a non-execution of powers from

⁹⁸ Periódico Oficial. Órgano del Gobierno del Estado de Nayarit (Official Gazette of Nayarit State): Pacto de Hauxa Manaka para la Preservación y Desarrollo de la cultura wixarika, dated on November 15th, 2008. Available at: <http://wixarika.mediapark.net/sp/documents/2.PactoHauxaManaka.pdf> [accessed October 2013]

environmental authorities, since the Commission had to request to PROFEPA and CONANP for the execution of preventive measures in order to avoid more serious environmental harms within the Wirikuta region due to the existence of mining activities.⁹⁹ Furthermore, we can also find a non-execution of powers at the Municipality scope since according to the Municipal authorities located within the polygon of the NPA of Wirikuta, they have not identified any environmental impact. Nevertheless, it is important to point out two aspects after said consideration; these are that federal and state authorities have clearly recognized and stated the existence of environmental damage within the region (explained within previous lines); and that the Municipal authorities have expressed so, without taking any action nor having provided any absolute proof for the non-existence of such impacts. Therefore, after the above has been mentioned, we can acknowledge that some of the main issues which have been obstructing the protection of the Wixárika people rights and the NPA of Wirikuta are due to: a) the existence of a conflict among the joint powers within the three levels of government; b) a misuse of powers from federal, state and municipal authorities; c) a lack of due homogenization among its three levels of government regarding the applicable legal framework for the protection of the NPA of Wirikuta, and d) a noncompliance of their obligations.

3.6. Mining and Corporate Social Responsibility.

“At First Majestic Silver Corp., we work under the philosophy of a Socially Responsible Company for which we are committed to safeguarding and respecting the historical and environmental heritage of the communities and areas where we operate in Mexico and specially in the case of the La Luz...We are proud to be partners in supporting and encouraging the preservation of indigenous customs where we operate, as an important historical legacy for Mexico, as well as to respect environmental laws for the care of the ecosystems.”¹⁰⁰

The above quotation reflects an ongoing worldwide trend which has been taken among industries, governments, and civilian society with the aim to achieve an environmentally, socially and economically sustainable development, mainly after the 1992 Earth Summit in

⁹⁹ See supra Note 98

¹⁰⁰ First Majestic Silver Corp. La Luz Silver Project. Available at: <http://www.firstmajestic.com/i/misc/LaLuz.html> [accessed October 2013]

Rio de Janeiro and World Summit on Sustainable Development (WSSD) in Johannesburg in 2002.¹⁰¹

In this sense, with the aim to gain reliability before and within the international community, the global mining industry intends to reflect its compromise towards the collective response to the sustainability challenge by including within its development policies and agendas, a burgeoning corporate social responsibility (CSR) policy. Following Sadler and Lloyd, CSR can be defined as “the notion that companies should accompany the pursuit of profit with good citizenship within a wider society.” For instance, through community-level development initiatives addressing concerns such as health, education, environment, infrastructure, the promotion of local businesses, and institution building.¹⁰² The rising of said concepts and initiatives is mainly due to an inclusion of such terms as sustainable development in global politics, as well as increasing the international community awareness and social resistance, due to the trans-boundary effects and changes caused by global climate change.

Natalia Yakovleva identifies three common governance models for community development initiatives in the mining industry:

- a. the company-led approach (through which initiatives and commitments are planned, executed, and evaluated internally by the firm);
- b. corporate foundations (through which program development is outsourced to separate organizations, which usually maintain ties to donor companies); and
- c. the partnership approach (through which firms seek the involvement of other parties, such as government agencies and NGOs).¹⁰³

In addition, Matthew Himley addresses that the formation of the Global Mining Initiative (GMI) was an important step in this respect.¹⁰⁴ It was launched at the Annual Meeting of the World Economic Forum of 1999, by executives from nine of the largest mining firms in the world: Anglo American, BHP Billiton, Codelco, Newmont, Noranda, Phelps Dodge, Placer Dome, Rio Tinto, and WMC Resources. According to its members, it was a sign of commitment towards sustainable development, with the objective of pointing out the

¹⁰¹ MDPI and ACS Style, Himley, Matthew. Global Mining and the Uneasy Neoliberalization of Sustainable Development. *Sustainability* 2010, 2, pp. 3274-3275

¹⁰² Sadler, D.; Lloyd, S. Neo-liberalising corporate social responsibility: A political economy of corporate citizenship. *Geoforum* 2009, 40, p. 6

¹⁰³ Yakovleva, N. *Corporate Social Responsibility in the Mining Industries*; Ashgate Publishing Company: Burlington, VT, USA, 2005.

¹⁰⁴ See supra Note 101, pp. 3270-3274, 3276

positive role of the mining and minerals industries within the global agenda priorities, including environmental and economic, since its employment rate has been estimated as “800,000 of the estimated 2.5 million people working in the mining and metals sector, with interests at over 750 sites in 58 countries across the globe.”¹⁰⁵

Following its intention of clarifying its commitments, in 2000, the GMI commissioned the International Institute for Environment and Development (IIED) to undertake a two-year dialogue and research initiative called “Mining, Minerals, and Sustainable Development” (MMSD), which through a global review about some projects and practices of the mining industry informed how the mining and minerals sector could contribute to the global transition to sustainable development.¹⁰⁶

As the IIED recognizes, if the mining and minerals industry intends to keep on developing exploration and exploitation projects, it needs to improve its social, developmental and environmental performance; and to be more transparent and subject to third-party audit or review.¹⁰⁷ Nevertheless, it is important to point out that the mentioned project initiated a deserved criticism by activists, who viewed the initiative as primarily advancing a corporate agenda.¹⁰⁸

I have said “deserved criticism”, since the performance of the MMSD, was commissioned by the same sector that was being studied, and even though the intentions could have shown a cooperative attitude with the international community, perhaps it is also true that by performing such a project, their intentions to address their current and future mining projects into their own interests would become easier and faster. Or it could be that its reports have been drawn in order to justify their ambition, boosted due to the re-boom of the mining industry which has followed, among other things, ore findings and high global prices of commodities and metal ores, as a consequence of an industrial demand for metals, especially by Asian countries foreconomic growth¹⁰⁹ Likewise, the concept of “sustainable mining”, has been a concept designed and understood, exclusively by its creators (the mining industry), which in my opinion, pursue the same objectives stated above.

¹⁰⁵ Making a Difference; International Council on Mining and Metals: London, UK, 2009. p. 26

¹⁰⁶ International Institute for Environment and Development and World Business Council for Sustainable Development (2002): The Report of the Mining, Minerals and Sustainable Development Project. Earthscan Publications Ltd. 2002. . Available at: <http://pubs.iied.org/pdfs/9084IIED.pdf?> [accessed October 2013]

¹⁰⁷ Ibid.

¹⁰⁸ See supra Note 101, p. 3274

¹⁰⁹ See supra Note 2

Notwithstanding, during the last two decades and following the CSR concept, some companies have carried out some social development projects within the regions where their activities are performed. One of them is Minera Barrick Misquichilca S.A. (MBM), a Peruvian subsidiary of the Toronto-headquartered mining giant Barrick Gold Corporation, which accomplishing its commitments to promote a more environmentally friendly and socially inclusive form of mineral-based economic development, has carried out a series of community-level development initiatives addressing concerns such as health, education, infrastructure, and agro-pastoral improvement. The principal targets of this social development program have been eighteen primarily Quechua-speaking small-scale farming communities that surround mining operations and constitute what MBM considers to be Pierina's "area of influence".¹¹⁰

Aiming to prove its compromise towards CSR, First Majestic is committed to the effort of balancing economic goals and profit-making with social responsibility practices and sustainability, prioritizing the social and environmental aspects at the expense of economic factors. It recognizes itself as a "transnational mining firm that have sought to position themselves as drivers of sustainable development, using as a key component of their efforts the implementation of social development programs in their areas of operation." In this regard, the corporation has planned a "Sustainable Development" project named "El Centro Cultural Hacienda de Santa Ana" at The La Luz Silver Project, which includes the building of a Mining Museum in the facilities occupied by the old Hacienda de Santa Ana.¹¹¹ This project will endeavor to show the historic importance of the mining activity in the past, present and future. On the other hand, the cultural center will offer opportunities for leisure, education and environmental awareness; remarking that both projects will provide permanent employment for the local community.¹¹²

However, if we follow the concept of CSR and the initiatives/projects which could be performed under its principles, we can see that by building a museum, the positive social, cultural, environmental and economic impacts among the local community are minimal. Additionally, if we take a look at the immense economic profits that the extraction of minerals represents for First Majestic (and all the other mining companies involved in the

¹¹⁰See supra Note 101, p. 3271

¹¹¹ First Majestic Silver Corp. La Luz Silver Project. Available at: <http://www.firstmajestic.com/i/misc/La-Luz.html> [accessed October 2013]

¹¹² First Majestic Silver Corp. Social Responsibility Overview. Available at: <http://www.firstmajestic.com/s/SocialResponsibilityOverview.asp> [accessed October 2013]

NPA of Wirikuta), I argue that what the Wixárika people and all the other communities living within the area obtain from said project is almost “nil”. Moreover, it will not contribute to tackle extreme divergences of wealth and poverty, long-term negative human health effects, and legacies of environmental degradation due to the extraction of nonrenewable resources within the area.

Considering the above, the museum project is not a true CSR project with a human rights based approach, which could foster or enhance minimum standards for living, such as the right to health, education, water and sanitation, or to food. We could also mention that it neither promotes the Wixárika people’s culture – the Museum is mainly directed to showing the historic importance of the mining activity in the past, present and future within the area – for recovering and valuing it as cultural heritage among young Wixárika people, the five Mexican states with Wixárika population, nor as national and worldwide heritage. Lastly, I would like to include that it does not play a role in contributing to biodiversity conservation, nor sets up a strategy focused on remedying deforestation within the area that has been affected due to past mining activities.

3.7. Views and attempts of the Wixárika people in relation to the mining industry.

The aim of the present chapter is to analyze the main problem acknowledged within this work, **the protection of the sacred sites and culture of Wixárika people in Mexico**, but from the perspective of the people who have been – and still are- directly affected, and whose integrity and existence have been in jeopardy for the last three decades.

The Wixárika people have actively responded to the present case by making use of the Law and mixing it with their worldview. We can, in fact, note that most of the development of the legal framework referring to the protection of their rights, sacred sites and routes of pilgrimage, has been influenced by its cosmogony, and developed in response to the threats that mining industry activities represent to them, both environmentally and to their cultural integrity and identity. Just to mention a few:

- a. In 1989, a group of Wixárika pilgrims expressed to the then President of Mexico in turn, their concern about the insufficient protection of their cultural and environmental rights, particularly asking for his intervention to safeguard their sacred sites and guarantee their right to carry out their pilgrimage to Wirikuta; a situation which fostered our next point;

- b. In 2001, following a long process, Wirikuta and its route of pilgrimage were finally established as an NPA, under the title of “Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People”;
- c. In 2004, the pilgrimage to Wirikuta was submitted to UNESCO, to be added to the World Heritage List under the reference number 1959.
- d. In 2008, the Wixárika people was consulted and had an active participation within the approval and design of the NPA Plan. The „Hauxa Manka Pact” was signed by the states of Durango, Jalisco, Nayarit, Zacatecas and San Luis Potosí;
- e. In 2011, an Amparo Trial was presented to the Federal Courts of Mexico, and the Wixárika people delivered a letter delivered to the previous President of Mexico, Felipe Calderón Hinojosa;
- f. In 2013, one more Amparo Trial was presented to the Federal Courts of Mexico (both Amparos were submitted by the representative authorities for the Wixárika people). One more letter was delivered to the current President of Mexico, Enrique Peña Nieto. Nomination file no. 00862 for the Inscription of the Pilgrimage to Wirikuta in the List of Intangible Cultural Heritage in need of urgent safeguarding by UNESCO was submitted; according to said submission, it was postulated by the Wixárika Union’s authorities (Nomination form ICH-01, p.10), which represent 27 Huichol people’s ceremonial centers. It was during this same year when the “Front for Wirikuta’s Defense” delivered a report to the Special Rapporteur on the Rights of Indigenous Peoples, regarding human rights violations, as a consequence for granting mining concessions.¹¹³¹¹⁴

Within all the actions mentioned above, there is a clear awareness and understanding from the Wixárika people about the nature of the present case, throughout which they remark the cultural and environmental importance of Wirikuta - as one of their sacred sites - and its route of pilgrimage. They go even further, explaining that Wirikuta should be seen as a whole unit located in the Sierra de Catorce, where the spiritual energy and power of their ancestors allow them to live and continue their existence into the future, and not as a set of geographic coordinates.

Furthermore, if we take a look at the starting point and development for the establishment of the NPA mentioned before, we can recognize a step towards an integral protection of

¹¹³ See supra Note 31 pp. 5-8

¹¹⁴ See supra Note 98

both individual and collective human rights of the Wixárika people, since from 1994 until present day, there is an awareness and better understanding over the relationship between their traditional livelihood, traditional lands and traditional knowledge and their natural, cultural and spiritual values, which are fundamental for their survival.¹¹⁵ This is without question acknowledged in the Natural Sacred Site of the Wixárika People Decree dated on June 9th, 2001, which defines **Natural Sacred Site** in order to clarify the scope of protection of said region, mentioning that it includes a combination of biodiversity and the sacred spaces where indigenous peoples realize acts with a divine sense. Hence, mixing both relevant facts, spiritual and natural (environmental).¹¹⁶ Therefore, from said point of view, the NPA of Wirikuta, and what it culturally and environmentally represents, has evolved and gained terrain within the Mexican legal framework and intentions for protection.

According to the Official Gazette of the Federation dated on August 16th, 2012, the federal government published a decree where it established a Mining Reservation Zone (MRZ) called “Tamatsi Paritsika Iyarieya Mataa Hane”, with a total area of 71,148.6614 hectares, encompassing the municipalities of Catorce, Charcas, Matehuala, Cedral, Villa de la Paz and Villa de Guadalupe, in the San Luis Potosí state. This decree establishes in its article 2 that **no mining concessions, authorizations nor assignments shall be granted within the MRZ.**¹¹⁷

Even though the aforementioned decree represents a protective measure - through a prohibition - to the area that encompasses “Tamatsi Paritsika Iyarieya Mataa Hane” and it

¹¹⁵ Periódico Oficial del Gobierno del Estado Libre y Soberano de San Luis Potosí (Official Gazette of San Luis Potosí State): Natural Protected Area Decree: Historical Heritage Site, Cultural Heritage Site and Ethnic Conservation Area of the Wixárika People, dated on October, 27th, 2000.

¹¹⁶ Periódico Oficial del Gobierno del Estado Libre y Soberano de San Luis Potosí (Official Gazette of San Luis Potosí State): Natural Protected Area Decree: State Reservoir of the Cultural Landscape denominates Wirikuta, the Sacred Sites and the Historical-Cultural Route of the Huichol People, dated on June, 09th, 2001.

¹¹⁷ Diario Oficial de la Federación (2012): DECRETO por el que se incorporan a zona de reserva minera a denominarse Tamatsi Paritsika Iyarieya Mataa Hane , los polígonos que se describen con una superficie total de 71,148.6614 hectáreas, ubicados en los municipios de Catorce, Charcas, Matehuala, Cedral, Villa de la Paz y Villa de Guadalupe, San Luis Potosí. (Mining Reservation Zone (MRZ) called “Tamatsi Paritsika Iyarieya Mataa Hane”), dated on August 16th, 2012. available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5264469&fecha=16/08/2012 [accessed October 2013].

could be seen as an international and domestic achievement; from the Wixárika people, authorities on Human Rights and Environmental topics, and the civil society perspective exists a quite different perception.

The Decree named “Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People” dated on June 9th, 2001, establishes 140,211.85 hectares as the area for Wirikuta as an NPA and for the pilgrimage route to Wirikuta a distance of 138.78km¹¹⁸ As we have seen within chapters 3.4 and 3.5, the La Luz Silver project and the Universo project cover a total area of 6,327 and 315,000 hectares in the State, respectively. Also, from these totals we can find that a part of both projects are under concession within the NPA of Wirikuta; the former project encompasses 4,107 hectares and the latter 48,833.697 hectares, totaling 52,940.697 hectares.

Following these lines, we can notice that the total area which is currently under mining concessions is superior from the area which that nowadays encompasses the NPA of Wirikuta and the MRZ (140,211.85 and 71,148.6614 hectares, respectively). Even if we add these two areas, which makes around a total of 211,360 hectares, it still represents less than the granted area.

These facts have been recognized, both by the Wixárika people and the Commission, and have triggered a conflict and a devaluation over the importance of Wirikuta as a sacred site and as an ecosystem of natural relevance. This is because according to the mining grant records of the Ministry of Economy, from all the mining concessions granted within the NPA of Wirikuta there are only two mining concessions incorporated into the MRZ, situation that definitely jeopardizes/nullifies the environmental protection of said Area and endangers culturally to the Wixárika people from the extractive industry, particularly mining. On the other hand, the rest of the concessions within the area which are not established as a MRZ do not have a prohibition for continuing their mining activities, both for exploration and exploitation.¹¹⁹

As has been mentioned, the Wixárika’s Regional Council and the Front for Wirikuta’s Defense, as representative institutions/authorities for the Wixárika people, have rejected the MRZ since with such a decree, the La Luz Silver Project and the Universo Project still threaten their own continuity and existence as indigenous people. They have stated that

¹¹⁸ See supra Note 89

¹¹⁹ See supra Note 60, pp.58-61 emphasizing the map located on the page 60, which shows on red color, the area of the mining concessions that have been yielded.

“...if the object of all of this tragedy is money, with conviction we inform you that it will be infinitely cheaper to cancel these concessions than to lament the ecological, spiritual and social tragedy that digging and extracting the entrails of Wirikuta could provoke.”¹²⁰

Notwithstanding, the Wixárika people has acknowledged that the mentioned actions are still not enough, especially those regarding the Inscription of Wirikuta in the List of Intangible Cultural Heritage in need of urgent safeguarding by UNESCO. In this sense, they affirm that more than being considered as an intangible cultural heritage, Wirikuta shall be recognized as the **cultural and natural heritage** of outstanding universal value by UNESCO.¹²¹ This action has been already taken on December 6th, 2004, under the reference number 1959,¹²² and can be understood if we realize that Wirikuta and all the other sacred sites located throughout its route of pilgrimage represent and possess, both cultural and environmental elements of importance, which not only exist intangibly within the cosmogony of the Wixárika people but also for the international community's heritage. However, within the international actions taken with the aim to protect the Wixárika peoples' rights we can find facts of inconsistency and incongruity, since according to the “Front for Wirikuta's Defense”, the nomination of the pilgrimage to Wirikuta in the List of Intangible Cultural Heritage in need of urgent safeguarding by UNESCO, has been made by the National Commission for Indigenous Peoples Development in Mexico (CDI) without respecting nor obtaining their free, prior and informed consent. Likewise, they continue their statement in the sense that both Conventions differ on their scope and aims of protection, situation that jeopardizes their cultural and environmental protection as an indigenous people. Thus, the aim shall be to protect their territory as a whole unit – culturally and environmentally – and not only the pilgrimage route as intangible or nonmaterial practice.¹²³

The above has been argued due to intangible cultural heritage could be understood as the process of acquiring and passing on knowledge from generation to generation. Such

¹²⁰ Urgent letter from the Wixarika People to the President of Mexico and to all the Peoples and Governments of the World. Available at: <http://www.frenteendefensadewirikuta.org/?p=913> [accessed October 2013].

¹²¹ Frente en Defensa de Wirikuta (2012): Wirikuta debe ser reconocido como patrimonio cultural y natural y no como inmaterial (Wirikuta shall be recognized as cultural and natural heritage, rather than inmaterial heritage) Available at: <http://www.frenteendefensadewirikuta.org/?p=4227> [accessed October 2013]

¹²² See supra Note 33

¹²³ See supra Note 121

knowledge is reflected, assimilated and re-created through practices, representations, expressions, knowledge, and skills which have been gained over time – sometimes thousands of years – and identifies each community, group, or people and differentiates them from each other. Hence, it is through all the activities that happen around the pilgrimage to Wirikuta that the Wixárika people identifies himself, recreates their genesis and reassures their own continuity while interacting with their history through nature and human creativity.

