

CONSULTA PREVIA IN PERU:

Moving Forward

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Moving Forward¹

Introduction

Peru has one of the largest indigenous populations in South America, and one of the most excluded in economic, political and cultural terms². For decades, indigenous leaders have struggled to obtain recognition of their collective rights, including implementation of the International Labor Organization's Indigenous and Tribal Peoples' Convention of 1989, better known as ILO Convention 169. Although the convention was incorporated into the Peruvian Constitution in 1994, its implementation began in earnest some two decades later, in 2011. It was then that the country's legislature passed Law N° 29785, or the *Ley del derecho a la consulta previa a los pueblos indígenas y originarios* (Law of the Right to Prior Consultation for Indigenous and Native Peoples) and the newly-elected President Ollanta Humala promulgated the measure, designed to incorporate ILO 169³ into national law and practice.

The purpose of this report is to examine the progress made and challenges remaining after four years of efforts to implement the right to prior consultation in Peru, from 2011 through the end of 2015⁴. Initially, sectors of Peru's conservative elite were resistant to implementing these rights, while some groups defending indigenous rights were equally skeptical about making real progress, given the historical limitations of the State in relation to indigenous citizens and the neoliberal direction the Peruvian economy has taken in recent years. Subsequently, and despite initial support from President Humala, there was pushback from within government

1 An earlier draft of this report was shared with experts at a Round Table sponsored by Americas Society and CIUP on November 5, 2015. Thirty two people from different government agencies, indigenous organizations, private industry, academia, the media, and activist NGOs, provided useful feedback to the authors. Although not all of their concerns could be addressed in this document, the most important suggestions were taken into account.

2 The last census, conducted in 2007, estimated the number of indigenous people at four million. This number was based on head of households' response to one question about mother tongue. In: <http://www.defensoria.gob.pe/blog/sabemos-cuanta-poblacion-indigena-hay-en-el-peru/>.

3 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

4 For a slightly updated version of the 2014 report by Sanborn and Paredes consult: <https://www.csrn.uq.edu.au/publications/getting-it-right-challenges-to-prior-consultation-in-peru>

as well.⁵ Faced with declining growth rates and increased impatience from investors, key members of the Humala Cabinet gave greater priority to pushing forward with new investment projects in mining, hydrocarbons, infrastructure and other key sectors, while stalling on consultation with indigenous communities potentially affected by such projects.

Although its initial supporters argued that implementation of the law would positively transform the relationship between the State, the private sector and indigenous peoples – and lead to greater inclusion of the latter⁶ – social conflicts involving rural and indigenous communities have continued to flare. Nearly 70 percent of such conflicts are considered “socio-environmental,” according to the *Defensoría del Pueblo* (Office of the Ombudsman).⁷ In particular,⁸ a number of important mining, hydrocarbon and infrastructure investments have been subjected to claims from local communities and elected authorities, who demand to be informed and consulted, and who are disillusioned with a government that appears to have left them behind.

Despite the challenges to implementing the right of indigenous peoples to be consulted by the Peruvian state about programs and policies that can significantly affect their lives and customs, our assessment of this effort to date is cautiously optimistic. Implementing ILO 169 in Peru has been a process of stop and go, advances and retreats. Yet in historical terms, there has been real progress – both in recognizing the existence of distinct indigenous peoples and their territorial roots and in creating institutions and practices within the State to engage with them and protect their rights. In a short period of time, the right to consultation has been positioned across a growing number of government agencies, and the majority of actors involved – government, business, and civil society – accept the legitimacy of this right, even while they resist or criticize its implementation. The sheer number of consultation processes undertaken in a few years is also impressive, although the quality of participation and holding power of the agreements reached are varied.

The report is divided into three sections. The first provides an over-

5 “The Minister of Environment only knows how to say NO to investment,” complained the head of the National Mining Society in February 2015. In: <http://www.defensoria.gob.pe/blog/sabemos-cuanta-poblacion-indigena-hay-en-el-peru/>

6 See for example: <http://www.andina.com.pe/agencia/noticia-onu-consulta-previa-y-mecanismos-dialogo-ayudaran-a-reducir-conflictos-sociales-438274.aspx>

7 As of September 2015, the Ombudsman was reporting 214 social conflicts, 66.8 percent of them “socio-environmental” and 63.6 percent of those (91 of 143 conflicts) associated with mining. Mining and hydrocarbons together account for 79.7% of such conflicts (*Defensoría del Pueblo*, 2015).

8 Our data on number of consultations is based on the official Website of the Ministry of Culture, available in: <http://consultaprevia.cultura.gob.pe/proceso/> and in the information provided by the promoting agencies in charge of conducting the processes on their official websites. For Mincul, “conclusion” involves the signing of the Consultation Act after the conclusion of the Dialogue stage. There are two other recent cases in the mining sector that have apparently also concluded, according to mainstream media reports.

view of the consultation processes that had taken place in Peru through December 2015. Between 2012 and 2015, according to the Ministry of Culture, there had been 23 consultation processes officially initiated by a public sector agency, and 20 completed as far as the law reaches. Of those 20, only four later led to implementation of the measures consulted and agreed upon⁹. In the mining sector, one of the most important in terms of potential impact on highlands indigenous communities, the first consultation processes did not begin until late 2015, which we discuss in the second section.

More broadly, the second section examines the role of different stakeholders in relation to this new right, while the third examines three cases (or types of cases) related to extractive industries, two of which were examined previously in Sanborn and Paredes (2014) and are updated here. The report ends with conclusions about the importance of, and challenges to, putting this new right into practice, along with tentative reflections on how the election of a new government in 2016 may affect this process.

9 We consider the implementation of the measure as the compliance with the agreements reached at the Consultation Act.

Summary of Cases of Prior Consultation

Although the Law of Prior Consultation was passed in 2011, it was not regulated (*reglamentada*) until April 2012, due in part to the need to consult with indigenous organizations over the measure itself. The first official consultation process undertaken under this law began in May 2013 (the Maijuna–Kichwa case, discussed below). From May 2013 through December 2015, there were 23 processes of prior consultation initiated in seven of Peru’s 25 regions. The law establishes that the government agency that plans to make the policy decision or issue the measure in question will be the one responsible for carrying out the consultation process.¹⁰ As listed in Appendix I, the 23 consultations that took place through the end of 2015 were promoted by seven national government agencies and two regional governments, those of Loreto and Cusco.¹¹

Twelve of these 23 processes involved the hydrocarbon sector, and, until beginning of 2015, were led by PERUPETRO S.A., the state-owned company responsible for promoting, negotiating and signing contracts for the exploration and exploitation of hydrocarbons projects. In May 2015, this responsibility was transferred to the Ministry of Energy and Mines¹². In these cases, the indigenous peoples involved were generally consulted about the granting of concessions for exploration and exploitation of oil and gas lots located on or near their ancestral territories and affecting their collective rights and welfare. Although some of these consultations were conducted before the government grants a concession to a private firm to work the lot, others involved the renewal of contracts with firms already present in the area before 2011, or lots that had been previously exploited by one or more firms and returned to state hands and that were being offered to new operators.

10 For example, in the case of the consultation process for a national health policy, the promoting agency is the Ministry of Health. See: <http://www.presidencia.gob.pe/ley-de-consulta-previa-promulgada-hoy-en-bagua>.

11 The seven agencies are: the Ministry of Health (MINSA), through the Center for Intercultural Health (CENSI), the Ministry of the Environment (MINAM), through the National Protected Areas by the State Service (SERNANP); the Ministry of Agriculture (MINAM), through the National Forestry and Wildlife Service (SERFOR); PERUPETRO S.A.; the Ministry of Energy and Mining (MINEM) through the General Office of Environmental Affairs; the General Directorate of Water Transport of the Ministry of Transport and Communications (MINTRA); and the Ministry of Education (MINEDU), through the General Directorate of Intercultural Bilingual Education.

12 On May 4, 2015, through Ministerial Resolution N° 209-2015-MEM/DM, responsibility for consultation processes in any mining, hydrocarbon or electricity-related measures was transferred to the General Office of Environmental Affairs (Dirección General de Asuntos Ambientales), within the Ministry of Mining and Energy (Minem). This includes consultation processes begun by PeruPetro (Ministerio de Energía y Minas, 2015).

Hence the role of private business interests, while not formally involved in the consultations, varies from case to case. This is discussed further below.

Of the total consultations through the end of 2015, four involved decisions or policies considered national in scope, and hence implied the participation of the country's national-level indigenous organizations. These involve the approval of a new *Política Sectorial de Salud Intercultural* (Sector Policy for Intercultural Health), the *Plan de Educación Bilingüe Intercultural* (Intercultural Bilingual Education Plan), the *Reglamento de La Ley N° 29735, Ley de Lenguas originarias* (Regulation of Law No. 29735, Originary Languages Act) and the regulation of a new *Ley Forestal y de Fauna Silvestre* (Forestry and Wildlife Law). The remaining cases involve actors at the regional level, though only two of these involved regional governments as the main promoter of the consultation.

In terms of outcomes, as of January 2016, as many as 20 of the 23 cases had concluded with some kind of agreement among all or some of the parties involved¹³, while as of publication only three led to actual implementation of the measure agreed upon. Because of delays, in June 2015 the Peruvian Ombudsman issued a public statement exhorting President Humala to address the pending agenda of indigenous consultation, and national indigenous leaders also called publicly for a better government response (*Defensoría del Pueblo*, 2015)¹⁴. This was a manifestation of tensions fostered inside the state apparatus regarding the use of this mechanism.

Under Peruvian law, a process of consultation is considered “concluded” once each of the seven stages of the process¹⁵ established by the law are fulfilled and an official Act of Agreement is published. However, this is not an indicator of the actual implementation of the agreements reached by the relevant government authorities. Depending on the matter under consultation, the process can continue in one of two ways. In the case of consultations on an administrative measure, the Act of Agreement must be analyzed by the promoting institution and other relevant government agencies involved, generating a new policy directive that should be implemented by the corresponding institutions. In consultations on a legislative measure, the Act is also reviewed and then submitted to Congress for debate and (ideally) approved. In both cases, however, the various government agencies involved have the authority to decide which points of the agreement they will adopt and if there are dis-

13 See footnote #8, above.

14 Also in: <http://larepublica.pe/impres/politica/4375-indigenas-piden-oficializar-cuatro-consultas-publicas-ya-concluidas> (Indigenous organizations)

15 The seven stages of a consultation process are: (1) Identification of the measure to be consulted; (2) Identification of the indigenous or native peoples to be consulted; (3) Publication of the legislative or administrative measure involved; (4) General information about the measure; (5) Internal evaluation by the indigenous organizations or institutions of the measure that would affect them directly; (6) Process of dialogue between representatives of the State and of the indigenous peoples; and (7) Decision.

agreements, how these will be resolved.

In this sense, of the concluded consultations, four involved measures that required revision by central government agencies for implementation. In the first case, the creation of the Maijuna–Kichwa Regional Conservation Area in Loreto (discussed below) was approved by the Ministry of the Environment in June 2015 after a two year struggle by the indigenous peoples involved.¹⁶ In the second, the government approved four regulations aimed at implementing the national Forestry and Wildlife Law in September 2015, after four years of negotiations¹⁷. The third case, the establishment of the Sierra del Divisor Reservation Area (in Loreto and Ucayali) as a national park, occurred in October 2015, after the clamor of indigenous, non-governmental and environmental organizations for over two years. The fourth case involved an Intercultural Health Policy, which was on hold for 19 months after the end of the consultation process, and was only approved by the Presidency of the Council of Ministers (PCM) at the beginning of April 2016. The approval took place after the Ombudsman and national indigenous organizations presented a *demanda de amparo* (request for defense) against the PCM and the Ministry of Health¹⁸.

The other 14 cases represented agreements in the hydrocarbon and mining sectors. One was for the exploitation of Lot 192 and ten to put lots up for concession, though the concession processes for these lots had not been completed¹⁹ at the time of publication; the final three were for the exploration of mining concessions. A process of consultation regarding a new *Hidrovia Amazónica* (Amazonian Waterway) project was concluded in September 2015, permitting bidding on the project to go forward, while another involving the Tres Cañones Regional Conservation Area still awaits approval by the national government.²⁰ This situation of long delays between the consultation processes and the actual implementation of the agreements reached therein can perpetuate tense relations between the indigenous people and other actors involved in these processes.

