

OCCASIONAL PAPER SERIES**Getting it Right? Challenges to Prior
Consultation in Peru****Cynthia A. Sanborn and Alvaro Paredes****About the Authors**

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Getting it Right? Challenges to Prior Consultation in Peru

“What we want to do with this law today is make it important for your voice to be heard. For you to be treated as citizens, and not as small children who are neither questioned nor consulted.”

- President Ollanta Humala. Bagua, September 6, 2011¹

“We have been the protagonists”

- Romero Rios, Founder, Federation of Native Maijuna Communities-FECONAMAI. Iquitos, February 23, 2014²

Introduction

Peru has one of the largest indigenous populations in South America. Although the national census does not measure ethnic or racial identities, around 37 percent of the population claims to descend from native Andean or Amazonian peoples and 15.6 percent claim an indigenous mother tongue (Sulmont 2012). In recent years, the country’s pre-Colombian history and cultural diversity have become sources of pride for Peruvians as well as an attraction for tourists from across the globe. Yet native Peruvians have also been the most exploited people in this country, and were denied many basic political, economic and cultural rights until the late 20th century.

During his 2011 presidential campaign, Ollanta Humala promised a new relationship between the State and indigenous peoples, in which the rights of the latter would be guaranteed and their participation in government would be fundamental.³ One of Humala’s first acts as head of state was to sign into effect the “*Law of the Right to Prior Consultation for Indigenous and Native Peoples*”, by which the ILO Convention 169 was incorporated into national legislation. Since 2011, Peruvian authorities have initiated 16 processes of formal consultation and completed nine, the first of which involved the Maijuna and Kichwa peoples of the Amazonian province of Loreto, regarding the creation of a conservation area on their ancestral lands. Another five of the completed processes involve hydrocarbon concessions. All of the processes to date have involved native peoples of the Amazon, including 11 different ethnic groups and 20 indigenous organizations.⁴

Behind the scenes, however, relations between government officials and indigenous organizations in Peru remain marked by profound tension and distrust. And although the stated objective of ILO 169 - to protect the distinct cultural heritage and rights of vulnerable native peoples – is enshrined in the country’s constitution, that objective continues to come into conflict with other, more powerful economic and political interests.

¹ <http://www.andina.com.pe/espanol/video-presidente-ollanta-humala-promulga-ley-consulta-previa-bagua-fuente-tperu-22244.aspx>

² Interview with authors, February 23, 2014, in Iquitos, Peru.

³ See for example: Servicios de Comunicación Intercultural – Servindi (2013)

⁴ <http://www.larepublica.pe/10-01-2015/consulta-previa-en-mineria-no-avanza-por-no-reconocer-a-pueblos-andinos>

and <http://gestion.pe/politica/ministerio-cultura-analizara-consulta-previa-sector-hidrocarburos-2114346>

Peru's influential Ministry of Energy and Mines has been especially reluctant to recognize consultations. As of January 2015, the Executive had not carried out any consultation processes regarding decisions in which mining interests are at stake. Mineral exports are one of the backbones of the Peruvian economy, and as many as 40 mining concessions in Peru today involve resources located under lands owned or occupied by indigenous peoples⁵. Most of the country's important hydrocarbon concessions are also located in lands owned or used by native Amazonian groups. Concerns about the impact of these activities have been a leading cause of social conflict.

In this paper, we examine Peruvian efforts to implement ILO Convention 169, and address the following questions: Has the implementation of ILO 169 in Peru helped to protect and empower indigenous peoples? Has it contributed to reducing social conflict, or to channeling it into more constructive forms? Has it helped or hindered private investment in Peru's most important export sectors? While it may be too early for definitive answers to these questions, what lessons can be drawn from the Peruvian case to date?

I. Background – Evolution of *Consulta Previa* in Peru

The Democratic Constitutional Congress of 1993, installed under President Alberto Fujimori, ratified Convention 169 in late 1993, and this was deposited with the ILO in February of 1994. One year later, on February 2, 1995, prior consultation became a constitutional right of Peru's native and Indigenous peoples. Yet more than 15 years would pass before this right would be put into practice.

The second Alan García administration (2006-2011) approved—in the context of negotiating a Free Trade Agreement (FTA) with the United States—measures to promote citizen participation in mining and hydrocarbon projects⁶. These norms, which were not aimed exclusively at Indigenous peoples, require firms to inform people about activities they would undertake and obtain their approval, *after* the State has granted them initial concessions. Indigenous rights advocates argued that these did not respect the ILO principle of *prior* consultation, however, and did not involve formal procedures to seek agreement as ILO 169 mandates⁷. By 2008, demand for full implementation of the Convention went as far as Peru's highest court, the Constitutional Tribunal, which urged Congress to legislate to this effect.

The catalyst for further action, however, was the violent confrontation between local populations and security forces in June 2009 in the Amazonian province of Bagua, which left 23 policemen and 10 civilian protesters dead, one policeman disappeared, and over 200 wounded. This conflict was provoked by the central government's failure to consult with native and indigenous communities before passing a series of decrees aimed promoting and regulating extractive activities in the Amazon. Opponents criticized these

⁵Under Peruvian law the central government grants concessions for extracting underground natural resources, but the holders of such concessions must obtain permission from the owners of the superficial lands before undertaking exploration or extraction activity. According to indigenous rights experts, over 40 percent of the lands belonging to indigenous communities in Peru may have mineral concessions underneath them (Pacto Unidad and DAR 2013:41). In mid- 2014, the Vice Minister of Interculturalism announced that consultation processes would take place in mining regions in early 2015, but to date none has been initiated. See <http://elcomercio.pe/economia/peru/consulta-previa-mineria-iniciara-2015-noticia-1750844>

⁶ 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.