On the other hand, the Convention concerning the Protection of the World Cultural and Natural Heritage comprises a wider and clearer definition of both heritages, hence a stronger scope of protection which could be better applied to the present case. This Convention, also called World Heritage Convention, is an international treaty adopted by UNESCO's General Conference in 1972, and entered into force on December 17th, 1975, 1037 U.N.T.S. 151.¹²⁴ It considers cultural heritage as monuments, groups of buildings and sites, which historically, artistically and architecturally defined as works of man or the combined works of nature and man. Natural heritage, as the natural features consisting of physical and biological formations or groups of such formations, geological and physiographic formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants which are of outstanding universal value from the aesthetic or scientific point of view; and natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science or conservation.¹²⁵

Thus, by analyzing previous definition and its domain of application, the NPA of Wirikuta and its route of pilgrimage could be comprised within it, since it represents a material place, ecosystem and landscape which could be physically and geographically referenced; and which tangible impact constitutes the habitat of threatened species of wildlife, with an environmental, scientific, conservationist, historical, aesthetic, ethnological or anthropological value.

Hence, we can see that the concern expressed by the Wixárika people is solid and their sacred lands, culture and the NPA of Wirikuta deserve to be protected, both as intangible

¹²⁴ UNESCO: The World Heritage Convention. available at: <http://whc.unesco.org/en/convention/> [accessed October 2013]

¹²⁵ UNESCO (2003): Convention Concerning the Protection of the World Cultural and Natural Heritage available at: <http://whc.unesco.org/archive/convention-en.pdf> [accessed June 2013]

cultural heritage, and as cultural and natural heritage of the world. Therefore, if the selection process favors only the nomination which refers to the Pilgrimage to Wirikuta as Intangible Cultural Heritage, Wixárika people's rights would be violated, and their own continuity and existence as indigenous people would be in danger of disappearing. In response to this, the Wixárika's Regional Council has sent a protest letter to UNESCO, expressing its nonconformity, since they were not consulted within the decision-making process for the Inscription of the Pilgrimage to Wirikuta in the List of Intangible Cultural Heritage in need of urgent safeguarding by said organization; and reassuring their interest that Wirikuta shall be selected and inscribed to the World Heritage List, as cultural/ natural heritage of the World.

Likewise, the Wixárika people has taken further actions pursuing the respect and protection of their property rights, access to the natural resources located within their traditional lands, right to share in the profits from natural resources extraction, self-determination, development, cultural identity and to enjoy one's own culture –traditional knowledge (TK), pilgrimages, and rituals. In this regard, they have made use of the legal resources provided and recognized by the Constitution of Mexico, its different acts, laws and regulations. This is the Mexican judicial proceeding institution better known as “Amparo” Trial.

The Amparo Trial is the judicial institution through which a person, named “plaintiff”, executes its right of legal action before a federal or local jurisdictional body to ask a federal, local or municipal body of the State, named “Responsible Authority”, about an action (s) or laws (s) which the plaintiff considers to infringe or transgress on its constitutional rights; or the distributive regime of competences among the Federation, States and District Federal. This is done in order that the alleged violated rights can be restored, or maintained as they were before the controversy, after all the process of appealing has been decided by a lower court judgment.¹²⁶

By analyzing Wixárika people's history and cosmogony, it is easy to acknowledge that since ancient times, their natural, cultural and spiritual values and survival are interconnected and interdependent. It can also be admitted that sacred and natural views are indeed one in the same; hence representing their genesis and continuity as an indigenous people. Therefore, if the La Luz Silver project and Universo Gold-Silver project continue

¹²⁶ Burgoa Orihuela, Ignacio (ed. 2008): *El Juicio de Amparo*. 2008 ed. México Porrúa. pp. 329-340

their exploration and exploitation activities, the cultural and environmental consequences will be unavoidable.

In this regard, Wixárika people's intentions follow a tendency and a step towards the world's indigenous peoples' rights that have been recognized within the report issued by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, issued on July 1st, 2013, where a pattern of agreements in which indigenous peoples are guaranteed a percentage of profits from the extractive operation or other income stream, and are provided means of participation in certain management decisions.¹²⁷

Some requests from the Wixárika people for the area are as follows:

- a. Wirikuta shall be inscribed as cultural and natural heritage of the world by the UNESCO, as part of the World Database on Sacred Natural Sites;
- b. To prohibit all kinds of mining activities within Wirikuta, and to not grant any administrative permissions to develop them;
- c. Do not grant any new mining concessions within Wirikuta;
- d. Wirikuta shall be proclaimed a Federally-designated NPA;
- e. The Sierra de Catorce shall be proclaimed as Cultural Landscape;
- f. The pilgrimage route to Wirikuta shall be inscribed to UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage;
- g. To perform all kinds of environmental activities for the restoration of Wirikuta;
- h. To take all kinds of preventive measures to guarantee the health of all the inhabitants of Wirikuta;
- i. To assign more resources and budget to the area;
- j. To develop federal and state programs with the aim of improving the quality of life of the inhabitants of the region.¹²⁸

Lastly, as it can be seen, what the Wixárika people is asking for finds solid bases in domestic and international legal perspectives for achieving an integral protection of their sacred lands and culture, as well as for the ecosystem that Wirikuta represents for being located within the Chihuahua Desert region. The previous Wixárika people's reasoning is

¹²⁷ UN, General Assembly, Human Rights Council (2013): Extractive industries and indigenous peoples Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/152/49/PDF/G1315249.pdf?OpenElement> [accessed April 2014]

¹²⁸ See supra Note 121

strengthened since they also understand the threats and adverse effects - environmental, cultural and economic - that a mining project to be developed within their traditional lands represents.

3.8. The legal case in Wirikuta.

In the section that follows, I will refer to the legal case in Wirikuta. Nevertheless, it is important to point out that due to the recent nature of the present case it is not possible to attend nor refer to all the details and actions taken and contained within it, neither from the “plaintiffs”, the “Responsible Authorities”, nor the “Jurisdictional Body in charge of the case’s resolution”. This is because, according to article 14 section IV of the Federal Act of Transparency and Access to the Governmental Information, all kind of information related to it cannot be provided because the same trial is pending final resolution for being adopted and executed; thus, the information contained within the judicial process is considered “reserved” at the moment.

On July, 2011, the Wixarika’s representative authorities of Tuxpan and San Sebastián, belonging to the municipalities of Bolaños and Mezquitic requested an Amparo Trial from the Fourth District Court of San Luis Potosí to ensure „*the recognition of Wirikuta as an integral part of our cultural heritage*” and „*to order the cancellation of concessions granted within the sacred territory of Wirikuta*”.¹²⁹ From the present Amparo Trial, the Federal Court granted through its Sentence issued on February, 2012, the “Provisional Suspension” of 38 mining concessions from the La Luz Silver Project. With this federal suspension, none authority - federal, state nor municipal - may grant any kind of permits/licenses for exploration nor exploitation of mineral resources within the region of the NPA of Wirikuta; and furthermore, it orders that Mexican authorities shall protect the area before any act by third parties who might violate said suspension.

As we have seen within chapter 3, the environmental and cultural threats to the Wixárika people have not stopped since the Ministry of Economy (the SE) kept on granting mining concessions within the NPA of Wirikuta, particularly those referring to the Universo project, without taking into account what was established in the Report issued by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya; the Constitutional amendment of 2011 on matters of human rights, which binds the authorities to promote,

¹²⁹ See supra Note 33 p. 7

respect, guarantee and protect the human rights established within the Constitution and International Treaties; the Recommendation and the State Decrees where Wirikuta is proclaimed as an NPA.

In this regard, through a legal resource for appeal called “Revision Resource”, the Wixárika people required from the SE the cancellation of the mining concessions located within the region. To this extent, and according to the Federal Act of Administrative Procedure, the authorities shall not exceed a period of three months to attend to or solve any petition. If the term has come to an end without getting any response, the answer or resolution shall be taken in negative sense to the petitioner.

However, despite said term the Wixárika people got no answer from the SE; hence, on June 2013, they lodged before the Federal Court an Amparo Trial with the aim to protect the Wixárika people's rights and the Sacred Site of Wirikuta from the mining industry. The Sentence from this trial favored them, since in September, 2013, an extension for the suit of Amparo was admitted and its Sentence granted the “Provisional Suspension” of 40 more mining concessions from the project Universo, owned by Revolution. Such legal action stops all mining activities within the sacred site of Wirikuta in the Municipalities of Catorce, Charcas, Matehuala, Villa de Ramos, Villa de Guadalupe and Villa de la Paz, in San Luis Potosí, representing almost 140,000 hectares.¹³⁰

All the above represents a milestone within the present case and will certainly establish a precedent, since the property, environmental and cultural rights of the Wixárika people were recognized, and it states that every authority shall pursue a wide range protection of human rights, particularly referring to indigenous peoples, their cosmogony and cultural elements which identify them.

Even though both Sentences represent a huge step towards the protection of the Wixárika peoples' rights, it does not represent the ideal scenario for the Wixárika people and Wirikuta, which should be the total and permanent suspension and prohibition of any mining activities within said NPA. This has been recognized by the Wixárika people through the “Front for Wirikuta's Defense”, explaining that the suspensions granted by the Federal Courts represent 98,000 hectares. Furthermore, as its name points out, they **only suspend** all exploration and exploitation activities, but they do not permanently cancel such

¹³⁰La Jornada (2013): Suspenden todas las concesiones mineras que afectan la región sagrada de Wirikuta, dated on September 13th, 2013 Available at: <http://www.jornada.unam.mx/2013/09/13/sociedad/038n1soc> [accessed October 2013]

works; hence, next step shall be to follow some other international resources to protect their rights.

4. Legal Context.

4.1. Developments of Mexican Environmental Law, along with International Instruments.

The background of Mexican environmental law can be traced back almost four decades. By analyzing its evolution alongside the international environmental law background, we can find that the Wixárika people cultural rights and nature conservation of Wirikuta have solid pillars to achieve an effective and inclusive protection.

Mexican's efforts for environmental protection and efficient environmental management have found influence and support on the international law scope. For instance, we can make a special emphasis on the Swedish suggestion to ECOSOC in 1968 of having a conference to focus on human interactions with the environment; Conferences of Paris and London, held in 1968 and 1970 respectively; and the UNCHE held in Stockholm in 1972¹³¹ - mentioned within this thesis in chapter 4.3.

It was during this period – January, 1971- when the Constitution of Mexico was amended on its article 73 section XVI 4a, pursuing an environmental objective for the first time. This article granted, among other things, the necessary faculties to the then existing General Salubrity Council to establish all measures to prevent and tackle environmental pollution.¹³² In this regard, the Mexican government enacted the Federal Act to Prevent and Control Environmental Pollution, on March 23rd, 1971.¹³³

Even though the political intentions and the legal scope in this matter pursued an effective environmental protection and sought to stop environmental degradation, the institutional and legal framework had to be adapted. Some of the main issues during those years were due to livestock expansion and growth, massive deforestation of rain forests in the southeast of Mexico and impacts of the fossil fuel industry (mainly oil). Others include an

¹³¹ Instituto Nacional de Ecología, Desarrollo de la legislación ambiental en México (2007). available at: <http://www2.inecc.gob.mx/publicaciones/libros/395/vargas.html> [accessed September 2013].

¹³² H. Congreso de la Unión, Cámara de Diputados (no date). available at: http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_071_06jul71_ima.pdf [accessed September 2013].

¹³³ See supra Note 131

increased awareness from society regarding a healthy and clean environment, which started to demand respect and protection of their environmental rights.¹³⁴

The mentioned before was elemental for the creation and establishment of the Ministry of Urban Development and Ecology (SEDUE) and the Sub-secretary of Ecology during the eighties. The former was in charge of establishing and directing the environmental sanitation policies in coordination with the Ministry of Health, to act on issues regarding flora and fauna, as well as certain forestry topics and ecosystems protection.

Noteworthy are the facts that it was also during the 80s decade that for the first time was included a chapter regarding ecology within the National Development Plan (1983-1988); and the enactment and publishing of the Act for Federal Environmental Protection (January 11th, 1982), which expanded more on environmental topics, and stipulated a wider punitive force, creating social interest within the public towards a healthy environment.¹³⁵¹³⁶ The latter Act is one of the main backgrounds for the enactment of the General Act for Ecological Balance and Environmental Protection (LGEEPA) in 1988, which reinforced the State's duty for preservation and restoration of the environment.¹³⁷

Such changes brought forth the establishment of the Federal Attorney for Environmental Protection (PROFEPA) and National Institute of Ecology (INE). The former, is in charge of watching, monitoring and verifying compliance of the environmental legislation, as well as to establish, through due administrative process, remedies and penalties for breaches to federal environmental legislation. The mandate of the latter is to formulate and issue standards and environmental criteria in order to evaluate environmental impact statements, to manage natural protected areas (NPA) that are not placed under the responsibility of other agencies and to be in charge of the land-use planning in an ecological way.¹³⁸

Nevertheless, the management of certain natural resources was located under the responsibility of some other authorities of the federal public administration, for instance land and forest resources were located within the attributes of the then existing Ministry of Agriculture and Hydraulic Resources (SARH); any kind of issues related to water were located within the faculties of the National Commission of Water (CNA); lastly, it was the

¹³⁴ PROFEPA, *Nuestra historia* (2010). available at: http://www.profepa.gob.mx/innovaportal/v/1164/1/mx.wap/nuestra_historia__.html [accessed September 2013].

¹³⁵ See supra Note 131

¹³⁶ See supra Note 134

¹³⁷ Ibid.

¹³⁸ Ibid.

then existing Ministry of Fisheries who was in charge of the topics related to fishery resources.¹³⁹

Similarly, on March 16th, 1992, the National Commission for Knowledge and Use of Biodiversity (CONABIO) was created under presidential agreement. The CONABIO is a research institution, whose aim is to promote, coordinate and implement any kind of activities directed to the knowledge and understanding of biological diversity, as well as its conservation and sustainable use for the benefit of society. It also compiles and issues information about national biodiversity.¹⁴⁰

It is important to remark that the creation of said institution was influenced by the huge impact of the Convention on Biological Diversity (CBD) in the international community, since the need to expand knowledge about the vital importance of biological resources to humanity's economic and social development, as well as the increasing awareness about the threat to species and ecosystems, due to alarming rates of species' extinction caused by human activities, demanded said actions.¹⁴¹

It is easy to note the influence over and evolution of Mexican environmental authorities/institutions after UNCED was held in 1992 and with the emergence/adaptation of the concept of “sustainable development”. First was the creation of the Ministry of Environment, Natural Resources and Fishery (SEMARNAP) in 1994, which was in charge of the planning and the management of natural resources and environmental policies in Mexico. However, after the amendments made to the Federal Act of Public Administration, on November 30th, 2000, the Ministry of Environment and Natural Resources (SEMARNAT) was created as the current environmental authority whose objective is to promote the protection, restoration and preservation of the ecosystems, natural resources and the environmental services, in order to foster a sustainable use and development.¹⁴²¹⁴³

4.2. Mexican legal framework.

¹³⁹Ibid.

¹⁴⁰ CONABIO, Quiénes somos (no date). available at: http://www.conabio.gob.mx/web/conocenos/quienes_somos.html [accessed September 2013].

¹⁴¹ Convention on Biological Diversity. History of the Convention. available <http://www.cbd.int/history/> [accessed March 2014]

¹⁴² SEMARNAT, Antecedentes (2013): available <http://www.semarnat.gob.mx/conocenos/Paginas/antecedentes.aspx> [accessed September 2013].

¹⁴³ SEMARNAT, ¿Qué es la SEMARNAT? (2013): available at: <http://www.semarnat.gob.mx/conocenos/Paginas/quienessomos.aspx> [accessed September 2013].

In order to understand Wirikuta's problem and accomplish an effective environmental and cultural protection of the Sacred Sites of Indigenous Wixárika People, we shall take into account the Constitution of Mexico, specifically its article 40 which states that Mexico is established as a representative, democratic, secular and federal republic, and it is composed of three levels of government: federal, state or local, and municipal. In this regard, I analyze Mexican legal framework from a general premise – higher legal norm - to a more specific premise – lower legal norm; in other words, from the Constitution of Mexico, as the supreme law of Mexico, to State-created and Municipal-created legal norms.

In this sense, the Constitution of Mexico establishes in its article 133 that, “The Constitution, acts or laws that have been introduced or enacted by the General Congress, and any Treaty which is in accordance to it, signed and ratified by the President of the Republic, with approval from Chamber of Senators, shall be the Supreme Law of the Union”.

Furthermore, I explore the applicable legal framework for the environmental and cultural protection of the Wixárika people and their sacred sites among its three levels of government; remarking the cultural and environmental importance of Wirikuta as sacred site and as a Mexican NPA with the aim to link the interconnection and interdependence of the rights of said indigenous people. The above is mandatory to understand that environmental protection, its management and balance, and cultural integrity of indigenous peoples go hand in hand.¹⁴⁴ If the aim is to respect and protect Wixarika peoples' rights and their sacred sites; the route of pilgrimage to Wirikuta shall therefore, be analyzed on one hand as part of Wixarika's right to culture, since this pilgrimage belongs both to their traditional and nature-based livelihood. On the other hand, it shall also be protected against any kind of environmental interference, since any harm to it could trigger irreversible and unquantifiable damages that could either unbalance or finalize the ability of Wixárika people to practice their traditional livelihood.

As it can be understood from the above mentioned, cultural integrity of Wixárika people and environmental protection of the NPA of Wirikuta are interconnected and interdependent; hence an effective protection of the right to cultural identity and enjoy their own culture could serve as a guide and base to protect them from environmental issues regarding to Wirikuta, and vice versa. However, it does not work if we intend to or if we

¹⁴⁴See supra Note 5, pp. 417, 437 and 453.

achieve to protect only to one of these aspects; no matter we choose its cultural or environmental importance. For instance, if we decide to protect the route of pilgrimage and sacred sites as a cultural element - since they represent an element of traditional and nature-based livelihoods of the Wixárika people - before environmental protection of the area where both are located; with the passage of time and taking into account that environmental degradation will continue due to mining activities will not be stopped, the existence of the sacred site is going to be at risk of facing harm, and perhaps in the worst scenario, to remain unusable forever. Consequently, there will be a loss of cultural integrity and heritage of and from an indigenous people, which in the case of the present thesis would be detrimental for the Wixárika people.

As Maria del C. Carmona Lara states, a couple of elements that are necessary in order to achieve a healthy and clean environment are the expansion and improvement of environmental education – reflected on an increase of the awareness about biodiversity and importance of its environmental services; and to analyze how accessible and effective the national environmental justice is established within the legal framework.¹⁴⁵

In this regard, right to environmental information shall be understood as the right to society's participation within the decision-making processes, and right to demand environmental protection and claim for environmental damage. These measures represent ways for ensuring an effective right to a healthy and clean environment.

Furthermore, the definition of right to a healthy and clean environment, and establishment of a right to sustainable development were established within the Constitution of Mexico on June 28th, 1999, with constitutional amendments to articles 4 and 25. These juridical concepts are based on general principles of law which have arisen through a comparative analysis over several legal systems and constitutions.¹⁴⁶

In the lines below, and taking into account that the Constitution of Mexico distributes powers among the federation, states and municipalities, I will go through Federal laws, upon local Acts or Decrees that have been enacted considering or granting any kind of right or obligation regarding the protection of the sacred sites of the Wixárika People, both towards cultural integrity of indigenous peoples, as well as environmental protection. In addition to the environmental legal background of Mexico, it is important to note that after

¹⁴⁵ Carmona Lara, María del Carmen (2000): *Derechos en relación con el Medio Ambiente*. 1A ed. México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, p. 3.

¹⁴⁶ *Ibid*

Norway, Mexico was the second country who ratified ILO Convention No. 169, on September 5th, 1990. Since then, such was the influence of the ratification and compromise gotten by the Mexican government that Mexico recognized itself as a poly-cultural nation; and in 2001, the article 2 of the Constitution of Mexico was amended, and rights of indigenous peoples were established at a constitutional level; fact that granted a stronger identity to Mexico's indigenous peoples.

4.2.1 Federal Legislation.

The federal legislation applicable to the present case are as follows: The Constitution of Mexico (the Constitution), General Act for Ecological Balance and Environmental Protection (LGEEPA), Rules of Procedure of LGEEPA on Environmental Impact Assessment matters, Rules of Procedure of LGEEPA on Natural Protected Areas matters, Mining Act and Land Act.

The Constitution deserves special attention and recognition since alongside international environmental law and human rights development, particularly the ILO. Convention No. 169 and Convention on Biological Diversity, it has shown actions in favor of indigenous peoples' rights. For instance, it recognizes Mexico's multicultural composition (multiethnic), which it is originally based on its indigenous peoples; right to self-determination, prior consultation, development, healthy environment, cultural and land rights, among others.