16 <http://elcomercio.pe/peru/loreto/area-conservacion-maijuna-kichwa-loreto-fue-oficializada-noticia-1819354>

17 See <http://www.actualidadambiental.pe/?p=32797> and <http://elcomercio.pe/peru/pais/promulgan-4-reglamentos-ley-forestal-y-fauna-silvestre-noticia-1844767>

18 See <http://www.aidesep.org.pe/se-aprueba-politica-de-salud-intercultural/> and <http://www.andina.com.pe/agencia/noticia-defensoria-del-pueblo-pide-aprobar-politica-salud-intercultural-603854.aspx>

19 This is related in part to lack of investor interest. See: <http://gestion.pe/economia/snmpe-peru-no-firma-ningun-contrato-exploracion-petrolera-desde-2012-2131652>

20 In: <http://www.andina.com.pe/agencia/noticia-concluye-consulta-previa-sobre-area-conservacion-tres-canones-594274.aspx>

Stakeholders, Power, and Perceptions

A. GOVERNMENT OFFICES AND FUNCTIONS

As mentioned, Peruvian law stipulates that consultation processes should be carried out by whichever government agency is responsible for making the decision that might affect indigenous communities.

The law also establishes that the *Viceministerio de Interculturalidad* (Vice Ministry of Intercultural Affairs), within the *Ministerio de Cultura* (Ministry of Culture or Mincul),²¹ must coordinate all public policies related to implementation of the right to consultation. The reason for this is ostensibly that Mincul has a nationwide presence with offices in each of Peru's regions. However, the specific responsibility for coordination of consultations with indigenous communities has been delegated to a small office within the ministry, under the authority of the *Dirección General de Derechos de los Pueblos Indígenas* (General Directorate of the Rights of Indigenous Peoples – one of two directorates within the Vice Ministry of Intercultural Affairs). That office, created in 2013, is the *Dirección de Consulta Previa* (Directorate of Prior Consultation–DCP), and as of mid-2015 had a staff of 17 people, including lawyers, social scientists, educators and administrative personnel (Acevedo, 2015).

The DCP is charged with promoting the implementation of the right to prior consultation for indigenous peoples. Its functions include coordinating with the promoting entities to undertake their consultation processes; organizing and maintaining the registry of the results of all consultation processes; informing and sensitizing indigenous peoples and other organizations regarding the scope of the right to prior consultation; providing training and technical assistance to the promoting entities and representative organizations of indigenous peoples; and emitting opinions, ex officio or at the request of any of the entities enabled to request consultations, about the qualification of a legislative or administrative measure for consultation, the scope of the consultation, and the determination of the peoples to be consulted²². Additionally, Mincul staff members are tasked to train and provide interpreters for native languages. In fulfilling these responsibilities, Vice Minister of Intercultural Affairs Patricia Balbuena reported in March 2015 that the ministry had invested around one million Peruvian soles (U.S. \$300,000) to provide training in prior consultation to 2500 indigenous leaders and 700 public officials (Derecho, Ambiente y Sociedad, 2015). The ministry has also published and continues to expand

21 In: <http://www.cultura.gob.pe/es/interculturalidad> (see map of agency structure and divisions)

22 In: <http://www.cultura.gob.pe/es/interculturalidad/consultaprevia>

the database of indigenous peoples officially recognized by the State, according to specific criteria that include both Amazonian and Andean groups. However, they have faced criticism over delays in the inclusion of certain peoples in that database.

As stated in Sanborn and Paredes (2015), Mincul faces several challenges. The entire ministry was only created in 2010, and before that there existed little historical continuity within the State with regard to indigenous affairs.²³ It remains one of the weakest ministries in the Cabinet, receiving less than one half of one percent of the national budget, and has had relatively high turnover in staffing. On numerous occasions, representatives from the DCP office have mentioned the institutional weakness and economic limitations the ministry faces²⁴ and the challenges involved in fulfilling these tasks²⁵. Being in a dependency of relatively low rank, the DCP staff also faces difficulties when negotiating with more powerful government agencies and officials, who are often anxious to hasten consultations along in order to meet other goals.

Aside from Mincul, the government agency that has had the most experience with consultation in Peru in the last two years is PERUPETRO S.A., which as of 2015 had conducted 12 processes and completed eleven. The first two consultations in this sector – for hydrocarbon lots 169 and 195 in the Ucayali region of the Peruvian Amazon – were criticized by some indigenous groups for being too rushed and for not informing the population adequately about what was being consulted or what the implications were for their collective rights, and hence left broad dissatisfaction. In March 2015, Vice Minister Balbuena recognized that this was still a learning process, but said that PERUPETRO was improving in its subsequent cases.²⁶ When this responsibility was transferred to Minem in May 2015, some concerns were raised among supporters of prior consultation due to the resistance of this institution to applying consultation in mining cases, but, as

23 Until the creation of the National Institute for the Development of Andean, Amazonian and Afro-Peruvian People (INDEPA) in 2005, there was no institutional agency in charge of Indigenous affairs. Zúñiga (2007: 39-40) states that this office included a board with Indigenous representatives. However, it remained weak as it moved to different locations within the State apparatus (Ruiz 2014: 7). It was eventually replaced by the Vice Ministry.

24 According to Acevedo (2015), the total cost of each consultation can run up to S/500,000 soles (US \$167,000), when it involves transportation of staff over long distances and by river to meet with remote native communities and the engagement of specialized translators and other professionals. Although the main costs of each process are to be assumed by the promoting agency, she says the DCP's own staff expenses average S/80,000 (US \$27,000) per consultation.

25 See for example: "Ministries without direction" (<http://gestion.pe/opinion/editorial-gestion-ministerios-sin-rumbo-2092808>), "Ministry of Culture: with no power or influence in intercultural policy" (<http://www.larevistaagraria.org/content/ministerio-de-cultura-sin-poder-ni-influencia-en-la-pol%C3%ADtica-intercultural>) and "Minister of Culture admits they do not even have the resources to guard the Nasca Lines" (http://elcomercio.pe/peru/pais/mas-mil-zonas-arqueologicas-riesgo-falta-seguridad-noticia-1783399?ref=portada_home).

26 In: http://bajolalupainforma.blogspot.com/2015_03_01_archive.html

noted below, this began to change at the end of 2015.

Before the new consultation law was passed in 2011, private investors in the Peruvian mining sector were awarded concessions by Minem and then largely left on their own to engage with communities of different linguistic and cultural traditions. These often included indigenous peoples engaged in small-scale or communal farming and herding, tourism, and other environmentally sensitive activities, and closely tied to their ancestral lands. In some cases, these communities had experienced mining activities in the past, and had enjoyed harmonious or mutually beneficial relations with mining companies. Others had endured histories of land loss, pollution, and social disruption as a result of older mining activities, leading them to distrust that newer companies will operate differently (Arellano 2011). Since 2008 mining companies have applied rules of “citizen participation” established in Peruvian law, in which they must inform communities – indigenous or not – in their areas of influence about their projects and Environmental Impact Assessments (EIAs) through assemblies and workshops with local authorities and residents (Sanborn & Paredes, 2015)²⁷. There have also been cases in which community leaders and/or local elected officials have convened “popular consultations”, in which members vote to accept or reject mining in general, or a specific project, proposed on their lands²⁸. However, such processes have not been accepted as legitimate by the State or private investors because decisions about subsoil resources constitutionally lie with the national government. In cases where there is disagreement about the desirability of a mine, or where people have historical grievances, the implementation of the new law of prior consultation—meaning just that, a consultation between the State and a community or people prior to awarding a concession or contract to third parties – was considered by some in the business community as a constructive means to secure acceptance to operate (Oxfam América, 2012).

In practice, however, there have been too few consultations in mining areas to assess their impact on subsequent operations. In fact, until 2015 the staff of the Ministry of Energy and Mines and key leaders within the *Sociedad Nacional de Minería, Petróleo y Energía* (National Mining Society—SNMPE), the peak association for industry had resisted applying the law of prior consultation to mining-related projects, for various reasons. First of all, because the majority of mining concessions were granted before the 2011 law was passed, they argued

27 Regulation of Citizen Participation in the realization of Hydrocarbon Activities (DS-EM 012-2008), Regulation of Citizen Participation in the Mining Sector (DS-EM 028-2008) and Rules for the regulation of Citizen Participation in the Mining Sector, approved by Ministerial Resolution No. 304-3008-MEM/DM and valid since June 2008.

28 One emblematic case is Tambogrande in Piura. See: Bebbington, Anthony (2013) *Industrias extractivas: conflicto social y dinámicas institucionales en al Región Andina*. See also Rodríguez-Franco 2014. <http://www.americasquarterly.org/content/rise-popular-consultations>

that any retroactive application of the law was illegal—in other words, that it should not apply to projects already underway. Second, even for new projects, the granting of a concession per se was not considered a decision requiring consultation, since it does not bring with it authorization to explore or otherwise carry out physical activity in a given territory, which are steps that could in fact require consultation²⁹. Third, in a number of cases it was argued that the community potentially affected by the project was not indigenous—either because it did not meet ILO criteria or it was not included in the database published by the Ministry of Culture. Although legally it is not necessary for a community to be in the published database in order to petition for prior consultation, in practice government agencies have been reluctant to carry out these processes with communities that are not listed (Defensoría del Pueblo, 2014).

Delays by Mincul in producing the official database exacerbated this problem for the mining industry and its neighbors. Numerous mining projects are in the Andean highlands, in areas inhabited by Quechua or Aymara-speaking peoples who were included with a general reference in the database first published by Mincul in 2013. However, Mincul did not publish specific lists of Quechua and Aymara communities with their geographical locations until July 17, 2015, and this was considered necessary for a government agency or potential investor to determine if the people in their area of influence were in fact bearers of the right to prior consultation. A few days later, on July 22, 2015, an investigative website published a report claiming that a more detailed database was actually ready to use in 2012 and that 60% of the indigenous peoples included in that version were located in the Andean region, the implication being that Mincul had held off publication in complicity with efforts to accelerate new investments³⁰. They also charged that the Ministry of Energy and Mines irregularly approved at least 15 mining projects in these indigenous territories without prior consultation. Mincul staff denied any complicity, arguing that the database was not constitutive of rights per se, and also that the protection of collective rights of indigenous or native peoples should be recognized regardless of their inclusion in this instrument³¹.

The role of Minem in regard to prior consultation was also questioned by the Ombudsman. According to the latter, in at least five of these cases the Minem has accepted as valid a waiver of the right to prior consultation on the part of communities. This has involved written acts in which community members have indicated that the activities of the mining companies in their areas “do not affect their legal status,

29 Ivan Lanegra, an expert on ILO 169 and former Vice Minister of Intercultural Affairs, also argues that the Prior Consultation Law is not retroactive. In: <http://servindi.org/actualidad/63018>

30 <http://ojo-publico.com/77/los-secreto-detras-de-la-lista-de-comunidades-indigenas-del-peru>

31 <http://ojo-publico.com/97/viceministra-de-interculturalidad-niega-que-el-gobierno-haya-querido-ocultar-base-de-datos-dea>

quality of life and development, collective rights and cultural identity.” (Defensoría del Pueblo 2015).³² Another practice criticized by the Ombudsman is the affirmation of an alleged absence of indigenous peoples in a given area set to be opened for mining activity, even when they may seem clearly present, based on such criteria as native language, customs and community landholding. In at least nine such cases³³, Minem has apparently authorized the commencement of mineral exploration, indicating that the absence of indigenous peoples was confirmed by the Mincul (Defensoría del Pueblo, 2014). However, upon investigation, the Ombudsman stated in the same document that they found no evidence of documentation to this effect by Mincul. There are also cases in which Mincul has identified indigenous peoples, but private consultants were hired to issue an alternative technical opinion, arguing that indigenous people were not in fact present and that there was no basis for granting a collective right to consultation³⁴. This has occurred in areas of Ancash and Apurímac, for example, in which native Quechua-speaking peoples are clearly present.