⁷ Ruiz Molleda (2010).

measures for proposing changes in land tenure and use that could accelerate deforestation and open up protected areas for monoculture production and unsustainable harvesting of forest products⁸. Then-President Garcia exacerbated the situation by vehemently accusing those who opposed extractive activities in the Amazon as being like the proverbial “dog in the manger” (*perro del hortelano*), standing in the way of progress⁹. After months of strikes and protest, the Garcia administration declared a State of Emergency and sent in an unprepared police force to break up a local roadblock, which led to the tragic events.

As a consequence of this tragedy, Peru’s Ombudsman (*Defensor del Pueblo*) proposed national legislation to implement the right to prior consultation. In 2010, the Constitutional Tribunal issued a sentence (TC 0022-2009-PI/TC) that reaffirmed this as a constitutional right, requiring the State to undertake intercultural dialogue and follow clearly defined stages and procedures prior to making decisions that could affect indigenous peoples¹⁰. That same year, Congress approved a first draft law to establish official stages and procedures for prior consultation, but Garcia refused to support it.

Finally, on September 6, 2011, the above-mentioned *Ley del Derecho de Consulta Previa a los Pueblos Indígenas u Originarios* was passed by Congress and promulgated by President Humala,—in an emotional public ceremony in Bagua¹¹. The regulation (*Reglamento*) of the law was then approved on April 3, 2012.¹²

The new law aims to promote agreement between the State and Peru’s native and indigenous populations, regarding administrative and legislative measures that could significantly affect the lives of the latter. Although investment projects are not specifically mentioned, in Peru all mineral and hydrocarbon investments involve concessions to private operators, hence in such cases the law would require the State to consult any indigenous population potentially affected by the decisions made in the framework of such concessions, and try to obtain their agreement. Legally, this should happen before private investors get involved, through carefully prepared processes of intercultural dialogue.

The Peruvian law also establishes that the government agency which plans to issue the measure in question is the one that should carry out the consultation process. So if the measure involved making a change in education policy towards bilingual schools for indigenous children, the Ministry of Education would be the corresponding authority. If it involved hydrocarbon concessions in the Amazon, it would be the state enterprise, PERUPETRO S.A.

However, the law also establishes that the Ministry of Culture, and within that the Vice Ministry of Interculturalism (*Viceministerio de Interculturalidad*), must coordinate all public policies related to the implementation of the right to consultation.

The Vice Ministry is expected to provide technical assistance and training to other state

⁸ This conflict began with the so-called “*Ley de la Selva*” (Law of the Jungle) which President García presented to Congress in late December 2006. Officially called Proyecto de Ley N° 840/2006–PE,1 it proposed a change in the property regime for “unproductive” forest lands owned by the State, in order to sell them to private investors. This was followed by Decrees N° 1064, 1080, 1081, 1089 and 1090, related to similar issues. Both the Ombudsman and a congressional committee challenged the constitutionality of the decrees and recommended their repeal. See: Comisión Consultiva de la Comisión de Pueblos Andino, Amazónicos, Afroperuanos, Ambiente y Ecología del Congreso de la República – CAAAP (2008). and Congreso de la República del Perú (2010).

⁹ In 2007, García published a widely commented editorial entitled “*El síndrome del perro del hortelano*”, in which he criticized those who would conserve rather than exploit Peru’s natural resources.

¹⁰ Sentencia del Tribunal Constitucional Exp. 0022-2009-PIC/TCP Caso COFOPRI.

¹¹ Presidencia de la República del Perú (2011)

¹² Both the law and its regulation are available in: Ministry of Culture (2014)

agencies, as well as to indigenous peoples and organizations, and to address the questions that emerge in the process of consultation. Yet it does not have power to sanction other agencies if they do not respect this right.

The final decision regarding approval or disapproval of any administrative or legislative measure lies in the hands of the Peruvian State. If an agreement is reached in the consultation process, the law establishes that it is mandatory for both parts. If agreement is not reached, the government authority must still make all possible efforts to secure Indigenous peoples' collective rights.¹³ Thus far, there has not been any unsuccessful case of prior consultation in Perú – in the sense of the consulted people or community not agreeing to the policy proposed.

II. Implementation of the Law - Challenges and Conflicts

“The business association (COMEX) argued that nearly three years after its promulgation, the process of the Law of Prior Consultation generates more uncertainty than clarity in the relations between the State, companies and communities. One of the reasons is that although it is not binding for the State, it generates a sensation of empowerment and expectation in the communities that can turn into violent protest [...]”¹⁴

Implementation of the new law in Peru has faced numerous obstacles, ranging from historical problems of establishing indigenous identity, to the weaknesses of the public institutions involved. Leading business associations and their allies in government have also resisted implementing the law, claiming that it threatens investment in urgently needed infrastructure, export agriculture and other sectors.

An initial (and persistent) challenge involves defining who should be considered “indigenous” for the purposes of granting the right to consultation. Although millions of Peruvians can claim an indigenous ancestor, the Vice Ministry for Interculturalism was tasked with compiling the first official Data Base for application of *consulta previa*, using the diverse criteria suggested under ILO 169 – including direct descent, historical ties to ancestral territory, and distinct social institutions and lifestyles, as well as self-identification.