As article 2 of the Constitution of Mexico states, indigenous peoples are those who descend from aboriginal people who inhabited the present territory of the Nation before colonization and that preserve their own social, economic, cultural and political institutions. An indigenous community is one that is comprised of a social, economic and cultural unit settled down within a territory, with its own recognized authorities by its customs and traditions. Its main aim is to guarantee their social, cultural and economic unity inside their territory and with their own authorities; it intends to ease its inclusion within national development by respecting their right to prior consultation and participation in the use, management, protection and conservation of natural resources located within their traditional lands.

Besides the recognition of the rights mentioned above, article 2 of the Constitution goes further and establishes an obligation for the State – among all governmental levels – to promote equality of opportunities and to eradicate any kind of discrimination of indigenous

peoples and integration of indigenous women, in order to achieve gender equity. Furthermore, institutions and policies must always encourage, grant and promote the respect of indigenous peoples' rights and the integral development of their population and communities. It also guarantees, promotes and improves education and health services (using traditional medicine), recreational areas, infrastructure and telecommunications. In this sense, a particularity that has triggered the present conflict of interests and shall be taken into account is that, as many other countries have enumerated, Mexico's position regarding the ownership of sub-surface mineral resources is exclusively assigned by constitutional or legislative provisions to the State, a fact that has been reflected in a negative way over indigenous peoples' right to access and use of natural resources located within their traditional lands. This is due to the fact that article 2 of the Constitution of Mexico expressly marks as an exception for the use or execution of said right when it refers to those resources that are considered as strategic for national development, such as mineral resources, oil and gas deposits.

Likewise, this particularity can be understood if we analyze what it is stated by article 27 of the Constitution as the main pillar in relation to property, possession, use, exploration and exploitation of natural resources located within Mexican territory, specifically all kind of ores and substances which can be found in veins, ledges, masses or beds, such as ores from which metals or metalloids are extracted and used in any kind of industry.

Throughout the whole history of Wirikuta's mining case, we can see that the rights mentioned above have been harmed and jeopardized since some direct consequences of the mining industry can be already noted within the NPA of Wirikuta, for instance the destruction and disappearance of language, traditional knowledge, cultural integrity and identity of Wixárika people, and wildlife which inhabits their traditional lands.

Economic rights and inclusion of indigenous peoples in the national development are remarked and related in articles 4, 25, 26 and 27 of the Constitution of Mexico. According to these articles, it is the Mexican State who is in charge of ruling said development and to ensure that it will be **inclusive and sustainable**. Furthermore, it is article 4 which recognizes the **right of every person to enjoy a healthy environment, right to health, and water and sanitation**; this article has been recently amended (February 8th, 2012) and to present day establishes that the State is in charge of guaranteeing the respect and

protection of said right; hence any kind of environmental damage and/or harm could be punishable.¹⁴⁷

Following what it is stated in the Constitution as the higher legal norm, LGEEPA is the main regulatory Act of article 4 of the mentioned Constitution and among its main objectives is to guarantee the right of everyone to enjoy a healthy environment, for their own development and welfare. Likewise, this Act is related with the national economic development since it addresses the powers and obligations of Mexican authorities towards protection, preservation, and sustainable use and exploitation of natural resources and protection of biodiversity. It also considers the relation between environment, indigenous peoples and their culture (traditional livelihood and knowledge).

LGEEPA also establishes that the national environmental policy shall follow a principle of mutual cooperation, since ecosystems are society's common heritage and by keeping their balance, life and national productivity rely. Therefore, sustainable use of the ecosystems and their elements is responsibility of both the authorities and society with the aim to protect and preserve the ecological balance. Furthermore, it also acknowledges the role of traditional knowledge, and effective participation and consultation of indigenous peoples in the elaboration of biodiversity programs from the region where they live, in order to achieve the preservation and a sustainable use of wildlife.

In the section that follows, I analyze some of LGEEPA's articles that apply to the present case, since the mining projects intended to be developed in the NPA of Wirikuta not only threaten biodiversity located in one of the top three most biologically rich semi-desert areas in the world¹⁴⁸; but also to the Wixárika people, its traditional livelihood and knowledge, which have been gained, saved, improved and developed for centuries.

It is important to analyze chapter IV section V of LGEEPA and its Rules of Procedure of the LGEEPA in EIA matters, since both laws establish principles that the environmental impact assessment (EIA) and its resolution shall follow. It is through the EIA, that any mining industry activities (exploration, exploitation and benefits from ores) are regulated, since they represent a work or activity that could cause an ecological unbalance, or exceed

¹⁴⁷ PROFEPA (2010). available at: http://www.profepa.gob.mx/innovaportal/file/435/1/NOM_059_SEMARNAT_2010.pdf [accessed September 2013].

¹⁴⁸ See supra Note 37.

the limits and conditions to protect the environment, and preserve and restore the ecosystem.

The mining industry's effects on environment and cultural integrity of indigenous peoples are well-known; thus LGEEPA recognizes and establishes the right of every citizen to consult the EIA before any mining activities are authorized or denied. In addition, it requires coordinated organization among the three levels of government, a public meeting for information and explanation (environmental and technical aspects) by the project petitioner. Likewise, any mining project which has been authorized and intended to be developed shall follow the Rules of Procedure, Official Mexican Standards, Urban Development and Ecological Order of the Territory Plans, and NPAs Declaration established by LGEEPA.

It is important to point out that even though the region that encompasses the route of pilgrimage to Wirikuta is only a State-proclaimed NPA, the main general rules established in LGEEPA and applicable to Federal-proclaimed NPAs are still relevant, since establishment of NPAs among three levels of government pursue the same objectives. In other words, preservation of the representative natural environments from different biogeographic and ecologic regions and most fragile ecosystems, as well as their functions and services, in order to ensure the balance and continuity of the evolutionary and ecological processes. This includes the protection of zones, monuments, and archeological, historical and artistic sites, as well as touristic zones, for the identity, recreation and culture of the nation and indigenous peoples.

Moreover, we can find that LGEEPA encourages and promotes the right of indigenous peoples to participate in the decision-making process for establishment, administration and management of NPAs. It even grants their right to make a request to SEMARNAT for the creation of NPAs for the preservation, protection and restoration of biodiversity. Even though the Wixárika people does not want the development of any project that could harm or jeopardize the environmental balance and cultural integrity of Wirikuta and its route of pilgrimage within their territory, article 64 Bis 1 of LGEEPA is noteworthy since it states that, before the scenario in which any permit or concession has been granted for the development of any work or activity within an NPA, where the holder(s) or owner(s) of the land is an indigenous people, they shall have the preference to obtain such permits. The Mining Act and the Land Act – both, Regulatory Acts of article 27 of the Constitution - are relevant to the present case, since exploration and exploitation of ores located within the

NPA of Wirikuta by the La Luz Silver project and Universo Gold-Silver project bring environmental and cultural issues to the fore which could set up legal procedures related to land issues, where one of the stakeholders concerned is an indigenous people. When this is the case, the Land Act clearly states that indigenous customs shall be considered in order to solve the controversy, as long as these do not conflict with the Constitution and/or Land Act. Moreover, it recognizes the right to judicial protection and fair trial of indigenous peoples, by stating that any written action taken by indigenous peoples in their own language shall not require a Spanish translation. Also, if any of the stakeholders as an indigenous people do not know the Spanish language, the authorities shall release a synthesis from all judicial actions, as well as the resolution provided to the case, in the native language spoken and written by the stakeholder.

Since the topics mentioned refer to joint powers among three levels of government, in relation to cultural protection of Wixárika people and environmental protection of an NPA, San Luis Potosí shall act in accordance with the Constitution, specifically what it is stated by articles 40 and 41, where each State of the Republic has the power to enact laws and issue regulations or any kind of legislation applicable to environmental protection, its management and balance, and cultural integrity of indigenous peoples.

4.2.2. State Legislation.

The Constitution of San Luis Potosí follows the same example established by the Constitution of Mexico in its article 2 regarding indigenous peoples' autonomy and self-governance, as well as their social, cultural and economic unity inside their territory, with their own authorities and traditions. It also reaffirms Mexico's multicultural composition, since the State also has a multi-ethnic, multicultural and multilingual composition, originally based on its indigenous peoples. It recognizes the historical and current existence within its territory from the Nahuas, Teének or Huastecos, Xi'oi or Pames, and **Wixárikas or Huicholes**. Likewise, it guarantees the principle of freedom of association among indigenous peoples, and right to access and control of natural resources located within their traditional lands – which shall be sustainable. A remarkable consideration within this article, is the preference that shall be given to the indigenous peoples about the use of such natural resources.

Lastly, following what is established in Section B of Article 2 of the Constitution of Mexico, San Luis Potosí shall grant and promote the inclusion of their population and

communities – including the integration of indigenous women, within the regional development. It also promotes the improvement and increase of indigenous people's education according to its own language and cultural particularities. It guarantees the effective access to all health services, encouraging the use of traditional medicine; the improvement of housing, recreational areas, roads and telecommunications – granting them the right to acquire and develop their own media.

Legislation of San Luís Potosí goes even further through its “Regulatory Act of article 9 of the Constitution of the State, about indigenous peoples' rights and culture”. It guarantees the recognition and effective protection of the basic rights of indigenous peoples, focusing mainly on its right to development and inclusion within the state/regional development. Article 15 states that in exercise of the right to self-determination and autonomy, indigenous peoples shall establish the bases and mechanisms to organize their community life.

In order to achieve its aim, it sets up the creation of a “State System for the Human and Social Development of the Indigenous Peoples”. It also establishes that every “specialized unit” shall maintain a direct and constant communication with the representatives of indigenous communities for the attention of such matters as indigenous justice and security; culture, education and indigenous language; health and social welfare; sustainable development; and human and social development. Its aim is to protect and promote the respect and integrity of values, beliefs, customs, cultural and religious practices of the indigenous peoples of San Luis Potosí.

For the topic contained within the present thesis, it is important to point out what articles 32 and 33 establish regarding sacred sites. They establish an obligation to the state to respect, protect and preserve the sacred sites which are in use by indigenous peoples for the realization of ceremonies, rituals, dances, pilgrimages or any other cultural manifestation. In order to preserve and protect the cultural heritage of indigenous peoples, San Luis Potosí and their municipalities shall establish official academic programs and educational plans which describe and explain the indigenous worldview, their history, traditional livelihood, and its traditional knowledge. To achieve so, articles 34 and 35 state as an obligation to establish official education inside the territory of indigenous peoples, with the appropriate educational and technological infrastructure – ensuring equitable conditions. It also establishes that in secondary school, the professor shall have knowledge about and respect for the indigenous peoples' practices and customs. Lastly, it recognizes as a necessity for

achieving such an aim, that the indigenous people(s) shall participate within the design, development and application of the academic programs and services.

The Environmental Act of San Luis Potosí also adheres to the amendment of article 15 from the Constitution of the State, which establishes the right to a healthy environment. Among its main considerations, it establishes that environmental policy of the state shall guarantee the inclusion of indigenous peoples for protection, preservation, and sustainable use and management of natural resources, acknowledging that in order to achieve a sustainable development, it is necessary to improve the living conditions of the population. In relation to Natural Protected Areas (NPA), as General Act for Ecological Balance and Environmental Protection (LGEEPA), the Environmental Act of San Luis Potosí also encourages and promotes indigenous peoples' right to participate in the decision-making process for the establishment, administration and management of NPAs. It also grants their right to make a request to the Ministry of Ecology and Environmental Management (SEGAM) of the State for the creation of NPAs for the preservation, protection and restoration of biodiversity; it also establishes SEGAM's obligation to consult indigenous peoples before the enactment of NPA's declarations. Particularly in this regard, article 33 section IV expressly recognizes the enactment of NPAs declarations for wildlife conservation as public interest, which is also linked to the cultural protection of the indigenous peoples from the state, such as the Nahuas, Teének or Huastecos, the Xi'oi or Pames, and the Wixárikas or Huicholes.

4.2.3. Wirikuta as a State-proclaimed Natural Protected Area.

The region that encompasses the pilgrimage to Wirikuta has been proclaimed three times as an NPA (1994, 2000 and 2001). The first time it was recognized as a "Historical Heritage Site, Cultural Heritage Site and Ethnic Conservation Area of the Wixárika People"; second as an NPA under the modality "State Reservoir of the Cultural Landscape of Wirikuta, the Sacred Sites and the Historical-Cultural Route of the Huichol People" (Sacred Site of the Wixárika People Decree); and third under the title of "Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People" (Natural Sacred Site of the Wixárika People Decree.)

Dated on October 27th, 2000, the Sacred Site of the Wixárika People Decree's main considerations are based on an environmental awareness, as well as on the importance that indigenous peoples' relationships with their traditional livelihood, traditional lands and

traditional knowledge have over their natural, cultural and spiritual values and survival. Some of these considerations are as follows:

1. It uses what is established by articles 4 of the Constitution of Mexico as a guideline, and similarly, articles 9 and 15 of the Constitution of the State of San Luis Potosí. From international legal framework, it is also based on ILO Convention 169 – articles 13 and 14; Convention on Psychotropic Substances of 1971; and Convention on Biodiversity.
2. The state recognizes that for an efficient protection of this sacred site, an efficient legal framework is needed.; Additionally, it is important to strength the social participation in the decision-making process on matters of natural resources; and last but not least, disclosure and coordination among all society sectors and powers, for the conservation and sustainable use of biodiversity and archeological, cultural, paleontological and scenic values is needed.
3. In order to achieve its environmental and cultural protection objectives, the present decree includes Wixárika peoples' sacred sites and historical-cultural route, the conservation of the historical monuments of the area, and the natural passage of the municipalities of Catorce, Villa de la Paz, Villa de Guadalupe, Matehuala, Charcas and Villa de Ramos.
4. It recognizes the public right of way – previous agreement with the owners, if that is the case- of the Wixárika people through the land that contains the pilgrimage to Wirikuta.
5. It includes the Wixárika people on the administration, conservation, development and surveillance of the NPA.
6. It is important to point out that article thirteen of this decree considered such matters as those related to permits, licenses and concessions for the exploration, exploitation and use of natural resources within the area of Wirikuta; including authorities in power to grant them, and its applicable legal framework, either federal or state.
7. However, nothing is mentioned regarding the mining industry. Furthermore, there is no specific mention to the right to consultation of indigenous peoples, before any authority grants any kind of concession in such regards.¹⁴⁹

¹⁴⁹ See supra Note 115

The Natural Sacred Site of the Wixárika People Decree, dated on June 9th, 2001, adheres an amendment which includes the definition of natural sacred site into the Decree that created the NPA's System of the State and the NPA's State Council of San Luis Potosi. It defines natural sacred site as: "The natural area which combines a great value for the conservation of biodiversity, and the sacred space where indigenous peoples realize acts with a divine sense, where reality is perceived and observed from a magic, spiritual and natural way. In these kinds of spaces, the practices, visits and ceremonies from such people take place."¹⁵⁰

As a consequence of this, Wirikuta's NPA changed its name to "Natural Sacred Site to Wirikuta and the Historical-Cultural Route of the Huichol People" and it is located in the municipalities of Catorce, Villa de la Paz, Matehuala, Villa de Guadalupe, Charcas, Salinas de Hidalgo and Villa de Ramos.

Nevertheless, despite said efforts, it was after seven years that the process of proclamation of Wirikuta as an NPA came to an end; because it was until 2008 that Wirikuta's NPA Management Plan (the NPA Plan) was approved by San Luis Potosí State government. The above mentioned was omitted due to a lack of compliance from its obligations as State, in relation to its powers of environmental planning. This can be supported by what it is stated by article Third transitory of the Decree dated on October 27th, 2000, since the NPA Plan was supposed to be designed and published within a term of 365 working days after the NPA's Decree was published.

Nevertheless, the NPA Plan represents one of the latest achievements towards cultural and environmental protection of the NPA of Wirikuta. It was designed through a public consultation in 2006, made by the National Commission for Indigenous Peoples Development (CDI) in Mexico, State Coordination for the Attention of the Indigenous Peoples, SEGAM, and Wixárika Union of Ceremonial Centers of the States of Jalisco, Durango and Nayarit A.C. During its different stages of consultation, the total amount of registered participants among Federal and State authorities/institutions, inhabitants of Wirikuta, and indigenous peoples and their traditional indigenous authorities/representatives, was 1,530.

The Autonomous University of the San Luis Potosí (UASLP) was the leading team in the research process. After the working method was approved, "Wirikuta's Natural Sacred Site

¹⁵⁰ See supra Note 116

Research Network” was established. The responsible research team was formed by academic staff from UASLP and Wixaritari researchers, which were appointed by their communities according to their own uses and customs. It was agreed to request from two Wixaritari (plural name for Wixárika) communities, their authorization for implementing a participatory cartographic research within the sacred space of Wirikuta.

The Rules of Procedure of the NPA Plan gives us a wider perspective about the spirit for achieving an environmental protection with the inclusion of the Wixárika people in the decision-making process, since the Administration Council - maximum body for the administration of the NPA of Wirikuta – is constituted by representatives, both from the common lands located within the General Polygon of the NPA, and from the municipalities of Catorce, Villa de la Paz, Villa de Guadalupe, Matehuala, Charcas and Villa de Ramos. In relation to the use of natural resources located within the NPA, including those necessary for the mining industry, there is a chapter entitled “Use of Resources”. This chapter states that such industry can continue their exploration and exploitation as long as the mining companies have the corresponding authorizations; mining activities are done by the communities living within the NPA region, or have their previous agreement; and those shall be compatible with the objectives, criteria and programs of sustainable development. Nevertheless, current social and economic situation reflect a rejection to the mining activities in Wirikuta from the Mexican community, international observers, and most importantly, from the Wixárika people. Furthermore, we can clearly notice and state without any doubt that the three points mentioned above – among so many other things – have not been accomplished, nor followed. In fact, the threat against the Wixárika peoples’ existence continues, and loss of cultural heritage and unquantifiable environmental damages could occur if the mining industry continues developing projects within the region that encompasses the NPA of Wirikuta.

4.3. International Legal Framework.

The protection of the route of pilgrimage to Wirikuta keeps gaining importance and power when we analyze the international legal framework that refers to environmental and cultural protection. As has been mentioned before, Wirikuta represents a biological and geographically notable region due to its vital contribution of plants and animals - including its endemic characteristics, and their genetic diversity. Furthermore, its role within the

Wixarika's people cosmogony makes it a core element for the continuity of their traditional livelihood and their existence as a people.¹⁵¹

Therefore, in the sections that follow, I briefly explain the evolution and development of international law, referring to the environmental protection context, and to the recent development and evolution that the legal personality of indigenous peoples has been gaining during the last three decades, in order to reinforce and reassure the awareness about its effective and efficient protection through an environmental, economic and social sustainability.

4.3.1. Development of International Environmental Law.

Most of the international environmental law development took place in the second half of the last century. However, it can be tracked back to the 18th century. It is divided in four phases: from early fisheries Conventions, to the creation of the United Nations in 1945; from the creation of the United Nations in 1945 to the United Nations Conference on the Human Environment (UNCHE) in Stockholm in 1972; from UNCHE in 1972 to the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro; and after UNCED in 1992.¹⁵²

4.3.2. The ILO Convention No. 169.

The Indigenous and Tribal Populations Convention, 1957 (the ILO Convention No. 107), which was originally concerned with Indigenous and Tribal peoples as workers, works as a background for ILO Convention No. 169. It was adopted on June 26th, 1957, and entered into force almost two years later on June 2nd, 1959. Furthermore said Convention was ratified by only 27 countries, 14 of which were Latin American countries; it was also ratified by Pakistan, India and Bangladesh. The Convention covers a number of issues ranging from working and labour conditions, recruitment of indigenous and tribal peoples, to land rights, health and education.¹⁵³

¹⁵¹ See supra Note 16.

¹⁵² UN, United Nations University Press, David Leary and Balakrishna Pisupati (2010): The Future of International Environmental Law. available at: <http://i.unu.edu/media/unu.edu/publication/2225/futureofintlenvironmentallaw-2.pdf>, pp. 7-10.

¹⁵³ International Labour Organization: Convention No. 107. available at: <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>[accessed October 2014]

On the other hand, with a different and more fresh approach, ILO Convention No. 169 replaces the former since it recognizes indigenous peoples' special needs and characteristics, and intends to regulate and promote their improvement and fair integration to global economic development, since they have been more affected by it, due to the fact that it has been planned and implemented without respecting their right to consultation, and free, prior and informed consent. A special focus is given to planning and implementation of development projects that could affect them, and it is through the analysis that they have to be consulted and democratically integrated, dealing with it according to their traditional institutions and procedures. Consequently, it could be stated that such legal evolution brought indigenous peoples into society, not only as workers, but as an aboriginal and continuing existence and development of the world. Therefore, a general attitude of respect towards their culture and way of life must be promoted.