Given the resistance to prior consultation in the mining sector, it came as a surprise, in late 2015, when Minem announced three consultation processes associated with authorization of rights to mineral exploration.³⁵ The first one involved the Parobamba community in the Cuzco region and took place between September and November 2015 (Minem 2015). The second involved the Santa Rosa de Quikakayan community in Ancash and occurred between October and November (ibid). The third case involved consultation with the Cotarusi community of the Apurímac region, about exploration for the Mischa project, owned by Barrick Misquichilca, between November 2015 and January 2016³⁶. All three cases involve native Quechua speaking populations. In late 2015, the Minister of Energy and Mines also announced that from a list of mining-related cases presented by the Ombudsman in which consultation was initially avoided, eight would be considered for a

32 This is allegedly the case for Canchahuani in Cusco, Corani - Aconsaya in Puno, and Huailcacay Large Aquilita in Ancash, and the native community “Los Naranjos” (Yagku Entsa project) in Cajamarca (Defensoría del Pueblo, 2014)

33 This practice was used with the communities of Pichccachuri (Mila mining project), San José de Cachipascana de Jesús María (Picha), Cullco de Belén (Princesa 2), Nueva Unión Ccarapata (Ccorisayhua), Chilloroya (Constancia), Silco (Antabamba), Pachaconas (Tumipampa) and Quilcayhuarin and Yacus (Kokan). (Defensoría del Pueblo, 2014)

34 Martha Vásquez, a lawyer with the General Direction of Mining within MINEM, recognized that under two prior ministers they had hired external consultants for this purpose. However, under Mining Minister Rosia Maria Ortiz (2015) the Minem promised to halt this practice. In: <http://ojo-publico.com/75/ministra-ortiz-no-hubo-voluntad-politica-de-hacer-consulta-previa>

35 <http://www.cultura.gob.pe/es/comunicacion/noticia/se-inician-dos-procesos-de-consulta-previa-en-cusco> http://www.minem.gob.pe/_detallenoticia.php?idSector=3&idTitular=7045

36 On January 12, the consultation process was concluded with an agreement for exploration. In: <http://elcomercio.pe/economia/negocios/comuneros-cotarusi-aprueban-exploracion-minera-barrick-noticia-1870506>

“late-consultation” to take place³⁷. This is a new mechanism created by Minem in an attempt to reduce the impact of the earlier lack of recognition of indigenous rights, though in late 2015 its implementation in the current legal framework was still pending.

In summary, although Minem now has responsibility for any consultations undertaken regarding hydrocarbon or mining activities, in the latter the collective right only began to be implemented in late 2015. Meanwhile, since 2012, Minem has granted at least 159 permits for new mining exploration and at least 69 for mining exploitation.³⁸ Not one of these decisions involved a process of prior consultation initiated by the Ministry, even though the Ombudsman and Indigenous rights advocates claimed that at least 15 of these projects would clearly impact Indigenous territories or communities. The three processes mentioned above involved consulting about exploration rights for companies that already hold initial concessions and have a presence in the area. In each case the consultations ended quickly with a decision in favor of exploration (Minem, 2015a; Minem, 2015b).

It is too early to tell if these new cases in the mining sector represent a major shift in policy or whether many more will be advanced in this sector before a change of government takes place in mid-2016. However, it is encouraging that Minister Ortiz declared that her predecessors did not have the “political will” to promote this policy in the Peruvian Andes or collaborate effectively with the Ministry of Culture, recognizing that this was in fact the main obstacle (OjoPublico 2015).

B. THE JUDICIARY

Regarding the role of the Peruvian courts in the process of prior consultation, the main actor to consider is the Constitutional Tribunal, which is roughly equivalent to a Supreme Court. This body has acted affirmatively in defense of the ratification of ILO Convention 169 through a series of verdicts related to Indigenous rights. As discussed in Sanborn and Paredes (2015:7,8), in 2008 the court challenged Minem’s position that existing legislation on citizen participation (*participación ciudadana*) in the process of developing mining investment projects qualified as prior consultation. The court refuted the argument because the citizen participation rule does not involve Indigenous peoples explicitly, does not require a consultation to be done prior to the public sector agency making a decision (in this case, to award concessions or exploration rights), and does not involve any formal procedures to seek agreement, as ILO 169 mandates.

In 2013, in the face of continued efforts by Minem to bypass ILO

37 <http://www.miningpress.com.pe/nota/289464/ortiz-consulta-previa-para-todos-los-proyectos-mineros>

38 See: http://www.Minem.gob.pe/_detalle.php?idSector=1&idTitular=5945&idMenu=sub5942&idCateg=989

169 with pre-existing legislation, the Tribunal produced a sentence that declared the ministry's position unconstitutional, arguing that norms of a lower rank regarding participation in mining and oil projects do not constitute the right to prior consultation and demanding that Minem fully comply with this new right. The Court also instructed the Ministry of Culture (Mincul) that Indigenous peoples do not need to be formally registered or recognized by the State in order to qualify for consultation (Sanborn & Paredes, 2015). This sentence also raised the possibility that decisions made before the 2011 law could be subject to review or reversal: however, no such case has been admitted to date, and this has been explicitly denied in the case of Cañaris, discussed below.

The courts have also been involved in a recent, high profile case involving Proinversión, the government agency responsible for leading procurement and bidding processes for major infrastructure investments and the Ministry of Transportation and Communications (MTC). On January 29th 2015, they put out the tender for construction of a major waterway investment in the Amazon called the Hidrovía Amazónica, whose design implies the dredging of four rivers in order to facilitate water transit by larger vessels and open access to more parts of Peru's dense jungle.³⁹ Earlier, in March 2014, a legal protective action (acción de amparo) was filed by the Asociación de Conservación de San Pablo de Tipishca (ACODECOSPAT), in representation of the Kukama–Kukamilla Indigenous people, to demand prior consultation regarding approval of the Environmental Impact Evaluation (EIA) for the project. In October 2014, the Mixed Court of the Province of Nauta (Loreto Region) declared the action to be founded. The local court's decision meant that the central government agencies had to suspend the project—even though a winner of the bid had been selected (a Chinese construction firm)—until a process of consultation was carried out. This process, conducted by the General Directorate of Water Transportation of the MTC, began on April 20, 2015 and ended on September 28⁴⁰. It involved training translators and engaging some 27 indigenous organizations representing 14 different peoples and over 350 communities that would be affected by this major project, including the Awajún, Asháninka, Bora, Capanahua, Kukama-Kukamiria, Shawi, Shipibo-Konibo, Yine, Kichwa, Murui-Muinani, Yagua, Tikuna and Urarinas.⁴¹

Although we have found no other cases to date in which a community or people has petitioned the courts for the right to consultation,

39 See: <http://gestion.pe/economia/interesados-concesion-hidrovía-amazonica-se-podran-presentar-hasta-7-marzo-2089044>

40 On December 14, 2015, ProInversión published the rules for the bidding process of the Hidrovía Amazónica. In: <http://semanaeconomica.com/article/sectores-y-empre-sas/conectividad/175879-proinversion-relanzo-proyecto-hidrovía-amazonica/>

41 In: <http://www.andina.com.pe/agencia/noticia-se-aprueba-plan-consulta-para-proyecto-hidrovía-amazonica-554193.aspx>, <http://www.cultura.gob.pe/es/comunicacion/noticia/finaliza-etapa-de-publicidad-de-consulta-previa-del-proyecto-hidrovía-amazonica> and <http://www.aidesep.org.pe/capacitan-a-interpretes-en-consulta-previa-para-el-proyecto-hidrovía-amazonica/>

the Constitutional Tribunal remains an option for other cases involving violation of Indigenous rights. This includes a lawsuit brought in February 2015 by a Kukama community against the Peruvian state — including Minem, PERUPETRO and the Ministry of Environment — for sustained contamination by oil spills that were not adequately prevented or addressed⁴². Also, a *demanda de amparo* (appeal against the violation of civil rights) was used in June 2015 by indigenous peoples of the Atuncolla district, in Puno, to revoke the mining rights on their territories after not being consulted⁴³. This is an example of the use of national legislation to enforce indigenous rights.

C. BUSINESS INTERESTS

Before the actual enactment of Peru's prior consultation law, there was already criticism about its implications coming from some prominent Peruvian business associations, including the Sociedad Nacional de Industrias (National Industrialists' Society) and the Confederación Nacional de Instituciones Empresariales Privadas (National Confederation of Private Business Institutions—CONFIEP) as well as the above mentioned National Mining Society or SNMPE (Ruiz Molledo 2010).⁴⁴ Their concerns centered not only on the potential for delaying or halting new investments, but also on the potential impact of the measure on land use more generally if Peru's many "peasant communities" (*comunidades campesinas*) were included. Peru has over 6,000 peasant communities (largely in the Andes) and another 1,300 native communities (in the Amazon). Together they hold over 60 percent of the arable land in the country.⁴⁵

Since the law was passed, some business leaders have indeed complained that implementation of the consultation process has hampered investment in infrastructure and the expansion of commercial agriculture.⁴⁶ Others argue that in practice, local social and political leaders can use this newfound right to exercise *de facto* veto power over projects despite their being approved by the State. As a response, private sector interests have encouraged government policy

42 <http://news.mongabay.com/2015/0330-fraser-amazon-oil-spill-peru-mrn.html#ixzz3W7fcarRi>

43 <http://servindi.org/actualidad/133742>

44 For example, Roque Benavides of Buenaventura said "The law of consultation recently passed by Congress may mean a delay in investment projects in the mining sector, due to the increase in bureaucracy". In: http://www.rpp.com.pe/2011-09-13-senalan-que-ley-de-consulta-previa-retardara-inversion-minera-noticia_403450.html

45 In: <http://www.agronoticiasperu.com/393/perspectivas393-2.htm>

46 For example, spokesmen for the Society of Foreign Trade said: "It (the law) is just another bureaucratic hurdle that the State has established... and will hardly achieve the purpose for which the law was created," (<http://www.larepublica.pe/08-09-2013/comexperu-sobre-la-ley-de-consulta-previa-es-puro-palabreo>).

changes aimed at making it easier to gain access to communal lands for commercial usage.⁴⁷

As mentioned, it is in the extractive industries where the strongest resistance has been demonstrated, which not surprising given that this is the sector with the closest and most longstanding relationships with Indigenous communities. Since the 1990s, the large-scale extraction of minerals and hydrocarbons in Peru is in the hands of private or foreign investors — primarily multinational corporations and state-owned enterprises (SOE), but also medium-sized Peruvian firms and associates. And as the Ombudsman reports, natural resource extraction is also the main source of social conflict in the country, which in turn has a negative effect on the operations of these firms.⁴⁸ Of course, the mining sector faces social risks worldwide. According to the most recent study by the Fraser Institute, a conservative Canadian based think tank, Peru is still considered among the 35 most favorable countries in the world for mining investment, from a list of 109, and second only to Chile in Latin America (Instituto Fraser 2015). However, in their studies of investor perceptions in 2014 and 2015, Institute staff found that respondents expressed concern over the difficulties in establishing good community relations in remote areas of the country and over possible delays for exploration permits due to the implementation of prior consultation (Ibid: 2014, 2015)⁴⁹.

In contrast to the above, for the leaders of some companies — especially the transnational firms engaged in global fora on CSR, transparency, and other governance issues — the implementation of the right to prior consultation for Indigenous peoples was initially seen as a potential way to improve community relations. According to an Oxfam report presented in Peru in 2012, global companies operating in the country such as Anglo American, Barrick, BHP Billiton, Newmont, Rio Tinto and Xstrata, are among those that share this vision and have a stated commitment to the development of free, prior and informed

47 For example: <http://www.defensoria.gob.pe/modules/Downloads/prensa/notas/2015/NP-069-2015.pdf>

48 According to the Peruvian Institute of Economy, social conflicts have impeded the development of mining investments for a sum of US\$8 billion in recent years (IPE 2014). For the consulting firm Eurasia Group, although Peru's copper output is expected to almost double in 2016 due to several large-scale projects coming into production, the challenges to obtaining permits, meeting high environmental regulation standards, and avoiding social tensions are delaying the development of other new investments (Puig, 2015).