This was a risky move for several reasons. First of all, because the Ministry of Culture, created in 2010, is one of the weakest members of the Cabinet, and the ministers initially chosen to lead it had been primarily individuals from the cultural sphere, with limited experience in public administration or tough political negotiation.¹⁵ Although the specific tasks for implementation of ILO 169 were charged to the Vice Ministry, it would prove difficult for the vice ministers - and their small team of social scientists and lawyers - to stand up to pressures from the more powerful ministries of Economy and Finance, and Energy and Mines, concerned with speeding up the consultation process, or bypassing it altogether.

¹³ On this point see Lanegra (2014), pp. 59-60.

¹⁴ http://gestion.pe/economia/comex-se-exonerar-consulta-previa-proyectos-interes-nacional-2089176?href=mas_leidas

¹⁵ From July to December 2011 the Minister of Culture was Susana Baca, a popular Afro-Peruvian singer; she was replaced by Luis Peirano, a theater director and university professor. In July 2013 a new minister, Diana Alvarez Calderón was named. She has a background in law and management and prior public sector experience, but not in indigenous affairs. Presidencia de la República del Perú (2013).

Second, creating the Data Base itself was a difficult and controversial task. The Vice Ministry used diverse criteria to identify Peru's indigenous peoples, including speaking an Indigenous or native language and living on communal lands recognized by state agencies. Both factors aim to reflect "historical continuity," meaning that one's ancestors had lived in national territory before the establishment of the Peruvian State. Although they also cited self-identification as native or Indigenous as a criteria, Peru's national census has not included questions related to racial and ethnic factors (other than language) since 1940. In the 1970s, the leftist military regime of General Juan Velasco converted the identification of most indigenous communities in the Andes into class-based, "peasant communities". In Peru many peoples living in the Andes Mountains do not identify with the general term "indigenous", and instead use more localized or territorial forms of identity. While technically this is not an impediment to consultation, in practice a number of communities have faced resistance from authorities to recognizing this right.¹⁶

The complexity of ethnic self-identification in Peru is evident in a variety of public opinion surveys taken over the last decade, which show the self-identified Indigenous population as ranging anywhere from 7 to 75 percent, depending on which questions are asked and how. As work by sociologist David Sulmont and others suggests, survey results find that the question "Do you consider yourself...an indigenous person?" will receive the lowest number of positive responses, while questions about identification with a specific ethnic group, such as Quechua or Aymara, receive a higher number of positive responses, and the percentage increases as you include questions about ones place of origin, parents' native tongue, and customs practiced at home.¹⁷ Some studies also suggest that self-identification as a native Peruvian may decline with rural-urban migration and higher levels of formal education.

A third challenge to implementation of the new law has come from Peru's most politically active, national indigenous organizations themselves, which have not fully supported this effort. The *Pacto de Unidad de Organizaciones Indígenas* (Unity Pact of Indigenous Organizations), formed in late 2011 by five major indigenous and peasant groups, has argued that indigenous organizations have not been adequately engaged in the process, and should have a stronger institutional role in government, including a new Ministry for Indigenous and Native Peoples (such as that initiated in Chile in 2014). They also argue that the law should take into account indirect as well as direct impacts of government decisions and policies on indigenous communities, and that it should be retroactive, applying to decisions taken since ILO 169 was ratified in 1995. This would mean re-opening the approval processes for some of the most important mining and hydrocarbon projects in the country. They also propose that the law involve the right to prior consent and not just consultation. A number of these criticisms are shared by NGOs involved in the working Group on Indigenous Peoples, within the National Human Rights Coordinate.¹⁸

¹⁶ INEI (2007), Valdivia (2011) y Sulmont (2012). For review of events to February 2013, see Sifuentes (2013)

¹⁷ "Comparing public opinion surveys taken between 2005 and 2009, Catholic University sociologist David Sulmont points out that there are stark differences: For example, a 2005 United Nations Development Program (UNDP) survey asks individuals if they identify as white, black or yellow, or as a Quecha or Aymara native, or as a native from the Amazon, or as a person of mixed race (mestizo). Given these options, 23,6% identified as part of a native people, and 68.7% as mixed. In the World Values Survey of 2006, a slightly larger number - 29,3% - identified as Quechua, Aimara or "from the Amazon", when this was based on their ancestors and customs. In the Americas Barometer LAPOP in 2008, however, individuals of native descent were only given the option "indigenous", and just 7% identified as such, while 75,9% identified as mixed race. Finally, in the Peruvian National Household Survey (ENAH0) of 2009, 36,7% of heads of household (primarily male) claimed to be Quechua, Aimara or "from the Amazon", based on their ancestors and customs". Tummino (2014)

¹⁸A summary of these arguments is in Pacto de Unidad and CNDH (2013). The Pacto de Unidad initially included AIDSESEP, CCP, CAN, CONACAMI and ONAMIAP, but later added other groups, including the Central Única de Rondas Campesinas. The Working Group involves 13 NGOS, including APRODEH, CooperAction, DAR, IDL and CEAS.

However, internal conflicts among indigenous organizations and strategic differences among their NGO supporters have also hindered their negotiating capacities. Both the *Asociación Interétnica de Desarrollo de la Selva Peruana* (AIDSESP), the main umbrella organization of the Amazon peoples, and the *Confederación Nacional de Comunidades del Perú Afectadas por la Minería* (CONACAMI), have been beset by internal political disputes, and in January of 2014 AIDSESP withdrew from the *Pacto* altogether in order to have more autonomy of action¹⁹.