The ILO Convention 169 recognizes indigenous peoples' collective rights to self-development, cultural and institutional integrity, territory and environmental security.¹⁵⁴ It is divided into 3 main sections. It deals with land rights and the relation with indigenous peoples' right of access to natural and mineral resources, this is particularly considering ownership and control of land and all type of resources located within their traditional lands. The special relationship and connection to their traditional lands must be understood from a sacred or spiritual meaning. Noteworthy to point out is that it was after the Meeting of Experts – 1986 – when ILO Convention No. 107 began its revision, describing that “all resources located within their traditional territories” consists of all matters pertaining to the lands, including water, sub-soil, air space, all occupants, plants and animal life, as well as all the resources. Some other experts include coastal waters and sea-ice.¹⁵⁵ Likewise, some relevant considerations of ILO Convention No. 169 regarding land rights and access to the natural resources located within their traditional lands, are as follows:

- a. Right to the land they traditionally occupy. Governments shall take all necessary measures to identify them and to guarantee an effective protection of their ownership and possession to those lands and, also to respect their special relationship to them;
- b. Right to participate in the use, management, protection and conservation of the natural resources located within their lands;

¹⁵⁴Washington, Haydn, 2013, p. 23 158

¹⁵⁵ Joona, T., 2012, pp. 102-113

- c. Right to be consulted before natural resources on their lands are explored and exploited;
- d. Right to reliable and effective studies on the effects of such exploration and exploitation;
- e. Right to benefit in the profits made from any exploration and exploitation; and
- f. Right to be compensated by the government for any damages caused by such activities.¹⁵⁶

As James A. S. Musisi recognizes, one of the biggest achievements of ILO Convention No. 169 is the recognition of indigenous and tribal peoples' cultures and ways of life, as well as their right to continued existence and development in any manner they want to. It also includes provisions on land rights which must be respected for traditional occupation, as well as protection of such rights. It is also noteworthy how the indigenous peoples' right to participate in the management and benefits of resource exploitation on their land, and their right to refuse to be displaced unless exceptional circumstances are provided.¹⁵⁷

Nevertheless, if indigenous peoples shall be displaced from their traditional lands, it shall be only within extreme cases (mining industry); in this sense, the ILO Convention No. 169 states in its article 16.2 that this must be **an exceptional measure**, and for implementing it not only the impacts on the way of life, well-being and cultural identity shall be considered, but also **it shall be done with a free, prior and informed consent and through an effective representation**. In this sense, "Free and informed consent" means that Indigenous and Tribal peoples fully understand the meaning and consequences of the displacement and that they accept and agree to it.¹⁵⁸

In this regard, indigenous peoples shall be consulted in accordance with their own customs and traditions since the first moment that the investment or development project has been planned, so indigenous people clearly know and understand all the potential risks – environmental, social, health and cultural – that the proposed project represents for them. The aforementioned shall be done in order to guarantee that their consent is given throughout democratic, reliable and effective procedures recognized by their own representative institutions. Even though they still do not possess the right to veto because

¹⁵⁶ Ibid., pp. 99-102, 103-117, 129-139

¹⁵⁷ See supra Note 154, p. 4.172

¹⁵⁸ International Labour Organization (2009): Indigenous and tribal peoples' rights in practice: a guide to ILO Convention No. 169. / International Labour Office. – Geneva, ILO, 2009 190 p. available at: <http://www.traffic.org/medicinal-plants/> [accessed October 2013], p. 97.

they are considered objects within the process and not as subjects, no measure should be taken against the wishes of indigenous and tribal peoples.

It shall be taken into account that said right to consultation is meant to be throughout meaningful, sincere and transparent procedures. This means that there is no room for the existence of any kind of vice or gap that could affect or dissuade their consent and that such participation must be held from beginning to end. This is confirmed by the Office of the High Commissioner for Human Rights (OHCHR) by concluding the fact that third parties are entering into an equal and respectful relationship with Indigenous and Tribal peoples, since such a right and connection to the lands has belonged and belongs – at least it should – to them before anyone else.¹⁵⁹ This could be compared to the General Principle of Law: *Priore tempore, priore iure*.

4.3.3. Impacts of UNCED over Indigenous Peoples' rights and their engagement within environmental discourse.

Indigenous peoples' engagement within environmental discourse, and the consequent improvement over their rights at all stages – design, creation, amendment, implementation, protection and enforcement - cannot be analyzed without taking into account and acknowledging the effects of UNCED. Through its targets for reaching multilateralism and interdependence of nations towards sustainable development, there was a recognition and compromise towards indigenous peoples' rights. A clear example of this is the report, *Our common future* - published in 1987 and also known as the Brundtland Report,¹⁶⁰ which was released by the World Commission on Environment and Development and laid the groundwork for the convening of international instruments of such relevance as the Rio Declaration and Agenda 21, CBD, Nagoya Protocol, etc. It is after this period, when a link is clearly set between biodiversity conservation and the role of indigenous communities from a human rights based approach.

In order to achieve and understand the aim of the international legal framework for indigenous peoples, it is necessary to focus on the evolution of their legal personality

¹⁵⁹ OHCHR, Sub-Commission on the Promotion and Protection of Human Rights, UNWGIP (2005): Legal commentary on the concept of free, prior and informed consent. available at: www.ohchr.org/Documents/Issues/IPeoples/WG/E-CN4-Sub2-AC4-2005-WP1.doc [accessed October 2013] p. 15 Conclusions.

¹⁶⁰ UN Documents, Gathering a body of global agreements: Report of the World Commission on Environment and Development: Our Common Future. available at: <http://www.un-documents.net/ourcommon-future.pdf> [accessed August 2013].

within the international context, as well as on their role in the protection of the environment due to their traditional knowledge.

As Russell Lawrence Barsh points out, the indigenous peoples' rights work began with the United Nations study of discrimination against indigenous "populations" in 1971. It continued with the establishment of the United Nations Working Group on Indigenous Populations (UNWGIP).¹⁶¹

The Earth Summit in Rio de Janeiro was as important within the international environmental law scope, as it was towards indigenous peoples' rights, since their right to environmental security was recognized. Some others include ILO Conventions No. 107 and 169; international instruments which address the issue of indigenous peoples and their rights.¹⁶²

4.3.4. The Rio Declaration and Agenda 21.

As it has been explained above, a remarkable milestone for the development of indigenous peoples' rights was the UNCED, and within it we can clearly find its scope of influence on Rio Declaration and Agenda 21- a program of action for achieving sustainable development, and a statement of principles on sustainable forestry, Statement of Principles on Forests.¹⁶³

Principle 22 of the Rio Declaration recognizes indigenous peoples' role in achieving sustainable development due to their traditional knowledge.¹⁶⁴ It explains their importance as follows:

Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁶⁵

¹⁶¹ Barsh, Russel Lawrence (1994): Indigenous Peoples in The 1990s: From Object to Subject of International Law?. Harvard Human Rights Journal. 1994 pp. 33-86.

¹⁶² Watters, 2004, pp. 6-7.

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¹⁶³ See supra Note 154, p. 23.

¹⁶⁴ Ibid.

¹⁶⁵ UN Documents, United Nations Conference on Environment and Development (1992): Rio Declaration on Environment and Development. available at: <http://www.un-documents.net/rio-dec.htm> [accessed August 2013].

In Chapter 26, “Recognizing and Strengthening the Role of Indigenous People and Their Communities”, Agenda 21 acknowledges indigenous peoples’ development of holistic traditional scientific-knowledge of their lands, natural resources and environment¹⁶⁶, by stating as follows:

In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical wellbeing of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.¹⁶⁷

Agenda 21 is a non-binding, voluntarily implemented action plan of the United Nations (UN), whose intention is to achieve a sustainable relationship between economics and environment; it is through compromise and partnership of States on the implementation of national strategies, plans, policies and processes, towards the fulfillment of basic needs, that there will be improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.¹⁶⁸ Likewise, it encourages a full partnership with indigenous people and their communities, and for the achievement of its objectives it calls on governmental and intergovernmental organizations to establish an empowerment process. To achieve this, among its objectives we can find:

- a. Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
- b. Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;

¹⁶⁶ See supra Note 162, p. 24.

¹⁶⁷ UN Documents, Agenda 21 (1992): Chapter 26, Recognizing And Strengthening The Role Of Indigenous People And Their Communities. available at: <http://www.un-documents.net/a21-26.htm> [accessed August 2013].

¹⁶⁸ UNEP, Environment for Development (1992): Agenda 21, Chapter 1, Preamble. available at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=52&ArticleID=49&l=en> [accessed October 2013].

- c. Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
- d. Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;
- e. Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
- f. Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;
- g. Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource management practices, to ensure their sustainable development.¹⁶⁹

As the aforementioned confirms, said strategies are directed towards an integration process from indigenous peoples into economic development. Nevertheless, Agenda 21 goes further than strengthening the active participation of indigenous peoples and their communities in the national formulation of policies, laws and programs related to resource management and other development processes that may affect them; it pursues a wider and more influential and surrounded participation by promoting their initiation of proposals for such policies and programs.¹⁷⁰

The development of indigenous peoples' legal framework clearly shows that it has been getting stronger during the last three decades. A remarkable achievement is the recognition of their legal personality as distinct societies, with special collective rights and a distinct role within national and international decision making. An increase in international community awareness about the importance of indigenous peoples can be also noted within some terms when relationships between nation-states and indigenous peoples arise, such as "cooperation" and "partnership"; some others include the shift from standard-setting to establishing practical programs for indigenous self-development. The aforementioned can

¹⁶⁹ Analysis of the effects of the environment on the enjoyment of fundamental rights (no date). Available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/2848af408d01ec0ac1256609004e770b/549eda2f66b0cccd8c005a6562?OpenDocument#2> [accessed August 2013]

¹⁷⁰ See supra Note 169.

be well noted when we analyze the existent connections between the background, objectives and means of implementation, particularly among the ILO Convention No. 169, the Rio Summit follow-up activities, the International Year of the World's Indigenous People, and the Decade of the World's Indigenous People.

Participation of indigenous peoples within any kind of development project is crucial if we want to talk about a human rights based approach. The development of international law has been headed in the right direction, from the right to proper consultation it is moving towards a free, prior and informed consent.

4.3.5. Convention on Biological Diversity and the Nagoya Protocol.

The Convention on Biological Diversity (CBD) is a remarkable example to enlighten the existent connection and interdependence between indigenous peoples' human rights, right to environmental security and to enjoy one's own culture. It entered into force on December, 29th, 1993, and among its main objectives we can find: Conservation of biological diversity; Sustainable use of the components of biological diversity; and Fair and equitable sharing of the benefits arising from the utilization of genetic resources.¹⁷¹ This relation can be analyzed and strengthened from the perspective that there is an inherent connection between indigenous peoples' human rights and protection of biodiversity; therefore, the CBD represents an international legal instrument for the conservation and sustainable use of biological diversity, which through granting and promoting indigenous peoples' cultural integrity and traditional way of life, also contributes to the protection of biodiversity.¹⁷²

The integral approach between human rights and environment has benefited indigenous peoples' role within the state of law; an increasing recognition and a better understanding about their effective participation in all decision-making processes regarding their lands and resources shows, if not the fastest, an optimum scenario for a change in the mindset and perspective that was dominant during the last five decades in global politics, in order to achieve an environmental, economic and social sustainability.

As Leena Heinamäki recognizes, the traditional focus on land rights and participatory possibilities in government policy-making is being strengthened. Furthermore, intellectual

¹⁷¹ Convention on Biological Diversity. Introduction. available at: <http://www.cbd.int/intro/default.shtml> [accessed August 2013].

¹⁷² See supra Note 5, pp. 466-467.

property rights have been brought to the fore as a powerful tool for gaining force, since those rights are granting a broader control of indigenous communities over traditional knowledge (TK) and practices, and the natural resources located within their lands.¹⁷³

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity's (the Nagoya Protocol) main goal is to follow and achieve one of the three objectives of the CBD. This being “the fair and equitable share of the benefits arising from the utilization of genetic resources”, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and an appropriate funding. With all these, the Nagoya Protocol contributes to the conservation of biological diversity and the sustainable use of its components.¹⁷⁴ The Nagoya Protocol is an international agreement which was adopted by the Conference of the Parties to the CBD at its tenth meeting on October 29th, 2010, in Nagoya, Japan.¹⁷⁵ It contains significant vanguard provisions that, for the first time relate to TK associated with the rights over genetic resources held by indigenous and local communities. Furthermore, **it sets out clear obligations to seek the prior informed consent of indigenous and local communities** in these situations. Lastly, it also provides for the sharing of benefits arising from the use of TK associated with genetic resources, as well as benefits arising from the use of genetic resources in accordance with domestic legislation. Benefit sharing must be based on mutually agreed terms. In addition, Parties to the Protocol must ensure that their nationals comply with the domestic legislation and regulatory requirements of provider countries, related to access and benefit-sharing of TK associated with genetic resources.¹⁷⁶ This is of such relevance because most indigenous and local communities are situated in areas where the vast majority of world's genetic resources are located. Many of them have cultivated and used biological diversity in a sustainable way for thousands of years.¹⁷⁷ Therefore, the above mentioned is a deserved recognition granted for the behavior which indigenous and local communities have been maintaining for generations. It also remarks

¹⁷³ See supra Note 5, p. 468

¹⁷⁴ Convention on Biological Diversity. The Nagoya Protocol on Access and Benefit-sharing. available at:

<http://www.cbd.int/abs/> [accessed August 2013].

¹⁷⁵ Ibid.

¹⁷⁶ See supra Note 162.

¹⁷⁷ See supra Note 41.

the importance of Wirikuta, for the Wixárika People - as a sacred site - since its location is inspired by a holistic philosophy (worldview), with divine and spiritual characteristics, and is a site wherein historical (divine) events took place. Furthermore, it clearly represents an awareness of and a connection with nature for their survival.

4.3.5.1. Convention on Biological Diversity and Traditional Knowledge of indigenous peoples.

The TK gained over centuries by indigenous and local communities around the world is unique for the implementation of environmental protection and sustainable development policies. Most often it is linked to agriculture, animal husbandry, fisheries, health, horticulture, forestry and nature. **“Indigenous traditional knowledge is a way of life.”** TK is a process of acquiring and passing on knowledge and understanding. It contains information collected over time. It includes values, stories, language and social relations. It is experience-based relationships with family, animals, places, spirits, and the land. It is a worldview. Moreover, it is the intellectual property of indigenous communities and the holders of this knowledge.¹⁷⁸

There is a direct relation between cultural diversity, linguistic diversity and biological diversity; therefore, it is important to stress that any environmental harm or variation – due to development projects or adverse effects of climate change – could affect indigenous peoples, both as communities and as people as well. The accelerating loss of TK has a correspondingly devastating impact on all biological diversity. Consequently, economic survival, spiritual well-being, and cultural identity of indigenous peoples, turn into essential topics of the Global Agenda, both as a Right to Development, and as a duty of States for cultural and environmental protection.

In order to support the previous information, within the text of the CBD we can clearly identify an increasing awareness about dependency of indigenous and local communities on biological diversity and the unique role of indigenous and local communities in pursuing global sustainability.¹⁷⁹ Nevertheless, I argue that the word “*dependency*” does not fit on

¹⁷⁸ See supra Note 41.

¹⁷⁹ Convention on Biological Diversity. Working Group on Article 8(j). available at: <http://www.cbd.int/convention/wg8j.shtml> [accessed August 2013].

its broadest sense, since it denotes a relationship based on subordination between indigenous peoples and biological diversity. However, it shall be understood and expanded that this “dependence” lies more over the international community, since without TK the current understanding and knowledge about biological diversity, and its valuable contribution and relationship with economic, political and cultural development issues would have evolved in a totally different way.

To exemplify the above mentioned, it is noteworthy to analyze what “*Fundacao Brasileira de Plantas Medicinias*” states regarding the annual world market value that derived from medical plants discovered from indigenous peoples in Latin America, which is about US \$43 billion. Estimated sales for 1989 from three major natural products in the United States of America alone were: Digitalis: US \$85 million; Respering: US \$42 million, and Pilocarpine: US \$288 million. The international seed industry alone accounts for over US \$15 billion per year, much of which derived original genetic materials from crop varieties selected, nurtured, improved and developed by indigenous peoples for thousands of years.¹⁸⁰

A more recent report shows that commercial trade in this sense has not been fair, neither with the environment - by over-exploitation of species or by threatening endangered species - nor with indigenous peoples, since they have received little benefit from the billionaire profits of the pharmaceutical industry. According to TRAFFIC, an estimated 50,000–70,000 medicinal and aromatic species are harvested from the wild, with an annual global export value of pharmaceutical plants alone being over USD2.2 billion in 2011. Nevertheless, in order to grant an environmental and cultural protection, it is necessary to promote sustainable management, transparency or increased benefit-sharing.¹⁸¹

By sharing this knowledge and understanding of environment, and including indigenous peoples into planning and decision-making processes, it shall be understood that these might bring out better and clearer results for the priorities of the Global Agenda.¹⁸² Article 8(j) “Traditional knowledge, innovations and practices of the CBD” states that: Each contracting Party shall, as far as possible and as appropriate:

¹⁸⁰ See supra Note 162, p. 6.

¹⁸¹ TRAFFIC (no date): Medicinal and aromatic plants trade programme, Promoting best practice in the botanicals sector to support conservation, healthcare and livelihoods. available at: <http://www.traffic.org/medicinal-plants/> [accessed August 2013]

¹⁸² See supra Note 5, p. 457-458

Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.¹⁸³

Furthermore, as the only legally binding instrument that explicitly protects the intellectual property of indigenous peoples, it is important to point out the preventive characteristic that CBD possesses, since it not only encourages governments to promote and grant indigenous peoples' rights, but in Article 8 (j) and Article 10 (c), it establishes the obligations that state parties **shall “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”**¹⁸⁴ This shows a solid congruence that balances and sets up at the same level, both the protection of the traditional livelihood of indigenous peoples and protection of biological diversity.

Nevertheless, from half of the last century, loss of traditional knowledge has been rapidly increasing; thus having a devastating impact on biological diversity as well. Also, one more fact that has contributed to the loss of TK, is the new agricultural and industrial products which are often developed by using TK without free, prior and informed consent of knowledge holders or without ensuring a fair and equitable sharing of benefits with them. However, through creation, implementation and enforcement of laws, policies and programs, it is possible to protect and promote TK and ensure that indigenous and local communities obtain a fair and equitable share of the benefits arising from the use of such knowledge. On the other hand, legal recognition of indigenous peoples' rights, and their involvement and inclusion within development projects is as important as its contribution to environmental protection and sustainable development, due to its TK and practices. Traditional Ecological Knowledge (TEK), is the knowledge of indigenous and aboriginal people about the ecosystem surrounding them and the utilization of their resources; it must be regarded as intellectual property of its holders. Therefore, utilization and publication of this knowledge requires their prior permission and a fair compensation. In this regard, I

¹⁸³See supra Note 41

¹⁸⁴ See supra Note 5, pp. 253, 262

consider that not only the State, as a provider and guardian of their rights as indigenous and tribal peoples shall be the one who is obliged to provide such compensation, but also the third parties involved in such benefits from any kind of industry: enterprises and companies.

There are several discussions about how to help indigenous peoples to maintain the use of this knowledge and promote their oral tradition. One way is to document all kind of materials from their TK before it disappears, but this would only mean the preservation of their values. However, the effective and ideal solution would be to promote their rights, to assure and strengthen their position within states' legal framework, and contribute in preserving their existence and continuity as indigenous peoples, by granting both their cultural integrity and identity, and environmental protection of their traditional lands. After the above is promoted and has been achieved, indigenous peoples will be in conditions to keep on passing this knowledge to successive generations; and Mexico will conserve its cultural heritage.