49 The Fraser Report of 2015 includes a quote of an executive of a company dedicated to mining exploration: "The new declaration of 2012 mandates that all exploration companies are obligated to give special treatment to indigenous people before field activities, resulting in a major lengthening of the time required for permitting" (Instituto Fraser 2015: 58).

consultation or even consent (Oxfam América, 2012).⁵⁰ Locally, the idea was that the State would make a stronger effort to consult with citizens and gain their confidence before private operators came into the picture. This has not been the case, however, and for some mining companies the implementation of prior consultation is now seen as yet another obstacle to getting projects up and operating.

At the same time, the mining industry relies on building viable community relationships and a “social license” to operate projects that take years or decades to develop. Therefore, for some company leaders the approach to prior consultation has been to avoid criticizing the law *per se*, instead focusing on how to speed up the process of identification of the measure to be consulted and assuring the final decisions remain in the hands of the State. Eva Arias, former president of the SNMPE and CEO of a medium-sized firm, has stated that she considers prior consultation to be a “good tool” as long as it is not binding on investment policies and is not the object of politicization by activists (Proactivo 2014). Carlos Gálvez, elected president of the SNMPE in 2014,⁵¹ had been a strong critic of the way prior consultation was being used when holding a top post at Buenaventura, a Peruvian multinational mining firm. When asked about it from his new industry-wide leadership position, however, he stated that prior consultation, as an administrative mechanism, could provide a company with enough information so as “not to waste time” and “spend money in vain” to get the social license.⁵² This reflects a more interest-oriented approach that aims to reduce the time between investment and profits. This is backed up by the Superintendencia de Banca y Seguros (Banking and Insurance Supervision Agency - SBS), which in 2015 established new regulations for managing social and environmental risk through what is called Resolution SBS No. 1928-2015⁵³. This affects companies that seek financing for activities that surpass the US \$10 million dollar mark and requires them to include information regarding consultation processes that have potential adverse impacts on indigenous people⁵⁴.

As mentioned above, there were at least three mining companies that were indirectly affected by consultation processes in late 2015. In addi-

50 “Señala el informe que actualmente el CLPI es considerado como un estándar de oro y está surgiendo como un principio de “prácticas óptimas” para el desarrollo sostenible, empleado para reducir el conflicto así como para realzar la legitimidad del proyecto, debido a que exige a las comunidades a estar adecuadamente informados de los proyectos extractivistas”. <http://archivo.larepublica.pe/01-05-2013/segun-oxfam-las-mineras-y-petroleras-aumentaron-compromisos>.

51 See: <http://elcomercio.pe/economia/peru/cajamarca-snmpe-ministerio-ambiente-solo-sabe-decir-no-inversiones-noticia-1789458>

52 See: <http://diariocorreio.pe/economia/gobierno-nacional-debe-gestionar-el-canon-565404/>

53 See: http://www.sbs.gob.pe/repositorioaps/0/0/jer/pub_otros/20150511_Res_1928_2015.pdf

54 In article N° 04 of the Resolution SBS No. 1928-2015. See also See: <http://www.justiciaviva.org.pe/blog/instituciones-financieras-internacionales-condicionan-prestamos-a-empresas-extractivas-a-la-obtencion-del-consentimiento-de-los-ppii/>

tion to Barrick, a major multinational with a long history in Peru, these involved Focus Ventures Ltd., a Canadian-listed company doing exploration, and its concessions include the Aurora project in the province of Calca in Cusco, in which the majority of interest (65%) is held by Daewoo International (Focus Ventures Ltd., 2015). The third is SMC Toropunto Ltd, a company created in Peru in 2012,⁵⁵ which expected to start exploration for a project called Toropunto in the province of Huaylas, Ancash. Although the national legislation does not allow a private investor to conduct the prior consultation process, the mining company can participate, at the request of the State or the indigenous communities consulted, to provide information or to clarify any aspect of the content of the administrative measure to be consulted (Lanegra, 2014). This appears to have been the case in these processes, which finished in record time and with decisions in favor of exploration.

As mentioned above, in the hydrocarbon sector, PERUPETRO is a state-owned intermediary engaged in refining and distribution, but not in direct exploration or extraction. PERUPETRO is, however, in charge of promoting and negotiating contracts for the exploration and exploitation of hydrocarbons by private investors and, until recently, was also responsible for conducting consultations with Indigenous peoples prior to the bidding process. According to PERUPETRO General Manager Isabel Tafur and President Luis Ortigas, interviewed in 2014, their involvement in consultations was aimed at making it possible for investors to start working when community approval has already been obtained (Carrillo 2014, Ortigas 2014.)⁵⁶ Meanwhile, a private industry association, the National Society of Hydrocarbons, broke off from the SNMPE in 2014, and its president through January 2016, former Ombudswoman Beatriz Merino, expressed support for consultations in this sector and has met with leaders from Amazonian organizations to encourage them (Sanborn y Paredes: 2014). As discussed below, however, this does not mean that consultations in this sector have been problem-free.

D. INDIGENOUS AND NATIVE ORGANIZATIONS

As discussed in Sanborn and Paredes (2015), Peru's Indigenous Movement has longstanding weaknesses and internal conflicts, which made it difficult to secure the right to prior consultation in the first place and which have made it difficult to implement since.

For purposes of consultation in the official legal framework, for example, Indigenous people in Peru must be represented by recognized organizations, and such organizations involved have to be identified

⁵⁵ <http://perudalia.com/empresa/20549210555-smc-toropunto-ltd-sucursal-del-per.html>

⁵⁶ See: <http://www.aidesep.org.pe/se-hara-consulta-previa-pese-a-oposicion-del-ministerio-de-energia-y-minas-mem/>

prior to the start of the consultation process. Yet the task of identification has been challenging. As of 2015, the database of the Vice Ministry of Intercultural Affairs recognized the existence of 55 distinct Indigenous and native peoples at the national level.⁵⁷ This database is updated with information generated by different public agencies as well as academic experts and organizations representing the Indigenous. However, the inclusion in this registry of the largest nationally-recognized groups -- Quechua and Aymara — does not guarantee that a specific, territorially based community identified with that group will be granted the right to prior consultation. The argument of the Mincul is that the information is listed for reference only and is being updated as more information is produced by other sources.

As mentioned above, Peru has over 6,000 “peasant communities,” which are largely based in the Andes and primarily Quechua-identified (Abanto, 2011). However, the term “Indian” has had a historically negative connotation, and from the 1960s onward, class-based identities became more popular than ethnic ones in the public sector and on the Peruvian Left. In the 1970s, the left-wing military regime that carried out major land reform changed the legal term for Indigenous communities to “peasant communities” in official registries (Sanborn and Paredes 2015). Hence although many of these communities have Indigenous languages as their mother tongue and retain indigenous customs and institutional forms, including community property, not all of them have been recognized as such for the purposes of applying the law of prior consultation.

Understandably, some Indigenous communities also see prior consultation as a way to put forth a series of demands that are longstanding but that exceed the administrative measure in question, with the hope of attracting attention to wider claims. This is the case, for example, of the Indigenous organizations in the basins of the Pastaza, Corrientes, Tigre y Marañón rivers in the case of hydrocarbon Lot 192, discussed below. While the government wants to focus the consultation on the direct issue of putting the lot back on the concession block, these organizations aimed to use the consultation as a tool to establish direct negotiation with the central government and to address the lack of compliance by the departing company with its commitments to environmental cleanup and compensation for the use of their lands.⁵⁸

In order to better defend Indigenous rights in this context, the Unity Pact (Pacto de Unidad) was formed in 2011 by five national Indigenous and peasant organizations. Its leaders have argued that the Peruvian prior consultation law is a weak mechanism that does not adequately guarantee Indigenous rights or fully meet Peru’s constitutional commitment, since there is no government agency in charge of monitoring

57 In: <http://bdpi.cultura.gob.pe/lista-de-pueblos-indigenas>

58 In: <http://observatoriopetrolero.org/organizaciones-y-comunidades-indigenas-de-loreto-exigen-inmediata-titulacion-de-territorios-ancestrales/>

compliance with the agreements⁵⁹. Among other criticisms, they object to the fact that the law only mandates consultation, but not consent to the measures consulted, and that it does not recognize the right to consultation as dating from 1995 when Peru ratified ILO 169.⁶⁰ Those who accept the law's existence have stressed the need to monitor and evaluate the fulfillment of the agreements that have been reached in completed consultation processes.

E. OTHER CIVIL SOCIETY ORGANIZATIONS

Peruvian Indigenous rights advocates have engaged international actors, including the ILO itself and the Inter-American Commission on Human Rights as well as professional NGOs, in monitoring and debate on the law's implementation (Servindi, 2010; Arroyo, 2009). In December 2011, a group of NGOs called the Working Group on Indigenous Peoples (“Grupo de Trabajo sobre Pueblos Indígenas”) presented a set of observations about the first effort to draft the regulation of the law to the Vice Ministry of Intercultural Affairs, arguing, for example, for the need to include cases in which consent and not just consultation must be secured, such as huge infrastructure projects or community resettlement—and recommending greater involvement of subnational authorities to decentralize the consultation process (Grupo de Trabajo 2012). This group has also played an important role in providing Indigenous organizations with technical support.

Although the relationship has not always been harmonious, for the most part the participation of NGOs with professional staff and other resources has been important for advocacy work on behalf of prior consultation, even if some of their recommendations were not always included in the final draft of the regulation. In the implementation stage, NGOs have continued to support those involved in consultation processes in regions with a weak state presence or where central authorities have not well understood the local cultural context (Huamaní, 2013). NGOs have also supported regional governments by providing assistance and human resources, as in the creation of regional areas of conservation in Loreto and Cusco (Galvez and Sosa, 2014). However, some analysts have observed that NGO staff—many of whom are lawyers -- often lack technical expertise in the specific issues at hand, including environmental impact assessments, containment of toxic chemicals, the dredging of rivers, and other challenges (Fraser, 2015).

Internationally-based NGOs and foreign donors have been important collaborators in efforts to strengthen the Vice Ministry of Intercul-

59 In regards to this claim, Mincul has indicated that the agreements reached in these consultation processes

60 See for example this “alternative report” on the implementation of the law, published by the Unity Pact in 2013, in which at least seven articles in the law are considered unconstitutional. https://ia601904.us.archive.org/10/items/InformeAlternativo2013_201310/Informe_Alternativo_2013.pdf

tural Affairs as an institution (GIZ, 2014; SPDA, 2015). This assistance is especially important considering the weak links that Indigenous organizations have with political parties and other national political institutions (Paredes 2013). Moreover, international actors have been an important reference in setting the standards for the recognition and the implementation protocols of indigenous rights. For example, the World Bank has emitted several policies and recommendations regarding the importance of consultation and even consent in cases of extractive investment (Garavito, Morris, Orduz Salinas, & Buriticá, 2010).



Selected Cases of Prior Consultation in Peru

A. THE MAIJUNA—KICHWA REGIONAL CONSERVATION AREA

The first consultation process to be concluded and to reach full agreement was the decision to create the Maijuna–Kichwa Regional Conservation Area (RCA). This process actually began in 2008 with efforts by the Maijuna, an ethnic group numbering less than 590, to develop an area to protect their ancestral homeland in the Amazonian region of Loreto and preserve its biological diversity for future generations⁶¹. The Regional Government of Loreto supported their claim, but the National Park Service insisted that they carry out a formal consultation process anyway. On October 22, 2013, the consultation process concluded its final stage, having included the larger Kichwa ethnic group living nearby, and all sides agreed on a viable plan for maintaining and governing use of this area. The initiative was led on the native side by the Federation of Natives Communities Maijuna (FECONA-MAI) and the Federation of Native Communities from the Mid-Napo, Curaray, and Arabela (FECONAMNCUA).