A fourth and increasingly important challenge has come from leading business groups, especially in the mining sector, who claim that implementation of the *consulta* law will further delay major investment projects that are already slowed due to other factors.²⁰ Although there is little clear evidence that this has been the case, this position came to be adopted by other members of the Humala Administration by 2013. In April 2013, then Prime Minister Juan Jimenez spoke of the need to “*destrabar*” or release certain mining projects from the *consulta* process, and others tried to claim that the people living in the Andes mountains where most mining projects are located, are not truly “indigenous” and hence have no right to be consulted.²¹ President Humala himself shifted his position on this issue, claiming that the right to consultation was meant only for certain Amazon tribes²².

This shift on the part of the Executive, delays in publication of the Data Base, and general lack of political support for the *consulta* process, led to the resignation of Ivan Lanegra, the Vice Minister for Interculturalism who had initially led the regulation effort, on May 3, 2013.²³ Shortly thereafter, in mid-May 2013, then-Minister of Culture Luis Peirano announced that the Data Base would not be published, because doing so would cause too much confusion and raise unnecessary expectations. Instead, he said that the government would work on the basis of requests. “If a community is affected by an investment project, it can request a consultation process”, is how he stated it in the media.²⁴

On May 23, 2013, the first official effort to apply the new law was initiated. **As discussed further below**, this was a consultation between the Regional Government of Loreto, in the Peruvian Amazon, and Maijuna and Kichwa indigenous peoples, regarding the creation of Regional Conservation Area in their ancestral lands. Although initially encouraging, it must be noted that this case apparently does not directly affect large mining or hydrocarbon interests. Meanwhile, by July 2013 the entire team originally working on ILO 169 and related indigenous issues in the Ministry of Culture resigned over these more controversial issues, as did Minister Peirano himself.

On August 12, 2013, the Supreme Court announced a sentence that encouraged indigenous rights activists in their effort to overcome resistance by the Ministry of Energy and Mines.²⁵ As mentioned above, since the García Administration government officials had essentially tried to bypass ILO 169 in the mining and hydrocarbons sectors, by

¹⁹ <http://www.larepublica.pe/24-01-2014/aidesep-se-retira-del-pacto-de-unidad-para-tomar-decisiones>

²⁰ See for example highly critical statements from mining leaders Carlos del Solar (in: <http://www.agubernamental.org/web/informativo.php?id=20640>) and Carlos Galvez (in: <http://gestion.pe/economia/carlos-galvez-buenaventura-no-creo-que-consulta-previa-sea-aplicable-todas-comunidades-2100105>).

²¹ <https://lamula.pe/2013/04/20/primer-ministro-confia-en-destrabar-14-proyectos-mineros-de-la-consulta-previa/Servindi/>

²² Servicios de Comunicación Intercultural – Servindi (2013)

²³ <http://elcomercio.pe/actualidad/1571905/noticia-viceministro-interculturalidad-formaliza-su-renuncia-al-cargo>

²⁴ SPDA Actualidad Ambiental (2013)

²⁵ See Ruiz Molleda (2013) and also Servicios de Comunicación Intercultural – Servindi (2013b).

recurring to existing legislation regarding “*citizen participation*”, although that did not specifically involve indigenous communities. While these measures remained in force under Humala Administration, human rights experts charged that they were not compatible with the right to *consulta previa* as established in ILO 169²⁶:

According to the *Instituto de Defensa Legal* (IDL) and press reports, the Court agreed that the ministry’s position was unconstitutional, and that the norms of lesser rank regarding participation in mining and oil projects do not constitute the right to prior consultation held by indigenous peoples under ILO 169. The Court sentence demands that the MINEM fully respect the right of prior consultation, and also instructs the Ministry of Culture that indigenous peoples do not need to be formally registered or recognized by the State in order to qualify for consultation, as long as the requirements established in Convention 169 are met²⁷.

The implications of this decision for current and past investments in Peru are not yet clear. While the 2011 law per se may not be retroactive, some legal experts, including Juan Carlos Ruiz of IDL, emphasize that Peru’s obligation to consult indigenous people dates to 1995, and hence all mining and hydrocarbon concessions granted since 1995 in territories occupied by indigenous people should have involved a process of *consulta previa*. While few would argue that these investments are invalid, the decision to grant such concessions could be legally challenged if it was demonstrated that the collective rights of indigenous peoples were affected, or if their operations are deemed to have produced “intolerable” conditions for the indigenous peoples involved.²⁸

This position has generated strong negative responses from the mining industry and from those in government concerned about what is perceived as slow process of getting new mineral projects into the production stages. Yet government authorities are also aware that Peru is receiving worldwide attention for its extractive governance reforms, and that should include the implementation of *consulta previa*. Hence it is important for authorities to show an effort to implement ILO 169 in cases involving decisions made after the law was passed in late 2011, and for activities with less dramatic implications for new foreign investment.

In October 2013, the Ministry of Culture under Minister Diana Alvarez Calderón, published the initial version of the Data Base, which included 48 Amazonian peoples and 4 Andean ones: Quechua, Aymara, Uro and Jaqaru²⁹. It is still a work-in-progress, and to date it remains a contested source of information that has satisfied none of the parties involved. The most staunch indigenous rights defenders, for example, have insisted that peasant communities be included, whether or not they demonstrate the indigenous traits considered under ILO 169. At the other extreme, the most active mining industry interests have been opposed to the inclusion of communities in the Andean highlands, where the most important mining projects, as well as many Quechua and Aymara peoples, are located.³⁰ One longtime mining executive put it bluntly;

²⁶ See Ruiz Molleda (2010)

²⁷ Procuraduría Pública Especializada en Materia Constitucional (2013).