TEK has a prominent role in several states' environmental legislation. Lawmakers are starting to realize that scientific and technological achievements of modern societies alone are not enough to solve global ecological problems, and that traditional and holistic worldviews and methods are required to handle cases affecting the whole ecosystem. Modern scientists should recognize the various methods by which this knowledge is received, assessed, and evaluated. Therefore, the holders of such traditional knowledge must be given respect by the scientists researching.¹⁸⁵

A clear example of this is the Declaration on the Establishment of the Arctic Council, issued in 1996, which affirms "the commitment of Arctic states to the well-being of the inhabitants of the Arctic, **including recognition of the special relationship and unique contributions to the Arctic of indigenous people and their communities.**" Furthermore, it recognizes: "...*the TK of indigenous people of the Arctic and their communities, and taking note of its importance, and that of Arctic science and research to the collective understanding of the circumpolar Arctic.*" Additionally, the preamble acknowledges "***the valuable contribution and support of the Inuit Circumpolar Conference, Saami Council,***

¹⁸⁵See supra Note 41

and the Association of the Indigenous Minorities of the North, Siberia, and the Far East of the Russian Federation in the development of the Arctic Council.”¹⁸⁶

The Arctic Climate Impact Assessment Report (ACIA) is also noteworthy to point out in this regard. It was prepared by an international team of over 300 scientists, other experts, and knowledgeable members of the indigenous communities. The ACIA is a dissertation discussing climate change in the Arctic with the sake of completeness. The report is issued by the Arctic Council, which is an intergovernmental body. The report focuses on problematic environmental tendencies on the Arctic, such as those caused by global climate change e.g. global temperature rising, the continuous loss of sea ice, permafrost thawing, rise of sea level, and other factors which can cause serious damage to the whole ecosystem of the Arctic.

The third chapter of the ACIA Report is called “*The changing Arctic: Indigenous perspectives*”. This chapter focuses on the definition of “Indigenous Knowledge”, it emphasizes the importance of ecological knowledge as the key to existing in the Arctic environment, and presents old habits and methods of indigenous groups, and shows the way they contribute to the ecological and cultural treasure of the Arctic through case studies.

TK is recognized as a vital source of information in the environmental impact assessment process. It has become a key component in current research on arctic ecology and the environment, and is intended to complement and support scientific and ecological findings. TK is used to gain a better understanding of the consequences of predicted impacts, to reduce uncertainties in predictions, and to assist in establishing baseline conditions and monitoring programs.

4.3.6. United Nations Declaration on the Rights of Indigenous Peoples.

As a background to the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration of Indigenous Peoples), we can mention the United Nations Permanent Forum on Indigenous Issues (UN Permanent Forum) which was established in 2000. It is an advisory body to the UN Economic and Social Council (ECOSOC) and is composed of 16 independent experts, eight of which are nominated by governments and eight by indigenous peoples. Its aim is to address indigenous issues, mainly topics related to the areas of

¹⁸⁶ Arctic Council (1996): Declaration on the establishment of the Arctic Council. Ottawa Declaration.

economic and social development, environment, health, human rights, culture and education.¹⁸⁷

Besides its expertise and recommendations on indigenous issues to ECOSOC, as well as to programs, funds and agencies of the United Nations through the Council; it promotes and raises awareness about the integration and coordination of activities related to indigenous peoples within the UN system.¹⁹¹ By analyzing the development of international human rights' legal framework and the inclusion of indigenous peoples, an evolution and engagement from the international community towards them can be seen by promoting their participation within international decision-making processes from an environmental context, as well as by strengthening their status in international law and ensuring a broader participation and influence in the design and implementation of international economy and development policy-making processes.

Moreover, it is important to point out that among its main goals was to push forward the adoption of the Declaration of Indigenous Peoples. After the Declaration of Indigenous Peoples was adopted by the United Nations General Assembly on September 13th, 2007, the UN Permanent Forum expanded its mandate to include the responsibility to promote respect for, and to track a full and effective application of the Declaration of Indigenous Peoples.¹⁸⁸ As we can see, said forum represents a fundamental development key for indigenous peoples to take part within the international community decision-making process, since they no longer only watch, enforce or disagree with the results of forums, meetings, conventions, councils or agreements. Nowadays, they are considered as serious parties which influence – they definitely have done so – policies on sustainable development, while project implementations take place and within the international legal framework. An example of the above, can be noticed through the endorsement of the concept of free, prior and informed consent which has definitely strengthened the status of indigenous peoples in international law.¹⁸⁹

¹⁸⁷ UN Permanent Forum on Indigenous Issues, Permanent Forum: Origin and Development. available at: <http://undesadspd.org/IndigenousPeoples/AboutUsMembers.aspx> [accessed August 2013] 191 Ibid.

¹⁸⁸ Office of the UNHCHR, Declaration on the rights of indigenous peoples. available at: <http://www2.ohchr.org/english/issues/indigenous/declaration.htm> [accessed August 2013].

¹⁸⁹ Fenge, Terry. Interview with the authors Tahnee Prior, Sébastien Duyck, Leena Heinämäki, Timo Koivurova and Adam Stepień. Addressing Climate Vulnerability: Promoting the Participatory Rights of Indigenous Peoples and Women through Finnish Foreign Policy, *Juridica Lapponica* 38, University of Lapland Press, 2013. available at:

The Declaration of Indigenous Peoples represents a huge achievement within the efforts of indigenous peoples and international community to amend past injustices, to grant and promote an effective protection of the rights of the world's indigenous peoples, and to support their inclusion in the decision-making process of the global development, with a special focus on projects which deal with natural resources located within their lands.¹⁹⁰

It represents one of the biggest triumphs for justice and human dignity for indigenous peoples, since it is the result of over three decades of hard-work, discussions and negotiations between governments and indigenous peoples' representatives. As Luis H. Álvarez Álvarez recognizes, it started when the then existing Sub Commission on Prevention of Discrimination and Protection of Minorities, the main subsidiary body of the former Commission on Human Rights of the United Nations, recommended the elaboration of a comprehensive study which analyzed the problem of discrimination against the world's indigenous populations.¹⁹¹

The result of the study was the Martinez Cobo report (E/CN.4/Sub.2/1986/Add.4) which included the definition of indigenous peoples, role of intergovernmental and nongovernmental organizations, elimination of discrimination, and basic human rights principles, as well as special areas of action in fields such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, and equality in administration of justice among other things.¹⁹²

It was during 1985, when the UNWGIP, created by the Economic and Social Council in 1982, began preparing a draft declaration on the rights of indigenous peoples. It was after its eleventh session in July 1993, when through its resolution 1994/45 of August 26th, 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted the draft declaration and submitted it to the Commission on Human Rights for its further consideration.¹⁹³

<http://www.arcticcentre.org/loader.aspx?id=3a0f4faf-f2e3-4385-981a-6e48cead1a0b> [accessed April 2014]

¹⁹⁰ Ibid. pp. 57-63

¹⁹¹ Comisión Nacional para el Desarrollo de los Pueblos Indígenas, Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas. Comisión Nacional para el Desarrollo de los Pueblos Indígenas.- México: CDI, c2008, 2009., p. 9-12.

¹⁹² Office of the UNHCHR, Fact Sheet No.9 (Rev.1), The Rights of Indigenous Peoples (1997). available at:

<http://www.ohchr.org/Documents/Publications/FactSheet9rev.1en.pdf> [accessed August 2013]. p. 2.

¹⁹³ Ibid.

On the other hand, the Draft Declaration also foresees mutually acceptable and fair procedures for solving conflicts or disputes between indigenous peoples and States, involving means such as negotiations, mediation, arbitration, national courts, and international and regional human rights reviews and complaint mechanisms.¹⁹⁴

On June 29th, 2006, during the first session of the Human Rights Council, the Declaration of Indigenous Peoples was adopted through Resolution 2006/2. However, after the adoption of few amendments (proposed by Namibia, on behalf of the Group of African States) the Declaration of Indigenous Peoples was adopted on September 13th, 2007, by a majority of 143 states in favor, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).¹⁹⁵

The Declaration of Indigenous Peoples establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. It addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others.¹⁹⁶ In order to achieve a respectful integration, and an effective participation, it condemns all kinds of discrimination towards indigenous peoples. With the objective of ensuring their right to remain distinct and to pursue their own priorities in economic, social and cultural development, **the Declaration of Indigenous Peoples stresses the right to cultural protection, self-determination, land rights and, right to access and control over natural resources located within their traditional lands, making special emphasis on the participation of indigenous peoples within all decision-making process regarding their lands and resources.**

4.3.7. Indigenous Peoples' Right to Self-Determination.

As it has been acknowledged and emphasized by the UN Special Rapporteur on the Rights of Indigenous Peoples, Prof. James Anaya, indigenous peoples' right to self-determination is a foundational right without which other human rights cannot be realized.¹⁹⁷ The Declaration of Indigenous Peoples recognizes the right to self-determination mainly from

¹⁹⁴ Ibid.

¹⁹⁵ See supra Note 192

¹⁹⁶ Ibid.

¹⁹⁷ UN Human Rights Council. (2009) Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, UN Doc A/HRC/12/34 (2009).

two perspectives, these are regarding their economic, social and cultural development, and from their self-governance in internal and local matters.¹⁹⁸

It is through indigenous peoples' enhancement and inclusion in the development, both of state and global, that their political, economic, social and cultural organization can be guaranteed. Likewise, its aim is to recognize and to compensate historic injustices, as well as eradicate all kinds of discrimination and oppression suffered by indigenous peoples; since with the passing of time and due to colonial powers and occupational periods, they have had to face integrations (political, economic, legal, cultural and social), mostly through imposition with settlers; integration that neither during those times, nor today, have meant a benefit for them. Lastly, we can also include that the spirit of right to self-determination, is to maintain and strengthen their rights over their lands, territories and resources.

In this regard, I remark what has been stated by Terry Fenge, since said injustices and inequities have been part of indigenous people's history, this is *"...from an indigenous perspective which operates from an overtly ecological, all-things-are-connected point of view, climate change is only the most recent issue to which they have to respond, and is very much a continuation of environmental issues that have attracted their attention for decades...Defending their rights and interests has always had a legal and human rights angle. In short, while the language of human rights very much postdates the second world war, the same concepts that inform the doctrine of human rights – equity, fairness, enjoyment of property, etc. have been at play for Indigenous peoples since 1492!"*¹⁹⁹ The United Nations has addressed that the right to self-determination shall be applied and understood from the perspective of any territory that is "geographically separate and is distinct ethnically and/or culturally" from the administering state. Therefore, if any decision or disposition shall be done within such territory, it must be based on the "free and voluntary choice" of the peoples concerned as "expressed through informed and democratic processes."²⁰⁰

As Russell Lawrence Barsh states, self-determination mainly refers to a special category of political rights for indigenous peoples that includes internal autonomy, rather than seeking

¹⁹⁸ UN (2008): United Nations Declaration on the rights of indigenous peoples. available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [accessed April 2014].

¹⁹⁹ See supra Note 189. p. 60

²⁰⁰ UN: General Assembly Resolution 1541, Principles IV and V. available at: [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1541\(XV\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1541(XV)) [accessed April 2014].

independence to form a new state and to unbalance the delicate line between sovereignty and territorial integrity of states.²⁰¹ The Principle of Territorial Integrity formulated in the Declaration on Friendly Relations adopted in 1970, consists of a balance between territorial integrity and State legitimacy, and indigenous peoples' right to self-determination within an independent State.²⁰² The principle of equal rights and self-determination of peoples states that "All peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Furthermore, it also clearly establishes the rule that pursuing such self-determination shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."²⁰³

One of the main ways to achieve so, within every nation-state jurisdiction, is through constitutional amendments which truly grant and promote the respect towards indigenous peoples' rights. This is by enacting new agrarian laws or through land rights decrees or procedures for obtaining land titles over their traditional and ancestral land and territories – beyond material particularities and physical spaces.²⁰⁴ Nevertheless, the above shall be known and understood that "Property" is quite different among indigenous peoples from what nowadays is recognized as legal property, which is mainly granted through a real title to property. On the other hand, indigenous peoples have a stronger and deeper connection to their lands. One more way to achieve this is the recognition of a right to a free, prior and informed consent from indigenous peoples, which shall be obtained before any kind of development project is realized within their traditional lands, or that might affect their natural resources.

However, territorial integrity or political unity of sovereign and independent States shall also be considered from a different perspective, for this we can analyze what has been

²⁰¹ See supra Note 162, pp. 16-17.

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²⁰² Ibid. pp.18-19.

²⁰³ UN, General Assembly (1970): Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. available at: <http://www.un-documents.net/a25r2625.htm> [accessed October 2013].

²⁰⁴ Organization of American States, Inter-American Commission on Human Rights (2009): Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System. available at: <http://www.cidh.oas.org/countryrep/IndigenousLands09/Ancestral-Lands.ENG.pdf> [accessed October 2013].

defined as “Doctrine of Discovery”. Previous Doctrine has worked as the legal and political justification for the dispossession of indigenous peoples from their lands, and disenfranchisement and abrogation of their rights; wherein the latter consideration from the colonizers or settlers point of view, indigenous peoples were constructed as “savages”, “barbarians”, or “inferior and uncivilized”; thus granting to the former a natural or superior right to subjugate, dominate and exploit indigenous peoples.²⁰⁵

For instance, we can note that within the State building process, this is the mechanism through which people obtain the elements of the principle of sovereign equality of States (special emphasis on the territorial integrity and political independence), most of the world’s indigenous peoples “did not have an opportunity to participate in designing the modern constitution of the States in which they live, or to share, in any meaningful way, in national decision-making”, just as Erica-Irene Daes, Chairperson of the Working Group states.²⁰⁶

With few exceptions, most indigenous peoples were indirectly “included” or absorbed within the building process of an independent State, without any intention or knowledge of it, since they were already inhabiting the conquered/colonized lands before such an independence movement occurred. However, it can also be claimed that once a State enjoys sovereign equality, the scenario changes and benefits indigenous peoples, since within the same search for their rights as a nation-state, indigenous peoples find themselves in the same position for recovering what once belonged to them and was taken from them without any consent, through non-peaceful and non-democratic means.

In this regard, as Leena Heinämäki has illustrated, indigenous peoples’ right to self-determination needs to be conceived as a starting point for dialogue on the resource developments, rather than an optional trade-off. This shall be done with the aim to avoid a rush and pressure on exploration and exploitation of the resources located within indigenous peoples’ traditional lands, and pursuing a greater economic autonomy and secure funding for basic social services for them.²⁰⁷

This right to self-determination is therefore, among other things, in order to compensate past injustices, aimed at reversing the political discrimination experienced by indigenous

²⁰⁵ IWGIA, UN Permanent Forum on Indigenous Issues (2009): Indigenous World. available at: <http://www.iwgia.org/images/stories/sections/human-rights/int-processes/un-mec-andprocesses/docs/IW2013/UNPFIL.pdf> [accessed October 2013].

²⁰⁶ Daes, Erica-Irene A., 2008, p. 13

²⁰⁷ See supra Note 189, pp. 69

peoples in the past and strengthening, rather than weakening, national unity. This means that through a sharing power within the existing State, both parts the nation-state and indigenous peoples, with mutual respect and in good faith shall share power democratically.²⁰⁸

4.3.8. From Indigenous Peoples' Right to Consultation to a Free, Prior and Informed Consent.

One of the main aims of the present thesis is to analyze and explain how Free, Prior and Informed Consent (FPIC) of Indigenous Peoples has developed within the international legal framework, and its particular relevance and relation to the mining case in Wirikuta. I also point out a few examples which happened within Wirikuta's case that will help us to understand the importance of the shift from consultation of Wixárika people to the recognition, establishment and granting of their right to FPIC when exploration and exploitation of any kind of natural resources is taking place in their traditional lands that has a significant effect on Wixárika peoples' culture.

According to the Final Report from the Consultation of Sacred Sites for the Wixárika People of the National Commission for Indigenous Peoples Development (CDI), some remarkable considerations regarding to the Right to Consultation process of the Wixárika people are as follows:

In order to observe what is established in articles 2 of the Constitution of Mexico, 6 of ILO Convention No. 169, and 2 of the Creating Act of the CDI; it was through the Consultative Council that the CDI designed a System for Indigenous Consultation (the System.) The System is based on the principles of diversity, equity, permanency, transparency, representation and accomplishment. Its intention is to allow a greater participation of Mexico's indigenous peoples in the creation, design, enforcement and assessment of any legislative measures and public policies, programs and actions among the three levels of government, and in regard to their development. It is through **democratic, reliable and effective consultation procedures recognized and enforced by Indigenous Peoples and their own representative institutions that the System works.**²⁰⁹

The clearest example of this is the consultation process taken by the CDI in 2006 for the design of the Natural Protected Area Plan of Wirikuta. Its objective was to consult to all the

²⁰⁸ See supra Note 162, 2004, pp. 19-21

²⁰⁹ See supra Note 16 pp. 21-25, 27-36

main participants who were involved with the protection and conservation of the historical and cultural heritage of the Wixárika people, as well as those issues related with their traditional lands and natural resources use which are encompassed within Wirikuta and its historical route of pilgrimage.

Within the general objectives of such consultation was to acknowledge the past and current problems to be tackled, and those actions needed to rescue and preserve the Wixárika people's sacred sites and traditions. Some other considerations were to promote their development; and to promote respect for their traditional lands, among all the states where the Wixárika people live.

The consultation process was realized in three stages and through thirteen workshops that took place at some Wixarika people's ceremonial centers. It followed an increasing stream, passing from a local impact with workshops by ceremonial centers to a regional impact with workshops among communities; and lastly, among states with the Inter-state forum in the states of Durango, Nayarit and Jalisco.

The FPIC is defined as “the right of indigenous peoples to make free and informed choices about the development of their lands and resources.”²¹⁰ The previous brief definition of FPIC reflects - at least at first sight – not to be a difficult concept; however as it has been materialized throughout the present thesis, the last sixty years of development of International Human Rights Law shows us that FPIC turns out to be a pretty contested, confusing and challenging concept. This is mainly due to a lack of awareness over FPIC's definition, scope and importance which has lead first to a loophole about a proper and complete definition, then consequently to a clear absence of respect towards indigenous peoples' Right to FPIC from the international community, institutions and extractive industries.

By relating indigenous peoples' Right to FPIC with resource extraction and other development projects within their traditional lands, it is easy to understand and find a straight connection between the Wixárika people's cultural, environmental and property rights, and the mining case of Wirikuta, since at present day both topics are currently a topical issue among international, regional, and domestic scopes.

The abovementioned is easy to identify since not only many State's governments have failed in granting said right, but also a wide range of bodies and sectors are included in this

²¹⁰ Ward, Tara. 2011, p. 54.

for not having the best legal, ethical and holistic practices. For instance the safeguard policies of multilateral development banks and international financial institutions; the practices of extractive industries; water and energy development; natural resource management; access to genetic resources and associated traditional knowledge and benefitsharing arrangements; scientific and medical research; as well as indigenous cultural heritage.²¹¹

In this regard, if the statement mentioned before wants to be avoided, any kind of development projects which could represent a cultural and environmental threat to indigenous peoples' rights or affect indigenous peoples' lands and natural resources shall respect the principle of FPIC through what the U.N. Commission on Human rights has correctly advised. These "steps" are as follows:

1. Indigenous peoples are not coerced, pressured or intimidated in their choices of development.
2. Their consent is sought and freely given prior to the authorization and start of development activities.
3. Indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being; and
4. Their choice to give or withhold consent over developments affecting them is respected and upheld.²¹²

Furthermore, as Leena Heinämäki has previously confirmed, the current world's indigenous people's situation and their human rights violations can be stopped and avoided through FPIC and their full participation within consultation mechanisms, environmental impact assessments and socio-cultural impact assessments.²¹³ To achieve so, it is an indispensable requisite to follow a good practice custom based on the principles of clear information and consultation with meaningful, sincere and transparent indigenous peoples' involvement in

²¹¹ U.N. Commission on Human rights, Sub-Comm. On the Promotion and Protection of Human Rights Working Group on Indigenous Populations, Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent, 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (14

July 2005), at 3. (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation)

²¹² U.N. Commission on Human rights, Sub-Comm. On the Promotion and Protection of Human Rights Working Group on Indigenous Populations, Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent, 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005), at 3. (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation), at 15, para 57.

²¹³ See supra Note 5, pp. 444-446

designing processes, whose aim is to obtain their total agreement throughout the whole process. Plus, in order to achieve indigenous peoples' real influence over the outcome of decisions that both directly and indirectly affect them, it is mandatory that they are completely informed of the consequences of the use and exploitation of natural resources located within their traditional lands and territories.²¹⁴

In addition, it is important to emphasize that Indigenous Peoples' Right to Self-Determination and FPIC go hand in hand and complement each other, since the latter is an exercise in and expression of the right to self-determination.²¹⁵ On the other hand, we can strengthen the above mentioned by reasoning that one way to ensure the protection and respect to self-determination is through granting to the world's indigenous peoples' participatory rights, or in other words, by respecting their FPIC.²¹⁶

Nevertheless, both rights shall not be understood as an equivalent, nor reduced to or promoted as individual participatory rights, since their intentions go beyond that and they are considered as collective rights which can definitely influence – improve or negatively affect – their economic, social and cultural development. The above confusion might arise due to the fact that by protecting and respecting these two rights the protection of some individual human rights is ensured, fact that is true; nonetheless the spirit of Indigenous Peoples' Right to Self-Determination and FPIC is to guarantee the rights of the community, right of world's indigenous peoples through legitimate customary and agreed processes via their own institutions.²¹⁷ In this regard, Siegfried Weissner illustrates to us by pointing out that individual rights are ascribed to an individual human being as such, who can invoke them in his/her own name, while collective rights are ascribed to groups of people and can only be claimed by the collective entity and its authorized agents.²¹⁸

The development of FPIC within the international legal framework during the last thirty years is noteworthy to point out, since it denotes an improvement towards indigenous

²¹⁴ Final report of the study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, Eighteenth session, Agenda item 5, 17 August 2011, p. 4.