Although the conservation area became a shared aspiration of the Maijuna, their Kichwa neighbors, their elected regional political authorities, and a larger number of national and international allies, two more years would pass before it became a reality. During this time it was stalled in the Executive branch—in the Council of Ministers (Consejo de Ministros, or Cabinet)—which had to produce a “supreme decree” to officially create the Area and include it in the national budget. Leaders of both native groups travelled to Lima to try to unblock this project, asking to meet with the President of the Council of Ministers (PCM) and with President Humala himself, since he lauded this case in his 2013 State of the Nation address, but none of them would receive them.⁶² In March 2015, the Ombudsman issued a public statement calling on the PCM to approve this decision but initially got no response either (Defensoría del Pueblo, 2015). The Maijuna and Kichwa suspected that the long delay was due to the government’s stated interest in building a major highway that would run through the area, dividing the reserve and opening the way for potential land invasions, illegal logging and other extractive activities, and the possible overlapping of the area with hydrocarbon lot 164 (Sanborn & Paredes, 2015).

Finally, however, on June 17, 2015 the government granted national

61 In: <http://natureandculture.org/maijuna-kichwa-reserve-declared/>

62 In: <http://diario16.pe/noticia/58421-contrastes-indigenas-importancia-honrar-acordado-ivan-lanegra>), “Ombudsman calls for issuing rule creates conservation area Maijuna-Kichwa”. (In: <http://www.andina.com.pe/agencia/noticia-piden-emitir-norma-crea-area-conservacion-maijunakichwa-535990.aspx>)

recognition to the Maijuna-Kichwa Regional Conservation Area under the Supreme Decree 008-2015-MINAM⁶³. The protected area covers roughly 391,039 hectares (roughly 966,278 acres) of tropical rainforest, an area larger than California's Yosemite National Park (747,956 acres), in the districts of Putumayo, Napo, Mazán and Las Amazonas (province of Maynas), and Pebas (Mariscal Ramón Castilla), in the department of Loreto, on the border with Colombia. The state objectives of the Area include the conservation of existing ecosystems (especially watersheds, native forests, and fish species) and guarantee use of natural resources to the local population, as well as contributing to the conservation and cultural identity of the Maijuna and Kichwa people.

Although the main objectives are conservationist, the decree explicitly states that it does not limit the undertaking of public works, including highways (infraestructura vial) and other economic activities within the Area, including the exploitation of renewable or non-renewable natural resources (with the exception of timber forest), as long as these activities do not compromise the basic conservation objectives, give priority to the local population, and respect the law of prior consultation.⁶⁴

B. THE HYDROCARBON SECTOR

Some of the most challenging cases in Peru involve the development of oil and gas reserves in the Amazon, where the country's quest for energy security and private investors' thirst for lucrative exports must be weighed against the rights and needs of the diverse ethnic minorities who claim the Amazon as their home.

The highest profile case to date has been that of Lot 192, previously known as 1-AB, involving nearly 300,000 hectares in the Loreto region near the Peru–Ecuador border. This lot has been under exploitation for almost 40 years, first by the Occidental Petroleum Corporation and since 2000 by the Argentine firm Pluspetrol and its partners. It provides around 17 percent of total crude oil production in the country⁶⁵. It also overlaps the territory of the indigenous peoples in four important watersheds (Pastaza, Corrientes, Tigre and Marañón), who belong to four ethnic groups (Kichwas, Quechuas, Achuar and Urarina (OXFAM, 2015)). Some 25 communities are involved in the area of influence of this lot (Ministerio de Cultura, 2015a; Ministerio de Cultura, 2015b).

The concession to Pluspetrol ended on August 29, 2015, and under the Law of Prior Consultation the government had to hold a new

63 On the objectives of the ACR see: <http://www.actualidadambiental.pe/wp-content/uploads/2015/06/Decreto-Supremo-008-2015-MINAM.pdf>, also <http://elcomercio.pe/peru/loreto/area-conservacion-maijuna-kichwa-loreto-fue-oficializada-noticia-1819354> and <http://www.actualidadambiental.pe/?p=30760>

64 <http://www.actualidadambiental.pe/wp-content/uploads/2015/06/Decreto-Supremo-008-2015-MINAM.pdf>

65 In: <http://gestion.pe/impresia/produccion-lote-192-puede-duplicarse-inversion-adicional-us-550-mlls-2139959>

consultation process before re-licensing the lot to a new bidder. This process started on March 2015, and four federations have represented the indigenous peoples involved.⁶⁶ However, before agreeing to a consultation on the new concession, the organizations demanded attention to other critical issues, including their lack of land titles and long-promised solutions to the serious environmental damage caused by years of oil exploitation in the area.

In January 2015, hundreds of Indigenous community members took over the offices and oil wells on this lot, blocking boat traffic and demanding to be heard.⁶⁷ After nearly a month of protest, the PCM announced that a commission would be sent to the area to speak with protesters, and in March 10th 2015, an initial agreement was reached.⁶⁸ One of the things agreed to was the creation of a special fund for implementing environmental remediation of the areas impacted by oil operations with an initial seed capital of S/50 million (around US \$17 million) (PCM 2015). While the fund was a contingency response from national authorities in order to move forward with the bidding process, it did not absolve Pluspetrol from eventually assuming its environmental obligations⁶⁹. The construction of water treatment plants was also promised⁷⁰.

Regarding the bidding process on the lot itself, it was scheduled to take place in parallel to the consultation process and to end by the August deadline.⁷¹ However, the initial auction of the lot was declared void because none of the companies that qualified to compete submitted their technical proposals⁷². Concerns about the delays and outcome of the Consulta process added to investors' concerns with costs and negative market trends. In August 2015, PERUPETRO announced the decision to sign a temporary contract with a Canadian company, Pacific Stratus Energy. This included the possibility for PETROPERU⁷³ to

66 The federations involved in the consultation are: Federation of Native Communities of Alto Tigre (Feconat), the Quechua Indigenous Federation of Pastaza (Fediquep), the Federation of Native Communities of the Corrientes (Feconaco), and the Interethnic Organization of Alto Pastaza-Andoas (Oriap). (Ministerio de Cultura, 2015a; Ministerio de Cultura, 2015b)

67 Sanborn and Paredes (2014) summarizes the on and off conflict with federations in the area.

68 In: <http://news.mongabay.com/2015/0330-fraser-amazon-oil-spill-peru-mrn.html#ixzz3W7Osoj00>

69 <http://gestion.pe/economia/ministra-rosa-maria-ortiz-hay-consenso-aprobar-ley-que-permite-certificacion-ambiental-integrada-2126159>

70 <http://news.mongabay.com/2015/0330-fraser-amazon-oil-spill-peru-mrn.html#ixzz3W7fcarRi>.

71 In: <http://alertaeconomica.com/perupetro-aprobo-las-bases-del-concurso-publico-internacional-por-concesion-del-lote-192/>

72 In: <http://elcomercio.pe/economia/peru/lote-192-ningun-postor-presento-su-propuesta-tecnica-noticia-1830676>

73 Petroperu or Petróleo del Perú S.A. is a Peruvian state-owned petroleum company. Its activities include transport, refinery, and commercialization of fuel and other oil derivatives.

participate with up to 25 percent of the contract. Nonetheless, the board of PETROPERU refrained, arguing that the public company did not have the required technical and financial conditions to achieve this. This decision raised considerable opposition from the Regional Governor of Loreto and from members of Congress from different parties, and, as a result, Congress approved a measure to allow PETROPERU to operate the lot. Although this was observed by the Executive, Congress approved it in October⁷⁴.

Meanwhile, the consultation process regarding this lot was complicated by the fact that neither the participation of all indigenous representatives nor that of the relevant subnational authorities was secured. Also, the government did not present an integrated proposal for the resolution of the indigenous demands⁷⁵. As a response, the Ombudsman published a statement exhorting President Humala and his government to respect the consultation process in regard to this tender as well as in other pending cases. After several months, the dialogue stage began in July 2015 and the final meeting was scheduled for August 13, with the participation of the Ministers of Energy and Mines and of Housing. The government proposal focused on the creation of a new social fund for the use of the communities, involving the equivalent of 0.75% of the monetary value of production on the lot to be included in the new operator's contract⁷⁶. These resources would be deposited in a trust (*fideicomiso*), which would include indigenous representatives in its management committee and be presided over by a representative of the Ministry of Culture. However, there was division among the indigenous federations involved over this offer. Of the four federations that participated, agreements were apparently reached with two of them. The other two (FECONACO and FEDIQUEP) refused to sign, arguing that the new proposal focused only on the economic benefits (the social fund) and did not include other pending issues such as land titles, environmental remediation, and participation in independent monitoring of the activities of the new operator to prevent further spills. While government negotiators presented a counterproposal to the points raised by these two federations, the consultation process *per se* was declared concluded by Minem on the same day the final meeting was held (Cultura, 2015).

After the consultation process was declared concluded, representatives of FECONACO and FEDIQUET tried to delay the

74 About the participation of local authorities: <http://iqt.utoero.pe/2015/08/25/lote-192-petroleo-ideologia-politiqueria-y-amazonia/>; about the role of central government: <http://elcomercio.pe/politica/gobierno/humala-observo-ley-que-permite-petro-peru-explotar-lote-192-noticia-1843790>; and about the final resolution of Congress: <http://elcomercio.pe/politica/congreso/lote-192-pleno-congreso-aprobo-insistencia-dictamen-noticia-1850261>

75 In: <https://redaccion.lamula.pe/2015/07/16/inicio-de-consulalote192-se-suspendio-nuevamente/albertoniquen/>

76 In: <https://redaccion.lamula.pe/2015/08/15/consulalote192-por-que-es-tan-dificil-cumplir-con-todos-los-derechos-de-los-indigenas/albertoniquen/>

operations of the lot through strikes and the stoppage of oil wells located in the Pastaza basin⁷⁷ in an attempt to obtain a new process⁷⁸. The government sent a delegation in response to the protests, which included representatives of the Presidency of the Council of Ministers (PCM) and the ministries of Culture, Housing and Energy and Mines, in addition to the Ombudsman⁷⁹. An agreement was signed on September 24th, 2015, between the government and all of the indigenous organizations involved that included public investments of roughly US \$42 million for 2016 - 2017⁸⁰. The Executive also presented a proposal to Congress to approve funding for the environmental remediation of Lots 192 and 8 in Loreto⁸¹. Although this was seen as a victory for the communities involved, the responsibility of Pluspetrol in this remediation remains unresolved.⁸²

C. THE MINING SECTOR—THE CAÑARIS CASE

As mentioned above, in late 2015 the Ministry of Energy and Mines finally began to undertake consultation in regard to mining projects affecting Indigenous peoples.⁸³ Unlike with hydrocarbons, these cases involved consultation about the exploration phase because of the potential for exploratory activity to cause changes in access and use of land and other natural resources used by indigenous communities (MINEM 2015). This right has yet to be recognized for a larger number of indigenous communities affected by mining activity.

One of the most controversial of such cases—where the right to prior consultation has not been recognized (as of late 2015) -- has been that of the Cañaris people of Lambayeque. A junior mining company, the Candente Copper Corporation of Canada, was awarded a license for exploration under the communal lands of the San Juan Bautista de Cañaris community in order to develop a large, open pit polymetallic mine. The company was granted the concession in 2001 and has been engaged in periodic exploration since 2004. Provided it was able to

77 In: <http://elcomercio.pe/peru/loreto/lote-192-panorama-protesta-nativos-fotos-noticia-1841340/4>

78 <http://elcomercio.pe/peru/loreto/lote-192-nativos-tienen-tomados-9-12-sectores-petroleros-noticia-1841335>

79 In: <http://elcomercio.pe/peru/loreto/ejecutivo-dialoga-hoy-nativos-que-toman-lote-192-noticia-1843414>

80 In: <http://consultape.com/2016/01/05/claroscuros-sobre-la-consulta-previa-en-el-2015/>

81 In: <https://poder.pe/2015/10/29/00426-ejecutivo-presenta-proyecto-para-la-remediacion-ambiental-de-los-lotes-192-y-8-en-loreto/>

82 http://elcomercio.pe/peru/loreto/lote-192-suspenden-medida-cautelar-contr-plus-petrol-norte-noticia-1862108?ref=flujo_tags_390845&ft=nota_1&e=titulo

83 See: <https://poder.pe/2015/10/21/00379-los-proyectos-mineros-en-la-sierra-tambien-pasaran-por-consulta-previa/>. Nowadays the project is still pending approval by Congress. See: http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Expvirt_2011.nsf/didpprojectoley/62B70504CC53C56005257EED005DEAC9

secure major financing, mine construction was slated to begin in 2014, and the projected life of the mine was predicted to be 22 years. However, progress on the project has been paralyzed due to community resistance as well as a lack of funding on the part of the firm.