²⁸ Based on authors’s interview with Ivan Lanegra, and on Molleda (2012)

²⁹ Ministerio de Cultura (2014) (at time of writing the list had 52 *pueblos indígenas*).

³⁰ According to former Vice Minister Lanegra, to date no legally recognized peasant community has been identified as part of an indigenous population in this Data Base. The Uro people, for example, are not organized as a peasant community, and so far no other form of organization is mentioned in the Data Base. Interview with authors. See also Ministerio de Cultura (2014)

*“This issue (consulta previa), linked to ILO dispositions, claims that there are indigenous people in the highlands, despite the fact that they no longer exist. Where is there an Indian today with poncho and sandals? Nowhere. Today they all walk around with tennis shoes and a cell phone. You can’t even find Indians in photos anymore. In the jungle, maybe, where there are nomads, but the consulta previa in the Andes should be eliminated”.*³¹

In regard to the legitimacy of consultations per se, a distinct position was initially taken by the state oil company, PERUPETRO S. A., which has promoted a series of consultations with Amazonian native groups regarding the creation or modification of lots for oil and gas exploration. Beatriz Merino, President of the recently-formed Peruvian Hydrocarbon Society, an industry group, also expressed support for consultation, and has met with leaders of the major Amazonian native organizations. Yet strong conflicts have also arisen as the rights of Amazon natives have been questioned by the Executive when powerful oil and gas interests are at stake, **as discussed below**.

In sum, the new law and its implementation process have forced the Peruvian State – at different levels and with varying degrees of will and capacity -- to recognize and try to communicate with its native citizens. It has also forced indigenous organizations to organize and defend the rights of their members. Nonetheless, as the popular saying goes, “*del dicho al hecho hay mucho trecho*”; turning this right into reality, is easier said than done.

III. Making Consultation Happen: Three Cases

In this section we briefly examine three cases that illustrate both the opportunities and challenges posed by the implementation of prior consultation in Peru. As mentioned above, the Peruvian government has initiated 16 processes of consultation since the 2011 law was passed and completed nine within that legal framework.³² The first “successful” process, in the sense of following the steps defined in the law and its regulation, involves the decision of a regional government to create an area of conservation that involves the ancestral lands of a small and vulnerable group of Amazonian natives. Other cases that have received considerable attention involve the concession of lots for hydrocarbon exploitation by the state firm PERUPETRO S.A., which also require dialogue and consultation with native Amazonian peoples. However, to date people claiming indigenous descent and living in the Sierra or highlands of Perú, where most of the large scale mining activity takes place, have not been consulted within this framework. The leaders of one such community, examined below, decided to take their demand for the right to *consulta previa* to the global community, including an audience before the Inter-American Commission on Human Rights in Washington, D.C.

A. The Maijuna - Kichwa Regional Conservation Area

“We are still a long way from saying that this is the most successful consultation process in Peru”

- Richard Rubio, President of the Federation of Native Communities of the Medio Napo, Curaray and Arabela – FECONAMNCUA, January 27, 2014³³.

³¹ Guido del Castillo, of Minera Aruntani, and himself a Cuzco native, in COSAS (2014)

³² Information about each process is available in Ministerio de Cultura (2015)

³³ Interview with authors in Iquitos, January 27, 2014.

The first completed process of prior consultation carried out under the new law, involved the decision to dedicate nearly one million acres of Amazon rain forest for the establishment of the Maijuna - Kichwa Regional Conservation Area (RCA), in the region of Loreto. As stated by Nature & Culture International (NCI), a conservationist NGO that has been deeply involved in this case;

“This protects a vast area of Amazon rainforest – larger than California’s Yosemite National Park – and all of its extraordinary biological diversity, including peccaries, tapirs, jaguars, giant river otters and many species of monkey. It also protects the ancestral home of the Maijuna People – one of the most vulnerable ethnic groups in Peru, who number fewer than 500 people.”³⁴

What makes this case exceptional is that it is not about the State asking indigenous people to allow resource extraction on their lands, but rather about indigenous people asking the State to help them regulate or prevent such activity. In particular, it is about the Maijuna, a vulnerable ethnic group, previously known as the “Orejones” because of the large earrings worn in their ear lobes (a tradition abandoned decades ago), who have struggled for centuries to defend their homelands, against rubber barons, loggers, gold diggers, oil companies, drug traffickers and any others who threaten their lifestyle.

In the late 1990s, with support from NCI, the Maijuna developed a proposal for a conservation area that would legally protect their homeland and preserve its biological diversity for future generations. The objective was to limit logging and hunting to the minimum levels necessary for use of the Maijuna people, and promote community participation in management of the area. Ideally, no paved highways would be built through the area, and no rights to mineral or hydrocarbon exploitation would be granted.

In order to have this approved, the Maijuna needed the support of the Regional Government of Loreto (GOREL), the National Parks Service (SERNAP, within the Ministry of the Environment), and the President of the Council of Ministers (PCM). In 2008, the Federation of Native Maijuna Communities (FECONAMAI) sought assistance from the Program for Conservation, Management and Sustainable Use of the Biological Diversity of Loreto (PROCREL), an agency of the regional government dedicated to the identification of priority areas for conservation in Loreto, with the participation of local communities.³⁵ Together they inventoried the wildlife in the proposed area, and in 2012 the proposal with a technical dossier was approved by GOREL and sent to SERNAP for approval.

When the proposal arrived to SERNAP, however, that agency’s staff argued that it did not include a formal process of prior consultation with the native population. This came as bitter surprise to the Maijuna, who had worked for years for a project they considered their own. The Vice Ministry for Interculturalism argued that the Regional Government should carry out the consultation while the Ministry of the Environment should participate on behalf of the central government.