²¹⁵ See *supra* Note 210, p. 55

²¹⁶ *Ibid.*, p. 58

²¹⁷ U.N. Commission on Human rights, Sub-Comm. On the Promotion and Protection of Human Rights Working Group on Indigenous Populations, Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent, 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005) (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation), at 12, para 45.

²¹⁸ Weissner, Siegfried, 1999, pp. 120-121

peoples' rights by recognizing the existent link between indigenous traditional culture and use of natural resources located within their traditional lands. The above has led to better practices on the recognition of their participatory rights and to their non-discrimination²¹⁹, as well as an awareness that through an effective and integral protection of said link, their cultural integrity and survival can be achieved.²²⁰

Just to mention some examples of said evolution within the international jurisprudence and doctrine, it is important to note what has been addressed by the UN Human Rights Committee when interpreting and applying the International Covenant on Civil and Political Rights (CCPR) and the Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation 23. Both Committees emphasize the importance of FPIC and its relation with the right to benefits of culture and protection from environmental interference of the traditional lands that indigenous peoples are entitled to own or use, and relates them to the exploration and exploitation of natural resources located within them.²²¹

An example of this can be identified within the *Poma v. Peru* case, wherein the CCPR recognizes and stresses that participation in the decision-making process must be effective through free, prior and informed consent of the members of the community if there is a significant interference in indigenous peoples' lands.²²²

The CERD reassures this by advising that, if States intend to respect and protect indigenous peoples' right to FPIC, it is mandatory and necessary to safeguard their rights to own, develop, control and use their communal lands, territories and resources, in fulfillment of the non-discrimination norm.²²³

Although resources located within indigenous peoples' traditional lands are related with their development, it shall not be forgotten that from their holistic worldview there is an intrinsic link between their traditional lands and resources which goes beyond economic

²¹⁹ See supra Note 189, pp. 73

²²⁰ Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), available at: <http://www1.umn.edu/humanrts/undocs/197-1985.html> [accessed May 2014].

²²¹ Ibid. at 189, pp. 74

²²² UN International covenant on civil and political rights (2009): Communication No. 1457/2006, Submitted by: Ángela Poma Poma (represented by counsel, Tomás Alarcón). Special Rapporteur's rule 97 decision, transmitted to the State party on 28 February 2006 (not issued in document form). available at: http://www.uio.no/studier/emner/jus/jus/JUS5710/h13/undervisningsmateriale/angela_poma_poma-vperu.pdf [accessed October 2014].

²²³ General Recommendation 23: Indigenous Peoples, Committee for the Elimination of Racial Discrimination, U.N. Doc. A/52/18, annex V; CERD/C/51/Misc.13/Rev.4 (1997), Para 4 (d).

wealth. Hence by unbalancing the resilience of their environment their continuity and existence as people is also threatened; this is why they have been standing up for residing communally upon their ancestral lands and to operate under traditional land tenure systems, in order to protect and preserve their culture and traditional modes of subsistence. This is why indigenous peoples' Right to FPIC sought to secure ownership, use and control rights over their ancestral lands and resources with the aim to achieve a full protection and respect towards their rights to self-determination, cultural integrity, and property.²²⁴

4.3.9. Cultural Heritage. Importance of Sacred Natural Sites.

Among the main international instruments whose aim is to protect and safeguard cultural heritage are the Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention), and Convention for the Safeguarding of Intangible Cultural Heritage (Intangible Cultural Heritage Convention).

The World Heritage Convention is an international treaty adopted by UNESCO's General Conference in 1972. It is one of the most widely ratified international legal instruments, with 190 member States as of September 2012. The main purpose of the World Heritage Convention is the identification and collective protection of the world's cultural and natural heritage considered to be of "outstanding universal value"; it enhances the connection and interaction between people and nature in order to preserve their balance.²²⁵²²⁶

The World Heritage Convention's only concerns about heritage is that it is tangible and immovable; if we analyze what it is stated in its articles 1 and 2, we find that it applies to cultural heritage, such as **monuments, groups of buildings and sites**; natural sites, such as **natural features, geological and physio-graphical formations and natural sites**; and mixed cultural/natural sites.

During the last decade the term "cultural heritage" has developed because of an increasing awareness, understanding and knowledge from civil society about it. This has been reflected by a culturally sensitive based approach to human rights in connection with the cultural specificity of sites of importance, the interaction of all people - special emphasis on indigenous peoples' rights to culture - with these sites, and the movable, immovable,

²²⁴ Miranda, Lillian Aponte, 2013, pp. 39-62, at 56.

²²⁵ UNESCO: The World Heritage Convention. available at: <http://whc.unesco.org/en/convention/>[accessed October 2013]

²²⁶ UNESCO: States Parties: Ratification Status. available at: <http://whc.unesco.org/en/statesparties/> [accessed October 2013]

corporeal and incorporeal elements that give them material conceptions and transcend holistically. Thus, in order to be able to protect and promote the safeguarding of the wealth of knowledge and skills that are transmitted through it from one generation to the next, the Intangible Cultural Heritage Convention was adopted by UNESCO in 2003.²²⁷ Currently, its State Parties are 155, and among its main goals is to maintain cultural diversity, traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts (article 2 of the Intangible Cultural Heritage Convention).²²⁸²²⁹

In this sense, Wixárika people and their territories fulfill the particulars considered within the Conventions mentioned before, since Wirikuta and its route of pilgrimage represent not only environmental sanctuaries, but it is also home and pillar of the genesis and worldview of the Wixárika people; hence both particulars and contributions are invaluable.

As we have seen within chapters 2.5, the Wixárika people has intended to achieve an efficient and integral protection of their sacred lands and culture through the submission of the pilgrimage to Wirikuta to UNESCO in 2004, to be considered and added to the World Heritage List under the reference number 1959; and afterwards, in 2013 under the nomination file no. 00862 for Inscription on the List of Intangible Cultural Heritage in Need of urgent safeguarding.

Nevertheless, as I am going to argue further, both nominations represent a problematic issue for the environmental and cultural integrity of the Wixarika's sacred sites, its route of pilgrimage, and their own continuity and existence as indigenous people. In this sense of recognizing the high levels of bio-cultural diversity of Wirikuta, the Wixárika people affirms that more than being considered as an intangible cultural heritage, Wirikuta shall be recognized as **cultural and natural heritage** of outstanding universal value by UNESCO, as part of the World Database on Sacred Natural Sites.

Sacred natural sites (SNS) are natural areas of special spiritual significance to people and communities. They include natural areas recognized as sacred by indigenous and traditional people, as well as natural areas recognized by institutionalized religions or faiths as places

²²⁷ UNESCO: Text of the Convention for the Safeguarding of Intangible Cultural Heritage. available at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00006> [accessed October 2014]

²²⁸ UNESCO: What is Intangible Cultural Heritage? available at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00002> [accessed October 2013]

²²⁹ UNESCO: The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003). available at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00024> [accessed October 2013].

for worship and remembrance.²³⁰ Their recognition obeys to an increased awareness and better understanding that natural-cultural heritage also contributes to the diversity and richness of civilizations and cultures which constitute the common heritage of humankind. By analyzing the previous definition, it can be understood that the cultural and natural elements of Wirikuta allows it to fulfill the elements as SNS since Wirikuta is an integral part of ethnic identity and plays a key role in traditional culture and lifestyle of the Wixárika people; it represents a variety of habitats, and guard traditional practices and knowledge related to biodiversity use and conservation. Lastly, it is through the route of pilgrimage that it also plays a key role as a process, by which their beliefs and cultural practices strengthen their nexus as nuclear families and indigenous people, and create inextricable link between societies and nature.

As Leena Heinämäki and Thora Martina Herrmann acknowledge, the right of indigenous peoples to cultural integrity has been recognized in general human rights instruments for almost fifty years. Likewise, human rights monitoring bodies have strongly promoted the special status for indigenous peoples in relation to their culture.²³¹ Lastly, it is also important to point out that there has been a special attention and remarkable development regarding to indigenous property rights over their traditional lands and natural resources, with the aim to achieve the enjoyment of other human rights. For instance, the Right to Life, to Health, Economic and Social Rights, to Cultural Identity and Religious Freedom, Labor Rights and to Self-determination. The development stated above has been mainly boosted by UN Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), and Inter-American Human Rights Commission and Court.

Moreover, it has been particularly during the last two decades that the unique relationship between indigenous and tribal peoples and their territories has been broadly recognized in international human rights law. We can particularly point out what is stated in article 21 of the American Convention and article XXIII of the American Declaration, which clearly protect this holistic bond between indigenous peoples, their lands, as well as with the natural resources located within their traditional lands. The recognition of said linkage is of fundamental importance since it leads to the enjoyment of other human rights of indigenous and tribal peoples. Furthermore, said recognition has helped to understand that, by

²³⁰ Oviedo and Jeanrenaud, 2006.

²³¹ Heinämäki and Herrmann, 2013, pp. 212-213.

protecting and preserving this particular connection, the own integrity and existence of indigenous peoples, as well as their social, cultural, and economic survival, can be respected, and consequently guaranteed.²³²

Likewise, the HRC recognizes that indigenous peoples' subsistence and social activities are an integral part of their culture; hence by jeopardizing and unbalancing such activities, cultural integrity and survival of indigenous peoples will be in danger. Previous reasoning can be strengthened by analyzing article 27 of the International Covenant on Civil and Political Rights (CCPR), which emphasizes that indigenous peoples' right to culture apply to a way of life that is closely connected to a territory and natural resources located within it. Even though said article refers to and is afforded to an individual right it also encompass a collective dimension,²³³ this is because by respecting and protecting certain rights of persons in community with others, cultural integrity and survival of a people can be achieved.

Furthermore, in the UN Declaration on the Rights of Indigenous Peoples, we can clearly recognize the existent nexus between sacred places of indigenous peoples as an integral part of their culture. The UN Declaration on the Rights of Indigenous Peoples acknowledges that in order to promote and improve the practice of indigenous peoples' traditions and customs, these have also the right to develop and teach their spiritual and religious traditions, and the right to maintain, protect and have access in privacy to their religious and cultural sites.²³⁴ Lastly, by analyzing articles 11 and 12 of the UNDRIP, the Natural Protected Area of Wirikuta and its route of pilgrimage fulfill said linkage, since the right to practice and revitalize their cultural traditions and customs, includes the right to protect and develop past, present and future manifestations of their cultures, such as the mentioned pilgrimage and all rituals which belong to it (e.g., fast and peyote consumption are essential elements of this ritual for recreating their creation myth).

As Taylor suggests, cultural integrity, identity and existence of world's indigenous peoples can be guaranteed through the establishment of an environmental human right that expresses the special spiritual, cultural, and social relationship between indigenous peoples

²³² See supra Note 229.

²³³ Hanski, R. and Scheinin, M. 2003, p. 375

²³⁴ United Nations Declaration on the Rights of Indigenous Peoples, article 12. available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [accessed April 2014].

and nature.²³⁵ The recognition of SNS of indigenous peoples besides strengthening their cultural viability, it also promotes a new environmental consciousness that supports cultural and spiritual values which can be seen as key components in a new environmental ethic.²³⁶ Hence, by recognizing and proclaiming SNS, indigenous and tribal peoples are integrated into conservation and human rights-based approach programs; where an intrinsic connection and dependency between biodiversity and sociocultural systems are recognized, in order to contribute to the common goal of environmental sustainability and human wellbeing.²³⁷ Furthermore, proclamation of SNS promotes and strengthens the recovery, recognition, demarcation and registration of the lands that are essential for their cultural survival, and for maintaining the community's integrity.²³⁸

In the present case, protecting and preserving to Wixárika people's sacred sites and the pilgrimage to Wirikuta represents a step towards indigenous peoples' rights to preserve their cultural legacy, since said pilgrimage not only recreates their genesis as a people and represents one more reason for visiting sacred sites, but also guarantees the integration between nature and their history, as well as the transmission of it to future generations through a constant recreation by members of Wixárika people.

Nevertheless, recognition and proclamation of SNS is not enough if indigenous peoples' free access to and participation in the decision-making process related to the "institutional" recognition and establishment of such are not respected and granted. For instance, when SNS are comprised within official State protected areas and indigenous peoples lose rights over them; or if policies of creation and management practices are not aligned with their traditional knowledge, recognized authorities and institutions, or customary law.

In this regard, what Leena Heinämäki and Thora Martina Herrmann have recognized within the Arctic case can be analogously applied to the NPA of Wirikuta and its SNS; in the sense that increasing outside impacts, such as economic development projects that mainly involved mining industry activities and that have been authorized since the 80s decade, difficult the protection of ancient sites²³⁹ – sometimes they even drastically threaten them – of the Wixárika people.

²³⁵ Taylor, Prue, 1998, pp. 309–397.

²³⁶ See supra Note 231, pp. 216.

²³⁷ Ibid., pp. 207–208.

²³⁸ IACHR, Second Report on the Situation of Human Rights in Peru. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 16

²³⁹ See supra Note 231, p. 209–211.

Therefore, as the Inter-American Court of Human Rights has remarkably and well interpreted, if the State fails to secure the right to territorial property of indigenous peoples, they are deprived “not only of material possession of their territory but also of the basic foundation for the development of their culture, spiritual life, wholeness and economic survival. Hence, by protecting said right, preservation of the fundamental basis for the development of the culture, spiritual life, integrity and economic survival of indigenous peoples can be achieved.”²⁴⁰

In conclusion, by indicating some of the international community compromises and efforts taken by the government of Mexico for granting and promoting the protection of indigenous people's rights; I intend to remark said political and legal development as achievements. On the other hand, I also point out that said achievements are not enough, since there is still a long way for an effective and integral protection of the Wixárika people's rights, according to international standard human rights based approach and the Wixárika's cosmogony.

4.3.10. International Human Rights Law.

In this section, I explore the roll-out of two bodies of international law designed to promote and protect human rights at the international level in America. These are the Inter-American Commission on Human Rights (the Inter-American Commission) and the Inter-American Court of Human Rights (the Court).

I refer to these bodies on human rights because through their recommendations and judgments they promote and protect indigenous people's rights under the rules and principles of international human rights. I also briefly refer to their history and objectives. Lastly, I describe few cases which are noteworthy because they represent milestones for cultural integrity of indigenous peoples and their communities, and the environmental protection of their traditional lands, which are interconnected and interdependent. In other words, through these cases we can illustrate the development of international law which favors indigenous peoples' status and it is starting to establish a legal, social and ethical precedent that is guiding tribal and indigenous peoples' ability to properly enjoy other human rights, e.g. the Right to Life, to Health, Economic and Social Rights, to Cultural Identity and Religious Freedom, Labor Rights and to Self-determination. Hence, improving

²⁴⁰ Ibid. p. 224

indigenous peoples' options and broadening their possible legal motions to be lodged in the case of possible human rights violations, by using them as a "transformative socio-political strategy, altering the vocabularies, expertise and sensibilities of those working on climate change and development."²⁴¹

Human Rights gained more global recognition and become a priority among the international community after the atrocities committed during the Second World War; within this period it is important to point out two more milestones which are the creation of the United Nations in 1945 and its following Universal Declaration of Human Rights drafted in 1948. Last document follows the common standard of universally promoting and protecting fundamental human rights.

One more milestone for the two monitoring bodies of human rights studied within the present chapter is the Inter-American Specialized Conference on Human Rights, which was held in San José, Costa Rica in November, 1969. It was during this conference where the delegates of the member States of the Organization of the American States (OAS) adopted the American Convention on Human Rights (the Convention) which entered into force on July 18, 1978, after a member State deposited the eleventh ratified document. The Convention created two authorities with competence to observe human rights violations: the Inter-American Commission and the Court.

4.3.11. Inter-American Commission on Human Rights.

The Inter-American Commission on Human Rights was created by the OAS in 1959. The Inter-American Commission is a principal and autonomous organ of the OAS, whose mission is to promote and protect human rights in the American hemisphere. It is composed of seven independent members who serve in a personal capacity. As for the Court, its beginnings can be traced back to 1948 when the Charter of the OAS was adopted and it was declared through this document that one of the principles upon which the Organization is founded is the "fundamental rights of the individual."

The Inter-American Commission was created with the aim to achieve the objectives of the Charter, this is "the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the

²⁴¹ Cameron, Edward. (2011) Development, climate change and human rights: From the Margins to the Mainstream? Social Development Working Paper 123, World Bank, Washington DC, 8., p. 15

essential rights of man.”²⁴² Its main pillars are: the individual petition system, monitoring of the human rights situation in the Member States and the attention devoted to priority thematic areas.

The Inter-American Commission works as one of the main promoters and protectors of human rights; it plays the role of organ of the Inter-American system and pursues to ease the interaction among different actors and users of said system, guaranteeing procedural equality between the parties, e.g. respondent States, alleged victims and their representatives. The coordination carried out with the Court is indispensable in order to achieve an autonomous, constructive, participatory, transparent, impartial and mandatory system, since the participation of the Inter-American Commission takes place both before the proceedings are brought into the Court and during some stages already to be decided at the Court level. For instance, after the application has been submitted to the Inter-American Commission, it shall issue a report to the Court where it clearly states its reasoning and elements that have led it to present the case before the Court. Another example of said coordination and cooperation takes place during the stage in which oral arguments are presented, since the Inter-American Commission shall also set out its final observations before the Court issues its judgment.

4.3.12. Inter-American Court of Human Rights.

The American Declaration of the Rights and Duties of Man was adopted in 1948 by the member States of the OAS. Nevertheless, the Court was established and organized until the Convention entered into force. During the Ninth Regular Session of the OAS General Assembly, the Statute of the Court was approved and in August 1980, the Court approved its Rules of Procedure which included the procedure provisions. On November 2009, at its 137th regular period of session, the new Rules of Procedure entered into force, which apply to all the cases currently brought before the Court.

To this date, twenty five American nations have ratified or adhered to the Convention, including; Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua,

²⁴² Organization of American States, Inter -American Commission on Human Rights. Charter of the Organization Of American States. available at: <https://www.cidh.oas.org/Basicos/English/Basic22.Charter%20OAS.htm> [accessed October 2013].

Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago denounced the American Convention on Human Rights by means of a communication addressed to the General Secretary of the OAS on May 26, 1998.

4.3.13. Jurisprudence of the Inter-American Court of Human Rights and the legal case in Wirikuta.

The aim of the present chapter is to point out some jurisprudence found in the “property rights” decisions of the Court and relate it to the alleged indigenous peoples’ rights treated within the present thesis that mainly deal with land rights – restitution of lands - and access to the natural resources located within their traditional lands, right to share in the profits from natural resources extraction, self-determination, development, cultural identity and to enjoy one’s own culture –traditional knowledge (TK), pilgrimages, and rituals.

The cases analyzed in this chapter find their relation with the mining case in Wirikuta since as the victims alleged within their applications, the respondent States have failed to respect and protect indigenous peoples’ rights, mainly those related to the use and enjoyment of its property and indigenous peoples’ right to culture in relation to the environment. In these cases - as in the mining case in Wirikuta- the legal claims were triggered because the State treated indigenous traditional lands as its own and granted natural resources rights to third parties (ore deposits located within the NPA of Wirikuta); and interfered with indigenous traditional lands of cultural and environmental relevance, both as a sacred site of Wixárika people and a because of their contribution to biodiversity (to date the Ministry of Economy has granted 68 mining concessions located inside, or at the boundaries of the polygon of the NPA of Wirikuta and its different zoning areas).

In this regard, it is important to point out that there is a clear shift over the approach, analysis and application that the Court has given to the Convention after the United Nations Declaration on the Rights of Indigenous Peoples was adopted in 2007, mainly regarding the interpretation of the right to property and indigenous peoples’ self-determination, in relation to the adoption and respect to their right to FPIC. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Moiwana Community v. Suriname* cases are great examples of the latter, since the Court acknowledged that the States did not adopt effective measures to ensure the property rights of the Communities to their traditional lands and natural resources located within them.