When the new law of prior consultation was approved in 2011, community leaders in Cañaris demanded the right to informed consultation regarding mineral concessions and exploration on their territory. Although the company was already present, there was dissatisfaction with the proposed project and concerns about the impact of large-scale mining on their lands. This demand for formal consultation, however, was rejected by the company CEO as well as officials at the Ministry of Energy and Mines, who argued that the law could not be applied retroactively and that existing citizen participation rules should apply instead. Community leaders took their case to the Regional Government of Lambayeque, members of Congress, and the national media (Sanborn and Paredes 2015: 21). In 2012, however, the ministry approved the company's Environmental Impact Assessment (EIA), and Congress did not pursue investigation of the case.⁸⁴ Hence the company asked the community for new authorization to use their surface land for further drilling for exploration.

Advocates for the community argued that this authorization should have been consulted within the new legal framework (the recently approved Prior Consultation Law), meaning that representatives of the State should consult with community leaders about whether they desired further development of this project. Instead, a communal assembly was convened by a local justice of the peace on July 8, 2012 to decide upon the measure. Although just a minority of community members attended (reports range from 200 to 725 participants out of an estimated 4,000 members), 70 percent of them voted in favor of granting rights for exploration, and this vote was accepted as legal by government authorities and the company CEO. According to company officials interviewed by the authors, the assembly was legitimate because it was "a formal space, conducted by a justice of the peace at the request of the community. There is an act, and a list of participants registered in Public Records (Freeze 2015)." However, the community president at the time challenged the legitimacy of this assembly and opted to conduct a new "popular consultation" on September 30, 2012, in which an estimated 1,700 to 1,900 community members participated. Around 95 percent of those present voted against renewing the company's authorization.⁸⁵ Neither Minem nor the company accepted this second consultation as legitimate, and, apparently, there are no voting rolls to confirm who voted in this process.

84 This news report in March 2013 summarizes the position of Minem and its response to a local Congressman who initially got involved in the case (but did not pursue it). <https://servindi.lamula.pe/2013/03/27/canaris-puede-un-informe-legal-del-minem-dejar-sin-efecto-el-convenio-169-de-la-oit/Servindi/>

85 For the second consultation see <http://servindi.org/?p=73666>

The result of this conflict, in which neither side accepted the other's vote and Minem refused to apply the seven-step consultation process under the 2011 law, led to the suspension of all exploration on the community's lands. During late 2012 and 2013, there were violent confrontations at the site, followed by a Development Roundtable (Mesa de Desarrollo) organized by the PCM, in which diverse Cabinet-level representatives committed to bringing public services and social investment to the people of Cañaris, presumably to win their favor for this project. Mesa participants approved some 49 new investment projects for the community, largely to be funded by government, but also by the firm.⁸⁶ However, the future of the project remained uncertain.

In October 2014, while the company was still hoping for a green light from the community to resume exploration activities, an opposition group within the community grew impatient with the government's refusal to accept the results of the popular consultation and decided to take their demands to an international audience. On October 31, 2014, with support from the International Institute on Law and Society (IILS), an Indigenous rights NGO, a Cañaris community leader - Rosa Sara Huamán - joined representatives from two Amazonian communities of Peru in a hearing before the Inter-American Commission on Human Rights (IACHR) in Washington, DC. (Derecho, Ambiente y Sociedad, 2015) The focus of the hearing was on the overall problems of land and legal rights for Indigenous peoples in Peru, and, as a result, the IACHR issued a statement encouraging the Peruvian state to comply with its international obligations.⁸⁷ Although it was a symbolic hearing with specific implications for State action, it caught the attention of international media and rights activists.

Taking this case before the Commission was a controversial move within Peru's human rights community, however, as some argued that the Cañaris had not exhausted the legal and administrative channels available within Peru to demand recognition of their right to prior consultation, at least regarding administrative measures or authorizations post-2011.⁸⁸ The position of the IILS lawyer advising the community is that the right to consultation in this case should be retroactive, that this right was violated by the initial granting of the concession without proper consultation back in 2001, and that it makes no sense to consult about future authorizations when this fundamental decision is still in question.⁸⁹

In January 2015, the IILS signed an agreement with the newly elected mayor and city council of the Municipality of Cañaris, with support

86 See: <http://gestion.pe/politica/dialogo-frustrado-no-se-llego-acuerdo-canaris-sobre-actividades-candente-2063132>

87 In: http://www.rpp.com.pe/2013-06-11-lambayeque-caso-canaris-sera-llevado-a-la-cidh-noticia_603459.html

88 *Ibid.*

89 In: http://bajolalupainforma.blogspot.com/2015_03_01_archive.html

from the Ford Foundation, to provide training and technical assistance, including assistance with the implementation of a new development plan that respects the lifestyle and rights of the Cañaris people and the strengthening of their Indigenous identity (Derecho, Ambiente y Sociedad, 2015). That same month, Florentino Barrios, then president of the community, announced they would resist any efforts by Candente Copper to reinitiate exploration, suggesting a broader agreement among members against the proposed mine.⁹⁰ In May 2015, the community elected new leaders who reiterated their opposition to the project and denounced the government for reneging on the social investment commitments made in the Dialogue Roundtable the year before. In November 2015, they declared their opposition to all mining concessions or activities on their lands.^{91, 92} To date the project is halted due to both the lack of investment funds and community acceptance.

This case has several interesting features (Sanborn and Paredes 2015). First of all, it involves an Indigenous community with an apparently solid, legitimate claim to the right to prior consultation under ILO 169. Yet both the central government and company executives have denied this right, even as new administrative measures were undertaken (such as granting permission for resuming exploration) after the 2011 prior consultation law was passed. Decisions made at the popular assemblies in July and September 2012 are contradictory, do not resolve this issue, and are not being recognized as *consulta previa* by Mincul.

Second, it is a case that has evolved rapidly over time, from a local conflict between a junior Canadian firm and a very poor community to a cause célèbre involving diverse regional and central government agencies, members of Congress, leftist parties and NGOs, and international organizations. As in many poor regions in Peru, the people of Cañaris want development from productive investment, not just handouts. They also want respect for their newfound right to be consulted about such a major project in their midst, and it appears that the project will not go forward unless that expectation is met.

Given this story, the inclusion of the community of San Juan de Cañaris among the indigenous communities of the Lambayeque region in the revised data base of MINCUL in October 2015 can be seen as an encouraging step in that it reopens the possibility for the community to claim the right to consultation on any administrative measure involving a potential, direct impact on their collective wellbeing.

The late 2015 consultations regarding mineral exploration in other regions should also have demonstration effects on two levels. For indig-

90 In: http://www.rpp.com.pe/2015-01-30-lambayeque-comuneros-de-canaris-alertas-por-reinicio-de-actividades-mineras-noticia_764877.html

91 <http://elcomercio.pe/peru/lambayeque/canaris-comuneros-buscan-anular-concesiones-mineras-su-zona-noticia-1855527>

92 See: <http://elcomercio.pe/peru/lambayeque/anuncian-nuevas-protestas-contra-proyecto-cuprifero-canariaco-noticia-1814105>. This position was ratified by the new community president on May 31, 2015. <http://elcomercio.pe/peru/lambayeque/comuneros-insisten-impedir-actividades-mineras-canariaco-noticia-1815313>

enous communities, they offer the chance to appropriate this right as a way to address broader concerns about mining projects and ensure that their citizen and collective rights will be respected by the State. For staff of Minem, they offer the opportunity to overcome—through an effective implementation of the agreements reached in consultations—the lack of capacity to attend the rights of indigenous peoples affected by mining operations. However, a series of challenges remain. These include the need to provide Minem with the necessary human and financial resources to conduct several processes in complex territories and regarding large-scale projects. They also include the articulation and timing of the different tools that involve the participation of indigenous communities, such as authorization for the use of superficial communal lands and mechanisms of citizen participation for approval of EIA.

IV | Conclusions and Future Challenges

Four years since the passing of domestic legislation aimed to put the right of prior consultation into practice and two and a half years since the first actual consultation occurred, we conclude that despite numerous challenges and setbacks, on balance these efforts have been significant and positive.

If we look beyond the numbers of processes conducted and focus on the impact this has had on the relationship between indigenous people, the State, and the private sector, we can say that the Law of Prior Consultation has served to shift the balance of power -- at least slightly—in favor of Peru’s Indigenous citizens. In some cases this has resulted in their constitutional right to consultation being recognized, while in others this is still pending, but indigenous communities and their national and international allies have a new tool to use in this domestic legislation. Furthermore, although this is a cause for complaint by some government officials and private sector interests, the implementation of the right to consultation has served some communities as a means to draw attention to a broader set of issues that affect them, including land titles, education and health concerns, remediation of past environmental damages, and the respect for other rights than have been historically ignored.

Another factor to examine involves the gains made by the Peruvian state. Worldwide, both ILO 169 and related domestic legislation aim to encourage states to engage with their Indigenous citizens, consult them in culturally appropriate ways, listen to their concerns, and seek agreement on policies and programs—before private investors or other actors become involved. In the process, the State itself should undergo a process of institutional learning and positive change. In the Peruvian case, this has primarily involved the creation and development of the Vice Ministry of Intercultural Affairs (VMI) as a central agency charged with overseeing and defending Indigenous rights across the public sector. It is notable that since 2011 the VMI has trained a large number of public officials in Indigenous rights and consultation and has formed a pool of interpreters in the diverse Indigenous languages spoken in Peru. This is a step forward for the positioning of an Indigenous agenda within the State and has helped to raise the consciousness of personnel in other agencies that have extensive dealings with Indigenous peoples, such as the Ministries of Agriculture and Health.

However, the VMI and its small DCP office remain relatively weak when lined up against powerful counterparts such as the Ministries of Economy and Finance and Energy and Mines. Other authors have also stressed the limited bargaining power of the VMI on these issues (Galvez and Sosa 2013, Zambrano 2015). Critics among indigenous organizations and human rights NGOs have argued for a separate min-

istry dedicated to indigenous affairs, given that the Ministry of Culture dedicates most of its resources to other issues (such as preserving historical patrimony). They have also noted the virtual absence of indigenous professionals and staff within this agency.⁹³ To enhance State capacity to promote Indigenous rights across the public sector, at a minimum, the VMI needs a better budget allocation, more stable and representative human resources, and greater enforcement authority to effectively monitor the implementation of agreements by other sectors and sanction those that do not comply. This is unlikely in the near future, given the general political instability in the country (seven Cabinet turnovers since 2011) and turnovers in Mincul itself, as well as the fact that Peru will elect a new government in 2016 and a sweeping turnover in almost all public agencies is to be expected.

Meanwhile, it may be premature to conclude that such institutional learning is taking root in a significant way in other parts of the State. For example, there are few indigenous public servants in Peru's national government in general and little experience in most agencies with indigenous affairs. In the case of PERUPETRO, the agency was acquiring experience (by trial and error) through the hydrocarbon consultations it promoted, but that task was later transferred to Minem. It is unclear that PERUPETRO will maintain its commitment to indigenous cultural understanding among its personnel, even though this state-owned company remains in close contact with native Amazonian peoples.