On May 21, 2013, an initial meeting was held between representatives of PROCREL, the ministries of the Environment and Culture, and the Maijuna, to develop the nature and extent of the process of prior consultation for the RCA proposal. Through these exchanges, on May 23, 2013, the Maijuna were presented with the “Consultation Plan” describing the specific rules and the following steps to be developed through the process, according to the law:

³⁴ Nature and Culture International (2014)

³⁵ Nature and Culture International (2014b)

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.
7. Decision.

What was being consulted in this case? Not the creation of the RCA per se, but rather the contents of the technical dossier. The Maijuna had to understand and approve the detailed information included, about the zone itself – ecological, biological, cultural, social, political and economic data – as well as the specific rights that will be respected. For example, the dossier had to make clear that no rights to mineral or hydrocarbon exploitation will be granted in this area. It also includes the zoning per se of the RCA, specific plans for how it will be managed (with community involvement), and the rights and responsibilities of all parties involved.

Throughout the process, a series of meetings were held with representatives of the four major Maijuna communities, and an expanding number of governmental, nongovernmental and international actors, all eager to participate in an historical first. This process involved identifying and preparing translators of the Maijuna language, travelling long rivers and over difficult terrain. However, the logistical aspects were not the most complicated part of the process.

On May 30, 2013, following steps 3 and 4, PROCREL as the state agency promoting the consultation had to inform the population about the process initiated, the proposal for the RCA, and the rights that could be affected by that administrative measure. For that purpose, an interview with the Executive Director of PROCREL was transmitted by radio and television, and published in a local newspaper in Loreto³⁶.

On Sunday, June 23, 2013, some 60 Maijuna, including 12 representatives of the four existing communities, met in Puerto Huamán – the largest of the four communities -- with representatives from the Vice Ministry for Interculturalism, the Ombudsman, the National Parks Service, and the Ministry of Environment, the German development agency GIZ, NCI and ILO. One of the translators was Romero Rios, who at the time was also the President of FENCONAMAI, and a bilingual teacher in the primary school of his community³⁷. By June 25, representatives of the Maijuna gathered in Puerto Huamán to begin step 5, which required them to evaluate three things; (1) the technical dossier concerning the creation of the RCA, (2) the collective rights potentially affected, and (3) the guarantees that PROCREL would offer for their collective rights.

³⁶ PROCREL. Gobierno Regional de Loreto (2014)

³⁷ Maijuna is one of 62 languages in danger of extinction in Peru, according to UNESCO. Rios is working with an NGO in California to prepare a dictionary for use in their schools. However, his biggest fear is that the young people get caught up in profitable illicit activities. “Maijunas versus Jijunas”, *Caretas*, July 12, 2013. http://www.caretas.com.pe/Main.asp?T=3082&S=&id=12&idE=1109&idSTo=0&idA=64364&NL=1#.Ug_mlpJ96So and <http://elcomercio.pe/peru/lima/loreto-lucha-maijunas-recuperar-su-estirpe-noticia-1373369>.

While everything seemed to be going well, on July 5, 2013, there was a new twist in the road. The Federation of Native Communities of the Medio Napo, Curaray and Arabela (FECONAMNCUA), comprised of native Kichwa peoples, petitioned to be involved, arguing that three of their communities also had collective rights over the future RCA³⁸. Their petition, supported by a Catholic church-linked NGO, was accepted by the authorities, and the Maijuna were obliged to negotiate with this larger ethnic group – an estimated 5000 people, compared to less than 500.

The Kichwa were incorporated into the process for step 6, involving dialogue and participation³⁹, which ended on October 22, 2013, with representatives of the Maijuna and Kichwa and a growing number of support organizations.⁴⁰ The following agreements were reached:

- The name of the reserve would be changed to “Maijuna – Kichwa RCA”
- The area assigned for direct use of the RCA would be expanded to benefit the Kichwa
- Indigenous and peasant communities not included in the consultation process, if desired, would be part of the process of elaboration of the *Plan Maestro* and establishment of the Management Committee of the Area.
- The area used currently as a rudimentary road would remain that way, to assure environmental recovery. If a more developed road was considered necessary in the future, that would involve a new administrative measure to be consulted⁴¹.

Apparently, the Maijuna and Kichwa had long perceived each other as competitors for the management and use of the area under debate, and held different conceptions of what constitutes sustainable development. Some Maijuna leaders, for example, expressed fears that the Kichwas’ intentions involved allowing commercial logging and other extractive activities. Given that the Maijuna are well outnumbered by the Kichwa, there was also concern about the long term relationship that would be established through this consultation process, between government officials and both groups of indigenous peoples. However, the final proposal sent to the central government retained an essentially conservationist nature. Once approved, the measure would involve election of a Management Committee and approval of a master plan to define concrete strategies for management of the RCA.⁴²

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, to date its creation had yet to be recognized by the Peruvian State. When the consultation process ended, the proposal was sent by the Ministry of the Environment to the Presidency of the Council of Ministers (PCM) for promulgation.

³⁸ AIDSESEP (2013)

³⁹ <http://diariolaregion.com/web/2013/08/31/definen-la-incorporacion-de-kichwas-del-napo-en-la-consulta-previa/>

⁴⁰ At this stage the following organizations were participating; the National Parks Service, Vice Ministry of Intercultural Affairs, Ministry of Environment, GIZ, the Catholic Bishops’ organization CEAS, Catholic Relief Services, and the NGO CooperAcción.