The first case is particularly related to the extractive industry. Among other things, the victims alleged that the State granted a logging concession on community lands without their consent; hence not respecting and ensuring their property rights. There is a remarkable consideration within Court's decision in its number 149, where it recognizes that among indigenous peoples exist a stronger and deeper connection towards and with their traditional lands that goes further than a real title to property, and which it is not centered on an individual property of the land but rather on the group and its community.²⁴³ This approach confirms close ties of indigenous peoples with their ancestral territories as fundamental basis of their cultures, spiritual lives, integrity, and economic survival. "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."²⁴⁴

It is in the *Mayagna (Sumo) Awas Tingni Community* case where a step towards indigenous peoples' right to FPIC can be observed since the Court is clear by stating that no further logging concession will be granted within their territory until the three safeguards of effective participation, benefit-sharing, and prior environmental and social impact assessments are complied with.²⁴⁵

The *Moiwana Community v. Suriname* case is of great importance as well since it also recognizes and strengthens the intrinsic link between traditional lands and resources due to victim's traditional livelihood and customs. This was reinforced by the expert witness Thomas Polimé whose reasons that N'djuka, like other indigenous and tribal peoples, have a profound and all-encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement has severed these fundamental ties. Hence, their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of

²⁴³ Inter -American Court of Human Rights: Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua; Judgment of August 31, 2001; (Preliminary Objections, Merits, Reparations and Costs), available at: <http://www.cidh.oas.org/countryrep/Indigenous-Lands09/Ancestral-Lands.ENG.pdf> [accessed March 2014], paragraph 149.

²⁴⁴ Ibid., paragraph 1.

²⁴⁵ Ibid.

their identity and sense of well-being, for instance they were unable to practice and enjoy their cultural and religious traditions.²⁴⁶

With these statements, indigenous peoples' rights related to their communal right to property were strengthened by remarking and recognizing that article 21 of the Convention protects the close and intrinsic link that indigenous peoples have to their traditional lands, the natural resources that are part of their culture and are located within their lands, and to other intangible elements of the land including their spiritual relationship with those traditional lands. This approach represents a step towards preservation of indigenous peoples' cultural integrity, and their own continuity and existence as a people by understanding their intrinsic connection (spiritual) and dependence (natural) over their traditional lands.

The victims from the *Saramaka People v. Suriname case* mainly alleged that the State did not adopt any effective measures to recognize, protect and respect its communal property and its right to the lands that they have traditionally occupied and used. The above is due to the construction of a hydroelectric power station during the 1970s decade, which is alleged to have flooded ancestral territories of the People of Saramaka. Following the details above and with the aim to protect and respect the identity of the right bearers (indigenous communities as property owners), the Court demonstrated being prepared to recognize the normative significance of an indigenous legal system, and that system's conceptualization of property by addressing and concluding that the State has a duty to recognize the juridical personality of indigenous peoples as owners by the claimant community as a reflection of its autonomy, drawing on relevant social and historical facts and according to their traditional customs and norms.²⁴⁷

On the other hand, the Court observes that property interests of indigenous communities may be vulnerable for the absence of juridical recognition of the community and the failure to recognize communal property interests; therefore, the State must ensure that it has in place effective and adequate legal remedies to protect them against the violation of their

²⁴⁶ Inter -American Court of Human Rights: Case of the Moiwana Community v. Suriname; Judgment of June 15, 2005; (Preliminary Objections, Merits, Reparations and Costs), paragraph 132. available at: <http://www.cidh.oas.org/countryrep/Indigenous-Lands09/Ancestral-Lands.ENG.pdf> [accessed March 2014].

²⁴⁷ Inter -American Court of Human Rights: Saramaka People v. Suriname; Judgment of November 28, 2007; (Preliminary Objections, Merits, Reparations and Costs), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf [accessed March 2014].

property rights.²⁴⁸ As it was mentioned before, the outcome decision in this case needs a special emphasis since pursuing the adoption of the concept of FPIC and with the aim to protect and respect indigenous peoples' right to self-determination, the Court referred to article 32 of the United Nations Declaration on the Rights of Indigenous Peoples in order to reassure and strengthen its decision. This is that the State shall delimit, demarcate and grant a collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people. Furthermore, the Court also stated that said requirement – FPIC – shall be observed by the State prior to the approval of a project affecting their lands, territories, and other resources.²⁴⁹

The present case is of such relevance because one of the many allegations of the victims refers to one of the most controversial – actually, harmed and not respected – rights of indigenous peoples: this is the right to property and ownership of their traditional lands. Most of the problems related to this right are due to historical facts (pre-colonization or preoccupation), and conceptualization and materialization of “property”. In other words, the modern and legal way to stand against the right of anyone else to claim the property is through a real title to property of the land and its consequent registration. Nevertheless, the foundation of territorial property – including indigenous peoples - lies in the historical use and occupation which gave rise to customary land tenure systems; hence, according to this custom, indigenous and tribal peoples' territorial rights did not need – in fact, they should not – a formal title to property granted by a “modern” State, since they “exist even without State actions which specify them”.

The aforementioned has been reinforced by the Court in the same judgment, in its chapter “C: the property rights of the members of the Saramaka people derived from their system of communal property (article 21 of the convention in conjunction with articles 1(1) and 2 thereof)”; by recognizing that there shall not be any legal distinction that privileges the property rights of third parties over the property rights of indigenous and tribal peoples on their traditional lands. This follows the analysis given by the State, due to the use of the term “factual rights” (or *de facto* rights) in the explanatory note to Article 4(1) of Decree L1, which serves to distinguish these “rights” from the legal (*de jure*) rights accorded to holders of individual real title or other registered property rights recognized and issued by

²⁴⁸See supra Note 247 at paragraph 173.

²⁴⁹ Ibid. at paragraph 131, 194, and unanimously decisions number 5 & 7.

the State. This limitation on the recognition of the legal rights of the members of the Saramaka people to fully enjoy the territory they have traditionally owned and occupied is incompatible with the State's obligations under Article 2 of the Convention to give legal effect to the rights recognized under Article 21 of such instrument.²⁵⁰

The *Saramaka People v. Suriname* case is notable because throughout the Court's considerations and decision there is a clear recognition that indigenous peoples' right to communal property is closely connected to their right to culture. Furthermore, it also acknowledges the importance of their right to enjoy their spiritual relationship to the territory that they have traditionally used and occupied, and the natural resources which are necessary for their social, cultural and economic survival. Hence the State shall recognize, protect and guarantee the Saramaka people the management, distribution and effective control over said lands, in accordance with their customary laws and traditional collective land tenure system.

Furthermore, the decision of the Court deserves special attention since it strengthens the actions taken by few countries regarding recognition of the indigenous communities' collective and inalienable right to ownership of their lands through land titling procedures, and encouraging its member States – aiming to set an example for the rest of the international community – to provide legal certainty to indigenous peoples by making these procedures fast and simple, and once that such titles have been awarded, to respect them, since when it comes into practice they are not respected.

To summarize, the central point draws indigenous peoples' rights a step forward since it considers all rights related to the property, use and occupation of their traditional lands, from the rules and principles of international human rights; therefore, they cannot be treated as a mere internal affair of States, and be referred just as internal agrarian controversies over land titles or use.

Lastly, the *Case of the Rio Negro Massacres V. Guatemala*. Through the Court's Sentence issued on September, 4th, 2012, said monitoring body of the Convention decided over alleged human rights violations that occurred since the beginning of the eighties regarding Right to Juridical Personality, Life, Humane Treatment, Freedom from Slavery, Personal Liberty, Fair Trial, Privacy, Freedom of Conscience and Religion, Freedom of Association,

²⁵⁰ See supra Note 247, pp. 29 -35

Rights of the Family, Rights of the Child, Property, Freedom of Movement and Residence, Equal Protection and Judicial Protection.²⁵¹

This case is of such importance because, besides the recognition given to the alleged violations after thirty years and bringing delayed justice to the Mayan community of Río Negro, it also recognized and strengthened the cultural rights of indigenous peoples, for instance by stressing the intrinsic link between traditional lands and resources from the traditional livelihood and customs, and Freedom of Conscience and Religion. With the aim to address its judgment with a clear emphasis on cultural integrity and identity, traditional livelihood and customs from the members of the community of Río Negro, in relation to their spiritual connection (worldview) and sacred sites, the Court used the illustration given by expert witness, Alfredo Itzep Manuel, in order to confirm that the construction of the Chixoy hydroelectric plant has affected the cultural balance and characteristics as indigenous people of “the Maya Achí people of Rio Negro”. In this regard he declares that with this construction, the Rio Negro community’s cultural rights as indigenous people were harmed in three ways. First, because the plant signified the closing or blocking off of the water, which means the closure of life itself; thus, depriving – by destroying - the right of those who survived the massacres, all contact and access to their sacred sites to celebrate their rituals, because many of these sites for the actual Maya Achí, including Los Encuentros, were flooded. Also, because those survivors cannot celebrate funeral rites in honor of those who, unfortunately and regrettably, did not survive because the State has not found or identified most of the remains of those supposedly executed during the massacres, and that 17 people remain forcibly disappeared. Lastly, and in relation to the first point, because they cannot perform their traditional rituals, due to the fact that the sacred sites they used to visit have been flooded because of the construction of the mentioned plant.²⁵²

The Court stressed previous reasoning by relating it with the first paragraph of article 12, Freedom of Conscience and Religion of the Convention, which states that “Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.” Hence

²⁵¹ Inter -American Court of Human Rights: Case of the Río Negro massacres v. Guatemala; Judgment of September 4, 2012; (Preliminary Objections, Merits, Reparations and Costs), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf [accessed March 2014].

²⁵² *Ibid.*, at paragraph 41, 87, 159 & 163.

through the construction of the Chixoy hydroelectric plant, not only their traditional lands, sacred sites and customs were affected, but also their worldview, religious beliefs and, consequently, their cultural identity or integrity, which is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society.

To conclude, the cases referred to in this chapter find their relation with the mining case in Wirikuta since by granting mining concessions that affect Wixarika people's traditional lands, the State – Mexico - has failed to respect and protect their rights, mainly those related to the use and enjoyment of their property and indigenous peoples' right to culture in relation to the environment. By doing so, Mexico is jeopardizing Wixárika's cultural integrity, the continuity of their traditional livelihood and the environmental protection of their traditional lands.

The previous mentioned analysis and sentences of the Court reinforce the claims of the Wixárika people since if the “La Luz Silver project” and “Universo Gold-Silver project” keep on developing their extractive activities within the NPA of Wirikuta, their very existence and preservation of their cultural heritage is in peril due to the fact that their territorial rights encompass a broader and different concept that relates to the collective right to survival as an indigenous people, with control over their habitat as a necessary condition for reproduction of their culture. By comparison, this can be reinforced if we analyze the statements of expert witnesses Thomas Polimé and Alfredo Itzep Manuel (mentioned above) and through what has been stated within chapter 2 of the present Master's thesis, since the close link of the Wixárika people to their traditional lands follows a holistic worldview that unites cultural (religious) and natural (wildlife species, landscape and mountains) elements of corn, deer and peyote - which are sacredly used during rituals, celebrations and pilgrimages to Wirikuta - with their sacred sites.

Lastly, Mexico shall consider reviewing the mining concessions that have been granted within the NPA of Wirikuta, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Wixárika people. Moreover, with the aim to avoid future human rights violations of Wixárika people and its members, if mining concessions are to be granted in relation to any kind of natural resources located within their traditional lands, Mexico shall respect and protect their right to self-determination and FPIC if Mexican cultural and biodiversity heritage protection wants to be secured and achieved.

5. Ecosystem services: paradigm shift from anthropocentrism to a holistic worldview.

The energy that powers our very cells, the nutrients that make up our bodies, the ecosystem services that clean our water and air, these are all provided by nature from which we evolved and of which we are a part. Yet this is the same nature that our numbers and technology are impacting to such a degree that extinction rates are 1000 times above normal, ecosystems are degrading and collapsing, and we have an ecological footprint of 1.5 Earths. Yet the truth is we only have *one* Earth.²⁵³

As the above quotation reflects, the Earth has a perfect balance to host life as we know it so far. It is the place where we belong and from which we all depend. Nevertheless, through the same statement, the author confirms the environmental crisis which we, human kind, have been facing for the last 40 years, due to an unsustainable use of natural resources.

In the present section, I intend to examine human dependence on nature. This is done with the aim to point out that since ancient times, the Wixárika people has understood and shown a holistic worldview, where they reflect that their natural, cultural and spiritual values and survival are interconnected and interdependent. In this sense, said analysis is done to highlight that if the mining industry continues their exploration and exploitation activities within the Natural Protected Area of Wirikuta, Wixárika people's holistic worldview will be unbalanced, and the cultural and environmental damage as a result will be immeasurable and irreparable due to the connection that they have with their traditional lands and sacred sites.

According to the Wixárika's worldview, if the existent link between their traditional lands, attached to cultural and natural elements of corn, deer and peyote - which are sacredly used during rituals, celebrations and pilgrimages to Wirikuta - with their sacred sites disappears, it will trigger the slow extinction of an indigenous people and loss of cultural heritage. As it has been stated throughout this Master's thesis, during the last thirty years said worldview has been threatened, since one of its sacred sites and route of pilgrimage has been altered and consequently, is under risk of vanishing.

²⁵³ Routledge. Environment & Sustainability (2012): Human Dependence on Nature by Haydn Washington. available at:
http://www.routledge.com/sustainability/articles/human_dependence_on_nature_by_haydn_washington/ [accessed August 2013]

It is important to understand that these damages will go further than merely cultural and environmental aspects. This is because the worldview and myth of creation of the Wixárika people would be affected – perhaps destroyed - and therefore the balance of the Universe would be altered, guiding us to a cosmic end.

Human rights approach to environmental protection has been resisted based on the accusation of anthropocentrism, which neglects the intrinsic value of nature.²⁵⁴ Environmental protection has been analyzed and based on human interests – economic, political and social - and simple survival needs. However, it should be based on respect of nature and its independent capacity of existence, as indigenous people have been traditionally recognized, “humans as a part of the nature”, from a holistic perspective where it is well known that humans totally rely on nature and the natural resources that it kindly provides for our survival. Without nature we are nothing, but with and within it, we are everything.²⁵⁵

The World Bank Operational Policy 4.10 on Indigenous Peoples (2005), the Inter-American Development Bank Operational Policy on Indigenous Peoples and Strategy for Indigenous Development (2006) and the Asian Development Bank Policy on Indigenous Peoples (1998), all contain provisions which acknowledge that indigenous peoples' identities and cultures are linked to their ancestral lands and territories and the natural resources they depend on. Most of the indigenous peoples have shown that this interconnection requires sustaining and respecting nature's laws and cycles, since they do not look at it simply as a goods and services provider, but as their own genesis and continuity.

Hence, I would like to address the particularities that exist within the present thesis about the effects of mining activities within the NPA of Wirikuta over the Wixarika people's worldview. For said purpose, it is important to define the scope of a better understanding about human dependence on nature, and how this can help us to stop and mitigate the current environmental damages and cultural threats that Mexico and the Wixárika people are facing.

As Haydn Washington points out, humans are **ecologically, bio-physically, psychologically, and spiritually dependent on the Earth**...Earth is not the human planet, it is the planet on which humans evolved. Humans do not run the life support systems of

²⁵⁴ P. Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* London and New York: Routledge, 1998

²⁵⁵ See supra Note 154, p. 55.

planet Earth, nature does. We ignore this truth at our peril, but sadly also at the peril of many of the lifeforms we share this world with. But our actions and addiction to economic growth and material acquisitions are blinding our society and moving us away from nature. Human civilization totally relies on biodiversity and its ecosystems' services, therefore its protection and restoration becomes a must and a priority all around the world since **more bio-diverse ecosystems means greater productivity**. Things such as greater drought tolerance, better water management, better nutrient cycling (such as more efficient use of nitrogen), greater community respiration, greater biotic resistance (to pests), and greater resilience.²⁵⁶

According to the United Nations Office for Disaster Risk Reduction, resilience means the ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions, this is the capacity to deal with such change and continuing to develop no matter what.²⁵⁷

In this regard, it is important to consider a few aspects of the definition mentioned above, particularly when it refers to our dependent relation with nature. Such recovering capacity is intrinsic to nature and has been there for all time and continues to be. It is also true that such a capacity is finite and exhaustive, and therefore cannot, and must not, be overused since it needs its own rebuilding and recovering time to find its balance and further dynamism.

Without such a brake, not only its balance and dynamic productivity could be affected, but its own existence as well. This is because it needs all its resources to be capable of organization and restoration both prior to and during times of need. Hence, if current overuse continues its pattern, we could lose two main elements of resilience: “preservation and restoration of its essential basic structures and functions” and “capacity to deal with and continue developing”.

Nature possesses some *great cycles* (water, nitrogen, sulphur, phosphorus and carbon) that besides allowing the existence of life on planet Earth, they also - if reasonably used -

²⁵⁶ See supra Note 154, p. 1 and 11

²⁵⁷ United Nations Office for Disaster Risk Reduction: Terminology on Disaster Risk Reduction. available at: <http://www.unisdr.org/we/inform/terminology> [accessed August 2013]

provide invaluable and countless resources and services to human beings; resources that are necessary for human development and the satisfaction of its needs.²⁵⁸

In spite of the mentioned gifts from nature, mankind still thinks and creates their own necessity for more of them. For instance, following an uncontrolled consumerism pattern, mainly due to industrialization, fertilization and pursuing faster, bigger, and “better” growing crops, mankind has increased the natural flux and production of nitrogen, sulphur, phosphorus and carbon; contributing to the impoverishment of both land and sea: The former by exhausting it and forcing the land to be fertile, and the latter by affecting and changing the cycle of water, and altering and polluting our ecosystems through acid rain, which causes acidification of rivers and lakes. “More is not always better”. The nutrients provided by Earth have been “naturally” quantifiable and balanced; thus, it will be extremely harmful to force their supplies in order to quicken agricultural production.²⁵⁹²⁶⁰

Regarding the natural balance over the carbon cycle, we face the same scenario since due to human-induced activities we have thrown out its balance, emitting 8.8 Gt a year from fossil fuel and land use change; therefore, doubling the amount that the oceans and vegetation can absorb, turning into a greenhouse gas that stays in the atmosphere, raising the global temperature, and contributing to climate change and its effects. A recent study states that worldwide deforestation is estimated to have been responsible for the equivalent of 10 to 35 per cent of global CO² emissions during the 1990s.²⁶¹ Consequently, we can consider the aforementioned elements/cycles’ alterations as major pollutants of the world’s ecosystems. Human behavior has reflected for the last four decades the erroneous idea that ecosystem services and natural resources will always be there to please our constantly growing

²⁵⁸ See supra Note 154, pp. 15-26

²⁵⁹ Millennium Ecosystem Assessment; Walter V. Reid, Harold A. Mooney, Angela Cropper, Doris Capistrano, Stephen R. Carpenter, Kanchan Chopra, Partha Dasgupta, Thomas Dietz, Anantha Kumar Duraiappah, Rashid Hassan, Roger Kasperson, Rik Leemans, Robert M. May, Tony (A.J.) McMichael, Prabhu Pingali, Cristián Samper, Robert Scholes, Robert T. Watson, A.H. Zakri, Zhao Shidong, Neville J. Ash, Elena Bennett, Pushpam Kumar, Marcus J. Lee, Ciara Raudsepp-Hearne, Henk Simons, Jillian Thonell, and Monika B. Zurek; MA Coordinating Lead Authors, Lead Authors, Contributing Authors, and Sub-global Assessment Coordinators (2005): *Ecosystems and Human Well-Being. Synthesis*. Island Press, Washington, DC. 2005, p. 34

²⁶⁰ See supra Note 154, pp. 2, 19-21, 23 and 25.

²⁶¹ UNEP, Nassar, A., Fontes, C., Lyrio, F., Gomes, J.P., Dean, J., de Andrade Filho, L., Barrett, M., Souza, M., Foley, C. (2010): *Everything is connected, Climate and Biodiversity in a fragile world*. January, 2010.