Another important state actor to examine is the Ministry of Energy and Mines. The resolution of cases initially ignored by Minem, but which the Ombudsman identified as meriting consultation, is still pending. To date there is no clear response about the possibility of an "after-the-fact consultation" (consulta posterior) as announced by the Ministry in 2015⁹⁴, nor have there been new consultations declared in the mining sector after the three cases mentioned above⁹⁵. Meanwhile, there is still such a degree of criticism from the mining industry guild about the consultation processes, that the International Council on Mining and Metals (ICMM), a global leader in the promotion of social responsibility in the sector, called public attention to their attitude.⁹⁶

The understanding of and respect for indigenous rights and customs is still a pending challenge for the Peruvian state. A recent example is

93 Silva Santisteban, Rocío (19 de enero, 2015) "DHHH y planes de gobierno: "no hay remedio" In: <http://larepublica.pe/imprensa/opinion/734673-dhhh-y-planes-de-gobierno-no-ay-remedio>; and Fraser (28 y 29 de diciembre de 2015)

94 <https://consultape.com/2015/11/23/la-omision-de-consulta-previa-se-debe-subsanar-con-una-consulta-posterior/>

95 <https://poder.pe/2015/10/21/00379-los-proyectos-mineros-en-la-sierra-tambien-pasaran-por-consulta-previa/> and <http://semanaeconomica.com/article/legal-y-politica/politica/172678-en-diciembre-terminaremos-de-incluir-a-los-pueblos-quechua-en-la-base-de-datos/>

96 <https://redaccion.lamula.pe/2016/04/06/organismo-mundial-minero-critica-a-la-snmpe-por-declaraciones-contrala-consulta-previa/victorliza/>; <http://larepublica.pe/imprensa/economia/758070-emplazan-la-snmpe-aclarar-su-posicion-sobre-el-proceso-de-consulta-previa>

that of the Hidrovía Amazónica, mentioned above, in which the native Amazonian communities won the right to a prior consultation. However, some observers argue that in the actual process the native practices of the peoples involved were left aside and the negotiations followed a more “Western” or urban format⁹⁷. There is also some concern as to whether the communities involved in consultation processes or their NGO allies really understand the implications of the decisions being made—in this case, for example, regarding massive dredging of their local waterways⁹⁸. In all of these cases, follow up of the decisions made and implementation of policies that were consulted is essential.

Beyond the State, Peru’s national and subnational-level Indigenous organizations also remain relatively weak and divided. Hence their capacity to represent the interests of their members at the bargaining table and in negotiations with different state agencies has at times been hampered. The multiple NGOs and foreign donors that have supported this cause are also relatively weak and divided. Most do not have indigenous staff members and many of them also lack the kind of technical expertise required to assist with complex decisions regarding policies or projects with major impact on the natural environment or local economies.

In regards to representative politics, the lack of attention to Indigenous rights across Peru’s weak party system and within Congress have also been problems for keeping the right to consultation and other indigenous rights issues on the front burner. Nonetheless, there is also progress in this field. Since 2002, Peru has had electoral quotas for indigenous people on party lists in regional and local elections in areas of high indigenous population. Although few of these indigenous candidates have been elected, even fewer at the national level, their presence appears to be growing (Flores Tello 2015; Pinedo 2012). In 2014 the indigenous quota was expanded significantly, to include 95 provinces in 18 of Peru’s 24 regions⁹⁹.

In the April 2016 national election process, Peru saw a greater presence of indigenous candidates, and issues of importance to indigenous peoples were also reflected in the proposals of virtually all 19 presidential candidates. Among these candidates, there was one new indigenous figure, Miguel Hilario, a native Shipibo-Conibo from the Ucayali region who ran on his own party ticket.¹⁰⁰ The third place finisher in these elections was the leftist Frente Amplio, which had a number of indigenous congressional candidates on its list, including Henderson Rengifo, Achuar leader and President of the largest national organization of Amazonian groups, AID-ESEP; Santiago Majuin, awajun leader and winner of the National Human

97 In: <http://servindi.org/actualidad/140582>

98 In: <http://observatoriopetrolero.org/a-proposito-de-la-consulta-sobre-la-hidrovía-amazónica-una-contribución-para-proximas-consultas/>

99 <http://www.idea.int/americas/peru/expansion-of-the-indigenous-quota-in-peru.cfm>

100 Hilario biography; <http://www.miguelhilario2011.pe/> and <http://larepublica.pe/impres/politica/734601-nacio-en-una-canoa-y-hoy-desea-guiar-una-nacion> Hilario was briefly responsible for indigenous affairs in the administration of former President Alejandro Toledo (2001-2006), who comes from an indigenous family with Quechua roots, and who is also running for another term.

Rights Prize in 2014 (wounded and then accused during the Bagua crisis), and Gladys Vila, quechua leader and founder of the National Organization of Andean and Amazonian Indigenous Women of Peru, ONAMIAP¹⁰¹. Although Peru does not have an indigenous quota for candidates to the national Congress, the NGO Chirapaq identified at least 30 candidates from indigenous communities, amidst a total of 2242 candidates for National Congress and Andean Parliament (Infogob 2016, Chirapaq 2016).

Beyond the candidacies, both indigenous organizations and state entities have proposed institutional reforms to improve indigenous representation in the political system. AIDSESEP and some other organizations are in favor of the establishment of a single indigenous electoral district for indigenous voters to elect their representatives throughout Peru. They think the current system of quotas generates fragmentation (AIDSESEP 2016)¹⁰². The Ministry of Culture and the NGO Transparency have also suggested incorporating ethnic self-identity and native language in candidate résumés for future elections submitted to the National Election Council (JNE)¹⁰³.

In regards to the presence of an “indigenous agenda”, we see that all parties that competed in the first round -19 among parties, fronts and movements—included at least one reference to indigenous peoples in their government plans, something unprecedented in the Peruvian political history¹⁰⁴. Moreover, at the beginning of the campaign there was some debate about prior consultation between the top candidates, and several candidates included this issue in their plans¹⁰⁵. Among the ten parties and fronts that remained in the race to the finish, five identified the indigenous situation as a central problem, and the three finalists for the first round—Fuerza Popular, PPK and Frente Amplio—detailed the intercultural policies they propose to implement (Voto Informado

101 Presidential candidate of Frente Amplio, Verónica Mendoza, congresswoman from Cuzco and former member of the Nationalist Party, seems to have channeled into her group much of the disappointment of indigenous organizations with President Humala, whose support level is so low that he has not kept his own candidate in this election. See: <https://redaccion.lamula.pe/2016/01/22/dos-lideres-indigenas-amazonicos-buscan-una-curul-en-el-congreso/redaccionmulera>

102 <http://www.aidesep.org.pe/cc-a-presenta-prioridades-en-la-agenda-de-los-pueblos-indigenas-de-la-amazonia/>

103 <http://elecciones2016.transparencia.org.pe/verita/317/recomendaciones-que-el-ministerio-de-cultura-envi%C3%B3-al-jne-sobre-la-nueva-hoja-de-vida>

104 This observation is based on the authors’ review of programs published on the website Voto Informado: <http://www.votoinformado.pe/voto/index.aspx>

105 In January 2016, when presidential candidate Julio Guzmán contradicted himself about his position on the right to prior consultation, national indigenous organizations and other rights advocates criticized him harshly and called on all candidates to defend this right. Several major candidates quickly came to their defense, and Guzmán retracted. See, for example, Aidesep: <http://www.aidesep.org.pe/aidesep-se-pronuncia-respecto-a-las-elecciones-2016-nunca-mas-un-peru-de-espalda-a-los-ppii/>, <http://rpp.pe/politica/elecciones/guzman-aclara-que-mantendra-y-aplicara-ley-de-consulta-previa-noticia-930674> and <http://rpp.pe/politica/elecciones/martin-vizcarra-ppk-si-respetara-ley-de-consulta-previa-noticia-930741>.

2016).

Although none of these political gestures guarantees that the new government will defend the right to prior consultation or other indigenous rights, the appearance of such issues on the national political agenda is important. In this scenario, it is vital that indigenous and other civil society organizations remain vigilant and join forces to keep demands for implementation of prior consultation on the front burner for the next government elected.

Despite their own lack of national political direction, engagement with the prior consultation processes does provide Indigenous groups with an opportunity to put their rights and needs on the national political agenda. Some organizations have taken advantage of these spaces to gain experience in dealing with extractive and environmental issues more broadly, to demand information about oil exploitation, and even propose changes in the governance of the hydrocarbon sector. In areas affected by large-scale mining, communities have organized not only to demand prior consultation, but to also discuss their development priorities and alternatives and enhance their alliance with other communities facing similar concerns across the country and beyond.

Indigenous leaders have also become aware of the need to participate in the monitoring of agreements reached through consultation and in the various round tables established around specific conflicts.¹⁰⁶ In some hydrocarbon cases, for example, the establishment of monitoring commissions is included in the consultation agreement.¹⁰⁷ Nevertheless, there is a legal vacuum, as the consultation law does not require nor regulate such activity. One proposal is for the VMI to have more binding authority to monitor implementation of agreements and the logistical resources to coordinate and guarantee ongoing participation of Indigenous peoples in this effort.

Finally, as several cases here demonstrate, prior consultation cannot be seen as a panacea for social conflict, but rather as one tool to improve communication between the State and Indigenous people. Seeking the opening of a consultation process without addressing other historical claims can be counterproductive. It projects the image of a State that is only interested in the short-term goal of securing a “social license” for private investment, or approval of a specific legislative measure, instead of conceiving prior consultation as a rights-based and participatory mechanism designed to overcome a history of exclusion. In this sense, processes conducted by the Minem to authorize the start of exploration activities in communal lands must take into account the necessary coordination and articulation with other state agencies to respond to communities’ claims.

Meanwhile, some business leaders, including the president of the National Mining Society, have taken to blaming the demand for prior con-

106 See: <https://agendambiental.lamula.pe/2015/03/27/se-necesita-una-evaluacion-integral-del-cumplimiento-de-derechos-indigenas-a-nivel-de-latinoamerica/darperu/>

107 They both created an Oversight Committee of the Contract (Ministerio de Cultura, 2014).

sultation, along with other rights-based and environmental issues, for the significant delays in getting new large-scale infrastructure, mining, and oil projects up and running¹⁰⁸. In many cases, however, the tensions generated by such projects predate the consultation and involve long-standing concerns, negative past experiences and, above all, distrust. Recent expressions of public vilification of protesters by corporate leaders, even equating anti-mining protesters with terrorists¹⁰⁹, only serve to exacerbate the high levels of distrust that many communities in Peru feel for foreign investors and their allies in government.

Will the new government that takes office in 2016 include more indigenous leaders and professionals in its ranks? Will the new authorities have the will and capacity to consult with indigenous citizens and their leaders and reach agreements regarding the proposals and projects they wish to undertake? Will the policies agreed to in the consultation processes to date be implemented in a manner satisfactory to all involved, protecting the cultures and well-being of the indigenous communities consulted? The experience with implementing ILO 169 in Peru so far has been encouraging. However, as Richard Rubio, President of the Federation of Native Communities of the Medio Napo, Curaray and Arabela said in regard to the first consultation process carried out in Peru, “there is still a very long ways to go” (Rubio, 2014).

108 “The consultation has proved to be a trap for investments. In addition to the delay in (establishing) rules, it is not clear on implementation and even tries to apply retroactively to projects that have a social license”, said the Vice President of the National Confederation of Private Business Institutions (CONFIEP), Gonzalo Priale. In: http://www.rpp.com.pe/2013-05-10-confiep-consulta-previa-es-una-trampa-para-las-inversiones-noticia_593614.html

109 The President of Southern Copper Peru Corporation stated that the protesters against Tia María mining project in Arequipa are “anti-mining terrorists” who endangered the safety of the residents in the area”. In: <http://gestion.pe/economia/tia-maria-southern-cooper-reitera-denuncia-terrorismo-antiminero-proyecto-2127523>

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Appendix 1: Peru.