⁴¹ <http://vigilanteamazonico.pe/component/content/article/7-vigilancia/579-culmina-primer-proceso-de-consulta-previa-para-el-acr-maijuna-kichwa.html>

⁴² The Master Plan includes the zoning of the ACR and its surrounding areas, and planning for the basic infrastructure required to maintain it, as well as designation of specific areas for economic activities such as tourism or responsible extraction of natural resources. See: SERNANP (1997)

Yet In late 2014, over a year after the consultation had ended, and after President Humala praised this initiative in his State of the Union address, the proposal was observed by the Executive and halted for reasons that were unclear⁴³. On December 17, 2014, the

Ombudsman issued a public statement calling on the Council of Ministers to respect the agreement reached in the consultation process and approve the creation of the RCA by executive decree⁴⁴. However, as of January 2015 there had been no response, and Maijuna leaders travelled to Lima to seek an audience with the President; to no avail⁴⁵.

This delay has led the Maijuna and Kichwa to fear that more powerful interests are involved in resisting the creation of this conservation area. In particular, the central government is promoting the construction of 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. Although the GOREL has proposed a less costly and invasive railway alternative, and the Ombudsman has argued that any transportation project in the area would require another consultation process, no such effort has been proposed. Hence as FECONAMNCUA President Richard Rubio said, “there is still a long way to go before we can say that this is a successful consultation process”⁴⁶.

B. Of hydrocarbons and human rights

“No oil company belonging to this association is against consulta previa. If that were the case, I would resign”

- Beatriz Merino, President of the National Hydrocarbon Society, February 17, 2014⁴⁷.

“This country has benefitted from more than 40 years of oil exploitation. Yet we live in poverty, the State has not invested in our education or health. The company has polluted our forests and rivers. The people are still consuming contaminated water and foodstuffs”.

- Carlos Sandi, President, Federación de Comunidades Nativas del Corrientes (Feconaco), February 1, 2015⁴⁸

Some of the most challenging cases in Peru involve the development of oil and gas reserves in the Amazon, in which 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 state oil company, PERUPETRO S. A., has promoted consultation of Amazonian native groups regarding the creation of lots for hydrocarbon exploration and exploitation and the granting of licensing agreements to private investors. In 2013, the agency announced that 26 lots would be subject to consultation. In January 2014 PERUPETRO announced completion of its first successful process, in the Ucayali region, involving the Asháninka, Ashéninka, Amahuaca and Yaminahua peoples and ending in an agreement on the development of Lot 169⁴⁹.

⁴³ <http://www.larepublica.pe/10-01-2015/consulta-previa-en-mineria-no-avanza-por-no-reconocer-a-pueblos-andinos>

⁴⁴ <http://www.andina.com.pe/agencia/noticia-piden-emitir-norma-crea-area-conservacion-maijunakichwa-535990.aspx>

⁴⁵ <http://www.larepublica.pe/02-02-2015/los-maijuna-evaluan-venir-a-lima-para-que-el-presidente-humala-cumpla-su-palabra>

⁴⁶ Authors’ interview, February 23, 2014. Iquitos.

⁴⁷ <http://www.losandes.com.pe/Nacional/20140217/78490.html>

⁴⁸ <http://www.connuestroperu.com/actualidad/45272-nativos-mantienen-paralizados-14-pozos-petroleros-de-pluspetrol>

⁴⁹ PERUPETRO (2014)

Yet few details about this process were made public, and some analysts felt that the agency was not fully prepared for this procedure.

In March 2014, the regional branch of AIDSESEP Ucayalí issued its own report on the process of consultation for Lot 169, which claimed that the native leaders involved were not fully informed about what exactly was being consulted and did not have access to the specific contract under discussion, a charge supported by Derecho Ambiente y Recursos Naturales (DAR), an NGO that accompanied the natives during the process⁵⁰. Nonetheless, on April 30, 2014, PERUPETRO announced completion of a second consultation in Ucayalí, in which the Shipibo-Konibo and Kakataibo people apparently agreed to the exploitation of Lot 195.⁵¹ Both of these lots were then put up for bidding, along with three others that also passed through consultation processes. The government hopes that all of these lots will be under exploration by investors in 2015, although the global decline in oil prices has made this more challenging.⁵²

Other cases have been more controversial. One of the most important involves Lot 192 (previously known as 1-AB), located in the basins of the Pastaza, Tigre, Corrientes and Marañón rivers in the Loreto region, near the Peru – Ecuador border. This is Peru's largest Amazon oil field and produces roughly 20 percent of all crude oil in the country⁵³. The current contract for concession of this lot, held by Pluspetrol (55%) and a subsidiary of CNPC of China (45%) expires on August 28, 2015. Although the Vice Ministry for Interculturalism announced in late 2012 that a process of prior consultation would take place before the new concession of this lot⁵⁴, some industry leaders questioned the legitimacy of consulting on a lot that has been exploited over the past 40 years.

However, for the indigenous people whose lives have long been affected by this activity, the proposed consultation meant a new opportunity to address longstanding demands. At least five indigenous peoples reside in the area covered by Lot 192: Achuar, Quechuas del Pastaza, Kichwa, Cocama and Urarina. They have lived with oil exploration and contamination on their lands since the 1970s, first by Occidental Petroleum Corporation and, since 2000, by Pluspetrol and its partners. Leaders of the communities involved posed a set of concrete demands to be met by the government as preconditions to entering the process, including remediation and indemnification for years of environmental and social damage produced by prior operators, as well as recognition of land titles, improvement of social services, and compensation for the company's use of their lands⁵⁵.