Available at: http://www.unep-wcmc.org/medialibrary/2010/11/08/6bafa1c0/Everything_is_connected.pdf [accessed October 2013], p.10

demand. Contrarily, they are finite and we have to live sustainably within that budget, within those limits. Through “**ecosystem services**”, nature provides for all human being’s needs, human economics and human survival. Ecosystem services studies, definition, and description have been evolving constantly, due to mankind's development, mainly technology and its benefits. From the U.S Report, “Man’s Impact on the Global Environment” (SCEP 1970) to scientists such as Holdren and Ehrlich in 1974, and Daily in 1997, it is stated that ecosystem services are the “conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life”. Some examples of ecosystem services are as follows: pest control, pollination, fisheries, climate regulation, soil retention, flood control, soil formation, cycling of matter, and the composition of the atmosphere. Some others expanded them to soil fertility and the maintenance of the genetic library, forage, timber, biomass, fuels, fiber, medicines and industrial products. Lastly, the Millennium Ecosystem Assessment 2005 (MEA) declares that everyone in the world depends completely on Earth’s ecosystems and the services they provide such as food, water, disease management, climate regulation, spiritual fulfillment and aesthetic enjoyment.²⁶²

Following the MEA report, ecosystem services are listed into four categories with a total of 31 topics:

1. **Provisioning services-** products obtained from nature i.e. food, fiber, fuel, genetic resources, bio-chemicals and medicines, ornamental resources, fresh water supply.
2. **Regulating services-** obtained from regulation of ecosystems processes like air quality regulation, climate regulation, water regulation, erosion regulation, water purification and waste treatment, disease regulation, pest regulation, pollination, pollution, and natural hazard regulation.
3. **Cultural services-** non-material benefits through cultural and spiritual enrichment, they could give a sense of place such as cultural diversity, spiritual and religious values, knowledge ecosystems, education values, inspiration, aesthetic values, social relations, cultural heritage values, recreation and tourism.
4. **Supporting services-** Those that are necessary for production. Even though they have an indirect impact on people and they act more as processes than products, they can be a bit underestimated. However, they are quite important for the energy and

²⁶² See supra Note 259, p. 1

nutrient cycles indeed, life itself, due to fact that they represent the beginnings like soil formation, photosynthesis, primary production, nutrient cycling and water cycling.²⁶³

All numbers stated above are relevant. Nevertheless, worthy to point out and relevant to the present case is the recognition of “cultural ecosystem services” as a category, even though they are *non-l* do not provide physical benefits. For example, the diversity of ecosystems is one factor that influences the diversity of cultures, an important but non-material influence. In the case of the Wixárika people we can acknowledge the cultural (religious) and natural (wildlife species, landscape and mountains) relation between corn, deer and peyote, which are sacredly used during rituals, celebrations and pilgrimages. Even the temporal and material organization of life itself revolves around them.

Nevertheless, through a project run by the UNEP, 6 years later the MEA changed into “The economics of Ecosystems & Biodiversity (TEEB) where the list of ecosystem services was modified and reduced. Unfortunately, the cultural services category was substantially reduced through omitting many categories listed in the MEA. Those omitted include cultural diversity and heritage, “sense of place” and “knowledge systems”. Education values only get mentioned in terms of “information for cognitive development”. Similarly, spiritual and religious values become just spiritual “experiences”.²⁶⁴

Comparing to MEA 2005 list of ecosystems and TEEB, it can be advised that the former is more holistic and it is more understandable about the breakdown of ecosystem services, clearly showing a wider connection and understanding of human dependence on nature. In what follows, I compare some of the conclusions that both reports – the MEA and the TEEB – point out in relation to the efforts taken for protecting nature and its ecosystems.

The first stresses that any progress achieved in addressing goals of poverty and hunger eradication, improved health, and environmental sustainability are unlikely to be sustained if most of the ecosystems services on which humanity relies continue to be degraded. Such

²⁶³ Ecosystems and human well-being: current state and trends : findings of the Condition and Trends Working Group / edited by Rashid Hassan, Robert Scholes, Neville Ash. Available at: <http://www.unep.org/maweb/documents/document.766.aspx.pdf> [accessed March 2014]

²⁶⁴ The economics of Ecosystems & Biodiversity; Thomas Elmqvist, Edward Maltby, Tom Barker, Martin Mortimer, Charles Perrings, James Aronson, Rudolf De Groot, Alastair Fitter, Georgina Mace, Jon

Norberg, Isabel Sousa Pinto, Irene Ring (2010): Ecological and Economic Foundations, Chapter 2 Biodiversity, ecosystems and ecosystem services. Earthscan from Routledge. 2010. Available at: <http://www.teebweb.org/wp-content/uploads/2013/04/D0-Chapter-2-Biodiversity-ecosystems-andecosystem-services.pdf> [accessed August 2013] pp. 42 - 44

degradation is harming many of the world's poorest people, and it is sometimes the principal factor causing poverty.

Hence, we are facing a vicious cycle in which our overuse of natural resources and ecosystems results in an impoverishment of nature – regeneration, production and access to its services – and consequently it hinders basic quality standards of life. According to UNESCO, we are currently facing many inequities that lead us to extreme poverty, which affects 1.2 billion people all around the world. 3 billion people receive 1.2% of the world's global revenue, while one billion people living in rich countries receive 80%. Also, 8 million children die each year of poverty-related diseases, 150 million suffer from aggravated malnutrition, and 100 million are homeless.²⁶⁵

In this regard, it looks as if the environmental crisis is affecting those who already belong to the group of more vulnerable people on a major scale. For instance, indigenous peoples are often excluded and benefit less from socioeconomic development projects and the survival of indigenous cultures is endangered. As the world changes, these populations also tend to change their lifestyles, thus slowing their development and even destroying the environment necessary for their survival.²⁶⁶ 76.1% of the indigenous population lives in poverty. Most of them are located inside zones of difficult access which definitively impacts them in scholar exclusion, denying their right to education and triggering illiteracy which is four times higher among indigenous communities than the rest of the national averages.

On the other hand, TEEB points out a valuation of ecosystem services that recognizes the benefits of natural capital. Haydn Washington mentions that an important step towards the conservation and sustainable use of biodiversity and ecosystem services lies in accounting for the positive and negative “externalities” associated with human activities. In economics, an “externality” is a cost or benefit not transmitted through prices, and incurred by a party who did not agree to the action causing the cost or benefit. A benefit is called a positive externality, while a cost is referred to as a negative externality. The impacts on the environment caused by humanity are overwhelmingly “negative externalities”.²⁶⁷ TEEB

²⁶⁵ UNESCO: Eradicating Poverty The world has never been as rich as it is today, yet over one billion people suffer from extreme poverty. UNESCO is committed to raising awareness to the fact that freedom from poverty is a fundamental human right. Available at: http://www.unesco.org/bpi/pdf/memobpi07_poverty_en.pdf [accessed August 2013] 270 Ibid.

²⁶⁶ Ibid.

²⁶⁷ See supra Note 154, p. 35

argues that economic valuation of nature and public goods and services are both necessary and ethical, and that “shadow prices” can and should be calculated and presented.²⁶⁸ Such a statement could be easily argued, since it is true that both costs and benefits from nature do not figure within the market stocks – at least directly – and that there are no established “prices” for the largely public goods and services that flow from ecosystems and biodiversity. Nevertheless, it is also true that for saving, protecting, and valuing ecosystem services it has not been mandatory to establish a monetary valuation, because it could represent a contradiction and a danger within it. Ethically and from a holistic worldview, it is not the best option to do such a thing since “humanly” we would just be valuing nature as a possession, when the truth is that we do not possess nature, it does not belong to anybody indeed, but the other way: we belong to it. Furthermore, if such valuation is taken, it would be again from an anthropocentric point of view, giving nature no voice and giving preference to human satisfactions. Just as Daily points out, ecosystem services have infinite use value because human life could not be sustained without them.²⁶⁹ Humanity needs to acknowledge its connection to nature, later its respect and protection will arise easier. Nature exists and lives -and has done so- without humankind. But humans rely totally on nature and the natural resources that it kindly provides for our survival. Without nature we are nothing, but with and within it, we are everything. Nature has social, cultural, educational, and recreational values to humanity.²⁷⁰

If we are willing to find out and take in our connection and dependence with nature, we shall start changing our anthropocentric worldview of nature and realize that people rely on ecosystems, ecosystems do not rely on us. The only way one could misconstrue that ecosystems “rely on us” would be for us not to destroy them. We just need to take into account our place on Earth, where a simple switch of roles would change our selfish ways of thinking and acting. In other words, following Haydn Washington's reasoning, it easy to advise that if humanity disappeared tomorrow, ecosystems would get along without us.

²⁶⁸ TEEB (2010) *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB*. Available at: http://www.biodiversity.ru/programs/international/teeb/materials_teeb/TEEB_SynthReport_English.pdf

[accessed August 2013] PREFACE. Pavan Sukhdev and the TEEB team, pp. 3-4

²⁶⁹ Gretchen C. Daily (1997): *Nature's Services: Societal Dependence On Natural Ecosystems*. Island Press,

Washington, D.C., pp. 365-374

²⁷⁰ See supra Note 154, p. 55

However, on the other hand, if nature disappeared tomorrow, then humanity would quickly go to extinct. **Humanity and Nature are not “interdependent social-ecological systems”. Humanity relies on Nature to survive, while Nature does not rely on us.**²⁷¹

The above stated might sound drastic; however, such a misunderstanding has been prevalent due to misdirections given by scientific reports, issued by scientific and academic recognized institutions. This can be affirmed if we follow a statement made by the TEBB and the UNEP whose key message was **“All ecosystems are shaped by people, directly or indirectly and all people, rich or poor, rural or urban, depend on the capacity of ecosystems to generate essential ecosystem services. In this sense people and ecosystems are interdependent social-ecological systems.”** So as we can see, nature is wrongly understood as a human possession, an object that is just there to serve and please us, when the reality is that we just try to “influence” it, we are adapted to it and shaped as nature is and as much as we want to shape it or to change its essence we just cannot do that, since mankind cannot go against nature’s laws and cycles without harming itself, and we are ruled by those same principles.

To strengthen such a declaration, we shall also analyze what is often used by policy-makers and information or reports that have a scientific base and international recognition. This is the UNEP year book, which on its executive summary it is stated that: **“In the face of further land use, change and land use intensification to meet global demands for food, water and energy, sustaining or even enhancing soil carbon stocks becomes a priority. During the past 25 years, one-quarter of the global land area has suffered a decline in productivity and in the ability to provide ecosystem services due to soil carbon losses. Because soil carbon is central to agricultural productivity, climate stabilization and other vital ecosystem services, creating policy incentives around the sustainable management of soil carbon could deliver numerous short and long-term benefits. In some locations, mechanisms will be needed to protect soils that are important: soil carbon stores, such as peat-lands and tundra, as alternatives to other uses such as agricultural or forestry expansion.”**²⁷²

If we analyze what has been blackened above, such report follows the same pattern that has been used by mankind and explained within this chapter; a model in which even though

²⁷¹Ibid. p.79

²⁷² UNEP Year Book 2012: Emerging issues in our global environment Published: February 2012. Available at: http://www.unep.org/yearbook/2012/pdfs/UYB_2012_FULLREPORT.pdf [accessed August 2013]

when the protection of the environment is intended, it finds its mistaken roots in human needs satisfaction.

There is, thus, a need to change our culture, policy making processes and legal framework; to shape it and direct it into “Nature”. The recognition of the rights of other species and ecosystems to exist for themselves can be seen as an acceptance of humility.²⁷³ A clear example of said situation is taking place in Ecuador, where a new constitution would give Ecuador's tropical forests, islands, rivers and air, similar legal rights to those normally granted to humans. If they vote yes - and polls show that 56% are for and only 23% are against - then an already approved bill of rights for nature will be introduced, and new laws will change the legal status of nature from being simply property to being a right-bearing entity.²⁷⁴

The proposed bill states: "Natural communities and ecosystems possess the unalienable right to exist, flourish, and evolve within Ecuador. Those rights shall be self-executing, and it shall be the duty and right of all Ecuadorian governments, communities, and individuals to enforce those rights."²⁷⁵ The mainstream for environmental protection follows the regulatory system which in some way according to the damage, loss or harm, its compensation is measured in terms that injury to a person, people or environment. Nevertheless, such an amendment attempt states that "Natural communities and ecosystems possess the unalienable right to exist, flourish and evolve... and it shall be the duty and right of all (governments, communities, and individuals) to enforce those rights.” Therefore, new laws would grant people the right to sue on behalf of an ecosystem, even if not personally injured; and furthermore, environmental protection would not rely anymore – at least mainly – on the polluter pays principle.

Ecologist Peter Vitousek and colleagues have noted that: “We are the first generation with tools to understand the changes in the Earth’s systems caused by human activity and the last with the opportunity to influence the course of many of the changes now rapidly under

²⁷³ Reed F. Noss (1991): pp. 120-123.

²⁷⁴ The Guardian (2008): A new law of nature. Ecuador next week votes on giving legal rights to rivers, forests and air. Is this the end of damaging development? The world is watching. Available at:

<http://www.theguardian.com/environment/2008/sep/24/ecuador.conservation> [accessed August 2013]

²⁷⁵ Ibid.

way.”²⁷⁶ Technology is there to help us, such capacity of understanding and creation exists for building, growing and creating; not for destruction. We do not dominate nature, we belong to it. Therefore, we shall drop our avarice and greed that has already guided us to an environmental crisis and, if it keeps on going, to an extinction.

One way to achieve what has been stated before, might be to follow what has been illustrated by Haydn Washington when it refers to solutions to keep our roots on Earth:

- a. To change worldview, ethics, values and ideologies;
- b. To change the growth economy and consumerism;
- c. To contain population;
- d. To reduce poverty;
- e. To improve education and communication;
- f. To become ecological sustainable;
- g. Use of technology on our behalf, energy efficiency and renewable energy;
- h. Politics. Political action and political lobbying. Activism.²⁷⁷

To conclude, I consider that connection with Nature and return to our roots shall begin by understanding and improving our consciousness and awareness towards nature, in order to comprehend that our origins rely on it and that by affecting and unbalancing it – through unsustainable use of its natural resources, natural services and extinctions - we are impacting our own way and putting our existence on the line, since we belong to Nature and we indeed depend on it. After recovering said connection, a change in civil society is needed, it is after people’s awareness about cultural and natural heritage that society can become a more responsible and ethical part within the Nature-mankind relationship.

Hence, once the claims from the Wixárika people for respecting and protecting their environmental and cultural rights become understood and implemented; then a change over policies, and a congruent legal framework in charge of establishing and guiding an economic development system towards an environmental, economic and social sustainability, will allow an awareness of the environmental and cultural services that the NPA of Wirikuta and its route of pilgrimage represent to Mexico and international’s community. Moreover, since said people and their sacred sites are part of the world’s natural and cultural heritage; represent an ecosystem and landscape which are physically

²⁷⁶ Vitousek, P., Mooney, H., Lubchenco, J. and Melillo, J, 1997, pp. 494-499.

²⁷⁷ See supra Note 154, pp. 111-139

and geographically referenced; and identified as the habitat of threatened species of wildlife, with an environmental, scientific, conservationist, historical, aesthetic, ethnological or anthropological value.

6. Conclusions and Recommendations.

The mining case in Wirikuta deserves special attention, both for the domestic and international law perspective since it can establish a juridical precedent and contribute with the present tendency regarding the relationship between cultural and natural protection, human rights and indigenous peoples' rights, and development and management policies. Throughout this Master's thesis I argue about the possibility to balance and reconcile cultural and natural heritage conservation and development, since particularly for almost five decades there has been a clear tension and contradiction between mankind's relationship to nature and present-day capitalist economies. In other words, because of the paradox and potential challenge that environmental, economic and social sustainability represents to current economic structures; hence creating a reasonable doubt about the scope and effectiveness of protecting and respecting Wixarika people's rights and claims before the mining industry that has been developing within an area that environmental and culturally represent their genesis and own continuity through the interaction among their history, nature and human creativity.

As it has been mentioned within this thesis, it has been for almost five decades that many milestones regarding matters for environmental and cultural protection, and efficient environmental management have influenced Mexican legal framework. For instance, we can mention the Conferences of Paris and London, and the United Nations Conference on the Human Environment. Some others include the UN Human Rights Committee, International Covenant on Civil and Political Rights, the ILO Convention No. 169 and the Rio Summit follow-up activities. Lastly, and more recently we can mention the United Nations Declaration on the Rights of Indigenous Peoples.

The above mentioned international efforts and achievements are elements for parallel development and a clear compromise of Mexico towards the improvement and adaptation to a universally recognized framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples, as well as regarding the protection of its cultural and biodiversity national heritage. Nevertheless, there are parallel actions that have been showing an opposite direction, since the Wixárika people has been facing several

environmental and cultural threats for over thirty years, due to the mining industry activities within their traditional lands.

In this regard, I argue that Mexico should really bind to its legal and political trajectory towards sustainable development, environmental management, cultural protection, and respect, support and promotion of indigenous peoples' rights. For instance special emphasis about their right to culture, property, land and development. On the other hand, it is imperative to include indigenous peoples' right to self-determination, self-government, and meaningful and strong participation within all stages of the decision-making process about development projects intended to be developed within their traditional lands. Lastly, Mexico shall follow and attain the current trend and development towards indigenous people's right to consultation and FPIC – before the scenario of large-scale or significant interference projects - regarding those projects to be developed either within their traditional lands or any kind of natural resources located within those.

The Constitution of Mexico and its legal framework on environmental and cultural protection matters support the stated above since they are addressed to achieve an environmental, economic and social sustainable national development, which shall be in accordance to Mexico's multicultural composition (multi-ethnic), which it is originally based on its indigenous peoples and respectful of their rights as peoples. Moreover, to date, Mexico is part of, supports and has ratified several international human rights legal instruments that reassure its commitment and compromise towards the protection of its cultural and natural heritage; to mention some of them: International Covenant on Civil and Political Rights, the ILO Convention No. 169, the Rio Summit follow-up activities (CBD and the Nagoya Protocol), the American Convention on Human Rights, the Inter-American Commission and the Inter-American Court of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples.

Nevertheless, something noteworthy to point out about the mining case in Wirikuta is that, to date, it is still pendant of judicial solution, at least at national scope. Hence, if such is the case that Wixárika people faces one more time the paradox between conservation policies and economic development; and Mexican authorities establish that the mining industry within the NPA of Wirikuta is environmental, cultural and legally possible, two scenarios shall be taken into account: 1. Prior to the continuation or authorization of any kind of activities related to the mining industry – and other large-scale or significant interference projects – it shall be mandatory to the concessionaries to offer and perform transparent,

impartial and exhaustive scientific and technical reports about all their activities within the area, with the aim to avoid future human rights violations of the Wixárika people and its members, and environmental adverse effects. It shall be also consider within this “prior” scenario, **the respect and protection of Wixarika people’s right to material benefits made from any exploration and exploitation activities; to be compensated by the government for any damages caused by such activities; self-determination, consultation and FPIC.** 2. If number 1 is not achieved and Wixárika people’s claims still subsist, the present mining case – or any other future large-scale or significant interference projects - **shall and can be lodged before the Inter-American Commission of Human Rights.**

To conclude, I suggest that in order to achieve an effective and full protection of the sacred lands and culture of Mexico’s indigenous peoples, Mexico shall acknowledge and adopt the principle of right to FPIC, prior to the granting of any kind of concessions or approval of a project affecting their lands, territories, and other resources. Particularly regarding the mining case in Wirikuta, I raise the following concrete propositions:

1. Wirikuta shall be inscribed as cultural and natural heritage of the world by the UNESCO, as part of the World Database on Sacred Natural Sites;
2. Wirikuta shall be proclaimed a Federally-designated NPA;
3. Sierra de Catorce shall be proclaimed as Cultural Landscape;
4. Pilgrimage route to Wirikuta shall be inscribed to UNESCO’s Convention for the Safeguarding of Intangible Cultural Heritage;
5. Mexico shall also consider reviewing the mining concessions that have been granted within the NPA of Wirikuta; in order to evaluate whether a modification of the rights of the concessionaires is necessary with the aim to preserve and guarantee the cultural integrity survival of the Wixárika people, While this is done, I consider that all kinds of mining activities within Wirikuta shall be stopped and prohibited, and no new mining concessions within said area shall be granted;
6. Mexico shall develop and implement federal and state programs with the aim to value and recover the Wixarika’s culture and traditional knowledge, promote their oral traditions and spread the meaning and significance of the Sacred Sites and Routes of Pilgrimage of the Wixárika people among young Wixárika people, Mexican and international community, with the intention of restoring, preserving

and spreading their cosmogony and holistic worldview. The above shall be done through their own narratives and different ways to represent their culture.

These recommendations could definitely permeate of coherence and logic to the domestic and international compromises that Mexico has taken in order to respect and protect its cultural and natural heritage; besides of improving the quality of life of the Wixárika people and inhabitants of the region, promoting their inclusion– including the integration of indigenous women- within the national and regional development.

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