List Of Consultation Processes 2013–March 2016

N°	Measure Consulted	Category	Promoting Entity	Indigenous People Identified	Indigenous Representatives/ organizations	Stage of Process	Start Date	End Date	Duration	Current state?
1	Exploration and exploitation of Lot 189	Local	PERUPETRO	Ashéninka and Shipibo-Konibo	Federación de Comunidades Asháninka de la Provincia de Atalaya (FECONAPA); Organización Indígena Regional de Atalaya (OIRA); Organización Indígena Distrital de Tahuania (OIDIT); Organización de Desarrollo de las Comunidades Nativas del Distrito del Tahuania (ORDECONADIT); Federación de Comunidades Nativas del Distrito de Iparia (FECONADIP)	Decision	8/4/14	9/22/14	2 months	The government launched the International Competitive Bidding for License Contracts for the Exploration and Exploitation of Hydrocarbons.
2	Exploration and exploitation of Lot 169.	Local	PERUPETRO	Amahuaca, Ashéninka, Ashéninka and Ayaminahua	Asociación de Comunidades Nativas para el Desarrollo Integral de Yurúa-Sharekoia (ACONADIYSH); Consejo Asháninka del Río Huacapishtea del Distrito de Yurúa (CARDHY; Unión de Comunidades Indígenas Fronterizas del Perú (UCIFP)	Decision	10/14/13	1/13/14	3 months	The government launched the International Competitive Bidding for License Contracts for the Exploration and Exploitation of Hydrocarbons 1.
3	Exploration and exploitation of Lot 190	Local	PERUPETRO	Yine	Consejo indígena de la zona baja de Madre de Dios (COINBAMAD); Federación Nativa del Río Madre de Dios y Afluentes (FENAMAD)	Decision	2/15/15	5/4/15	3 months	The government launched the International Competitive Bidding for License Contracts for the Exploration and Exploitation of Hydrocarbons.
4	Exploration and exploitation of Lot 195	Local	PERUPETRO	Shipibo-Konibo and Kakataibo	Federación Nativa de Comunidades Cacataibo (FENACOCA); Federación de Comunidades Nativas Shipibo de la Cuenca del Río Aguaytia (FECONASHCRA)	Decision	2/14/14	6/2/14	4 months	The government launched the International Competitive Bidding for License Contracts for the Exploration and Exploitation of Hydrocarbons.
5	Exploration and exploitation of Lot 175	Local	PERUPETRO	Amahuaca, Ashéninka, Ashéninka, Matsigenka, Yaminahua and Yine	Federación de Comunidades Asháninka de la Provincia de Atalaya (FECONAPA); Federación Ashéninka de la Cuenca del Río Unini (FACRU); la Federación de Comunidades Nativas Yine Yami (FECONAYY); Organización Indígena Regional de Atalaya (OIRA); la Federación Asháninka del Bajo Urubamba (FABU); Organización Indígena Yine de la Provincia de Atalaya (OIYPA); Central Asháninka del Río Tambpo (CART); Federación de Comunidades Nativas del Distrito de Sepahua (FECONADIS)	Decision	8/4/14	12/7/14	4 months	The government launched the International Competitive Bidding for License Contracts for the Exploration and Exploitation of Hydrocarbons.

N°	Measure Consulted	Category	Promoting Entity	Indigenous People Identified	Indigenous Representatives/ organizations	Stage of Process	Start Date	End Date	Duration	Current state?
6	Regulation for the Forestry and Wildlife Law	National	MINAM (SERFOR)	All indigenous communities identified at national level (55)	Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP); Confederación Campesina del Perú (CCP); Confederación Nacional Agraria (CNA); Confederación de Nacionalidades Amazónicas del Perú (CONAP); Federación Nacional de Mujeres Campesinas, Artesanas, Indígenas, Nativas y Asalariadas del Perú (FEMUCARINAP); Organización Nacional de Mujeres Andinas y Amazónicas del Perú (ONAMIAP); Unión Nacional de Comunidades Aymaras (UNCA),	Decision	10/2/14	3/16/15	5 months	Promulgated by government
7	Exploration and exploitation of Lot 164	Local	PERUPETRO	Kukama-Kumiria and Capanahua	Asociación Indígena de Conservación de la Selva Peruana (ASICONSEP)	Decision	6/20/14	11/25/15	5 months	The government launched the International Competitive Bidding for License Contracts for the Exploration and Exploitation of Hydrocarbons
8	Proposal for Regional Conservation Area Maijuna – Kichwa	Local	Regional Government of Loreto and MINAM (SERNANP)	Maijuna and Kichwa	Federación de Comunidades Nativas del Medio Napo, Curaray y Arabela - FECONAMNCUA	Decision	5/23/13	12/13/13	7 months	Created
9	Proposal for the categorization of the reservation area "Sierra del Divisor" as a National Park	Local	MINAM (SERNANP)	Asheninka, Isconahua, Shipibo Conibo, Matsés and Huambisa	Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP); Organización Regional de AIDESEP Ucayali (ORAU); Organización Regional AIDESEP Iquitos (ORAI); and la Conferación de Nacioanlidades Amazónicas del Perú (CONAP)	Decision	11/8/13	2/26/14	4 months	Created
10	Sector Policy for Intercultural Health	National	MINSA	All indigenous communities identified at national level (55)	la Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP); la Confederación Campesina del Perú (CCP); la Confederación de Nacionalidades Amazónicas del Perú (CONAP); la Confederación Nacional Agraria (CNA); la Confederación de Comunidades del Perú afectadas por la Minería (CONACAMI); la Confederación Nacional de Mujeres Indígenas Andinas y Amazónicas del Perú (ONAMIAP); la Unión Nacional de Comunidades Aymaras (UNCA).	Decision	11/14/13		Ongoing	Awaiting approval of Ministry of Health
11	Exploration and exploitation of Lot 198	Local	Ministry of Energy and Mining	Murui-Muinan and kichwa	Federación de Comunidades K19Nativas del río Nanay - FECONARINA (ORPIO-AIDESEP); Federación de Mujeres Indígenas Artesanas de Loreto - FEMIAL (CONAP)	Decision	2/7/15	8/12/15	6 months	
12	Exploration and exploitation of Lot 165	Local	Ministry of Energy and Mining	Awajún, Wampis, Shawi and Kukama-Kukamiria	IJUMBAU CHAPI SHIWAG ; Organización Nativa Awajún de la Provincia Alto Amazonas (ONAPAA)	Decision	1/25/15	6/26/15	5 months	

N°	Measure Consulted	Catagory	Promoting Entity	Indigenous People Identified	Indigenous Representatives/ organizations	Stage of Process	Start Date	End Date	Duration	Current state?
13	Exploration and exploitation of Lot 197	Local	Ministry of Energy and Mining	Kichwa del Napo	Federación de Comunidades Nativas del Curaray - FECONCU (AIDESEP); Federación de Comunidades Nativas del Medio Napo, Curaray y Arabela – FECONAMNCUA (ORPIO-AIDESEP).	Decision	2/6/15	8/23/15	6 months	
14	Exploration and exploitation of Lot 191	Local	Ministry of Energy and Mining	Ese – Eja, Shipibo, Amahuaca, Yine, Kichwa Runa and Machiguenga	FENAMAD; COINBAMAD	Decision	2/17/15	5/22/15	3 months	
15	Proyecto Hidrovía Amazónica	Local	General Directorate of Water Transport of the Ministry of Transport and Communications (Dirección General de Transporte Acuático, del Ministerio de Transportes y Comunicaciones) and Regional Government of Ucayali and Loreto	14 indigenous peoples: Achuar, Ashaninka, Awajun, Bora, Capanahua, Kichwa, Kukama, Kukamaria, Murui Muinani, Shawi, Shipibo – Konibo, Tikuna, Urarina, Yagua and Yine.	CORPI-SL; ORAU; ORPIO; FEDECOCA; ACODECOSPAT	Decision	4/30/15	9/28/15	5 months	ProInversión published rules for bidding process
16	Exploitation of Lot 192	Local	Ministry of Energy and Mining	Kichwa, Achuar, Quechua and Urainas	Federación Indígena Quechuas del Pastaza (FEDIQUEP); Federación de Comunidades Nativas del Corriente (FECONACO); Federación de Comunidades Nativas del Alto Tigre (FECONAT); ORGANIZACIÓN INTERÉTNICAS DEL ALTO PASTAZA – ANDOAS (ORIAP)	Decision	5/24/15	8/29/15	3 months	The results of the consultation are being challenged by indigenous leaders who disagreed with the outcome of the process. There has been a social conflict, and dialogue was resumed with these indigenous leaders to resolve the disagreement.
17	Exploration and exploitation of Lot 181	Local	Ministry of Energy and Mining	Kichwa, Achuar, Quechua and Urainas	Federación Indígena Quechuas del Pastaza (FEDIQUEP); Federación de Comunidades Nativas del Corriente (FECONACO); Federación de Comunidades Nativas del Alto Tigre (FECONAT); Organización Interétnicas del Alto Pastaza - Andoas (ORIAP)	To be consulted			Ongoing	
18	Exploration of Toropunto mining project	Local	Ministry of Energy and Mining	Quechua (Santa Rosa de Quikakayan)		Decision	10/14/15	11/4/15	1 month	
19	Intercultural Bilingual Education Plan	Local	Ministry of Education	All indigenous communities identified at national level (55)	Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP); Confederación de Nacionalidades Amazónicas del Perú (CONAP); Confederación Nacional Agraria (CNA); Federación Nacional de Mujeres Campesinas, Artesanas, Indígenas, Nativas y Asalariadas del Perú (FENMUCARINAP), Organización Nacional de Mujeres Indígenas Andinas y Amazónicas del Perú (ONAMIAP); Unión Nacional de Comunidades Aymara (UNCA)	Decision	10/21/15		3 months	
20	Exploration of Aurora mining project	Local	Ministry of Energy and Mining	Quechua (Parobamba)		Decision	9/4/15	11/4/15	2 months	

N°	Measure Consulted	Category	Promoting Entity	Indigenous People Identified	Indigenous Representatives/ organizations	Stage of Process	Start Date	End Date	Duration	Current state?
21	Proposal for Regional Conservation Area Tres Cañones	Local	Regional Government (Cusco) MINAM (SERNANP)	K'ana (Cerritambo, Chaupimayo, Alto Tahuapalca, Villa Tahuapalca, Huancocahua or Manturca, Mamanihuayta and Achahui)		Decision	9/11/15	1/15/16	5 months	
22	Regulation of Law No. 29735, Native Languages Act	National	Ministry of Culture	All indigenous communities identified at national level (55)	Asociación Interétnica de Desarrollo de la Selva Peruana (AIDSESP); Confederación Campesina del Perú (CCP); Confederación de Nacionalidades Amazónicas del Perú (CONAP); Confederación Nacional Agraria (CNA); Federación Nacional de Mujeres Campesinas, Artesanas, Indígenas, Nativas y Asalariadas del Perú (FENMUCARINAP), Organización Nacional de Mujeres Indígenas Andinas y Amazónicas del Perú (ONAMIAP); Unión Nacional de Comunidades Aymaras (UNCA)	Decision	12/16/15		3 months	
23	Exploration of Misha mining project	Local	Ministry of Energy and Mining	Quechua (Cotarusi)		Decision	11/26/15	1/12/16	2 months	

FOOTNOTES

1 *THE GOVERNMENT, THROUGH PERUPETRO, HAS STARTED THE BIDDING OF THE HYDROCARBON LOTS AFTER THE CONSULTATION PROCESSES CONCLUDED. IN: [HTTP://GESTION.PE/ECONOMIA/PERUPETRO-LANZARA-LICITACION-OCHO-LOTES-PETROLEROS-MEDIADOS-DICIEMBRE-2112998](http://gestion.pe/economia/perupetro-lanzara-licitacion-ocho-lotes-petroleros-mediados-diciembre-2112998)

*** THE INFORMATION PROVIDED HERE CAN BE FOUND IN: MINISTRY OF CULTURE (2015) *PROCESSES OF PRIOR CONSULTATION* IN: [HTTP://CONSULTAPREVIA.CULTURA.GOB.PE/PROCESO/](http://consul-taprevia.cultura.gob.pe/proceso/) AND IN PERUPETRO (2015) *PRIOR CONSULTATION* IN: [HTTP://WWW.PERUPETRO.COM.PE/WPS/WCM/CONNECT/PERUPETRO/SITE/CONSULTA%20PREVIA](http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site/consulta%20previa)