⁵⁰ SERVINDI (2014a)

⁵¹ <http://www.andina.com.pe/agencia/noticia-perupetro-y-pueblos-indigenas-ucayali-culminan-consulta-previa-del-lote-195-505366.aspx#.U3A7yPI5OSp>. More details on the consultation processes for Lots 169 and 195 were shared with the authors and others in a workshop organized by the Vice Ministry of Interculturalism in November, 2014. A digital report was distributed to participants, but to date has not been made public. See: MINCUL. 2014. *La implementación del derecho a la Consulta Previa en el Sector Hidrocarburos. La experiencia de los Lotes 169 y 195*. Lima: MINCUL, GIZ.

⁵² <http://semanaeconomica.com/article/infraestructura/150282-perupetro-lanzo-licitacion-publica-internacional-de-siete-lotes-petroleros/>

⁵³ "El Lote 192 merece una especial mirada pues hoy Lote representa aproximadamente el 20% (13.490 barriles por día-BPD) de la producción nacional de petróleo que se encuentra en los 68.664 BPD. Años atrás este lote representó hasta el 50% de la producción del Perú". <http://www.larepublica.pe/03-06-2014/perupetro-descarta-prorroga-a-pluspetrol-para-lote-192>

⁵⁴ <http://gestion.pe/economia/acuerdos-alcanzados-consulta-previa-seran-incorporados-contratos-2011670>

⁵⁵ <http://diariolaregion.com/web/2013/02/22/si-quieren-ofertar-los-lotes-primero-asuman-su-responsabilidad-como-estado/>.

Although the Peruvian government recognized the legitimacy of these demands, actual progress in addressing them has been minimal. In March 2013 the Ministry of the Environment declared the area in environmental emergency, demanding that Pluspetrol take actions to remedy the contamination. According to studies made by the government,

there were several toxic elements in the water, including aluminum, lead, manganese and arsenic, due to multiple oil spills. "(The company) is not acting responsibly and is not giving the correct information about the real situation in the area", said then Minister of the Environment, Manuel Pulgar Vidal.⁵⁶ However, to date company spokesmen have argued that they are not responsible for damages perpetrated by the companies that preceded them.⁵⁷

Meanwhile, in August 2013 a "Dialogue Roundtable" (*Mesa de Diálogo*) was organized between indigenous leaders and the Regional Government of Loreto to address the land titling issue⁵⁸, and in October 2013 the Office of the President of the Council of Ministers (PCM) announced a broader roundtable to address other concerns. In November 2013 the Ministry of Environment's office in charge of monitoring and sanctioning environmental pollution (OEFA) fined Pluspetrol over S/.20 million (around US \$7.5 million) for polluting the Shanshococho lagoon, located in Lot 192.⁵⁹

When UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, visited the area in December 2013, however, indigenous leaders denounced the Humala administration for not taking stronger action to implement the environmental emergency measures declared earlier in the year. As stated by Aurelio Chino Dahua, President of the Indigenous Federation Quechua del Pastaza (FEDIQUEP), "The State has not inspected or sanctioned the oil company for this environmental crime. Pluspetrol must respond for the terrible impacts it has had on our territory and our lives"⁶⁰. Their concern from the start has been that the consultation process – and the addressing of their prior demands – would simply be bypassed when the contract expired.

On April 2, 2014, a year after the government declared the area to be in environmental emergency, around 500 indigenous protesters occupied installations of Pluspetrol, demanding that the government address their demands. According to the company, output fell by 70% as a result, while indigenous leaders stressed the urgency of their people's needs and the justice of their demands for compensation and greater benefits from the operation. "Almost 80% of our population is sick due to the presence of lead and cadmium in our food and water from the oil contamination," said Carlos Sandi, president of FECONACO, the federation of native communities in the Corrientes River, to a reporter from The Guardian. Although they agreed to retreat after a week, when government and company representatives promised to find a solution to their demands, they also threatened to resume protest measures in 90 days if these promises were not kept.⁶¹ Unfortunately, they were not.

⁵⁶ <http://gestion.pe/empresas/gobierno-pluspetrol-ha-tenido-mal-comportamiento-ambiental-cuenca-pastaza-2062414>

⁵⁷ "...the Manager of Institutional Relations of Pluspetrol said that the communities' demands were disproportionate, as the environmental damage was perpetrated by the companies that preceded them". *Diario El Comercio*, February 6, 2015, p. A18.

⁵⁸ <http://www.larepublica.pe/04-10-2013/pueblos-indigenas-y-pcm-dialogaran-en-mesa-de-desarrollo>

⁵⁹ <http://gestion.pe/empresas/oefta-multo-pluspetrol-norte-mas-s-20-millones-desaparecer-laguna-loreto-2082073>

⁶⁰ SERVINDI (2013c)

⁶¹ <http://gestion.pe/empresas/pluspetrol-restablece-bombeo-crudo-lote-1ab-retiro-nativos-2095690> and <http://www.theguardian.com/environment/2014/apr/25/indigenous-protesters-occupy-perus-biggest-amazon-oilfield>

In late August 2014, leaders of the four main indigenous federations from the area met with members of a multisectoral commission including representatives of the PCM and the ministries of the Environment, Social Inclusion, and Energy and Mines. They reiterated their demands for certain conditions to be met prior to consultation or tender of Lot 192⁶². Disgruntled at the lack of response, in October indigenous protesters occupied the airport belonging to the Pluspetrol concession, paralyzing operations and forcing all sides back to the negotiating table.⁶³ Yet apparently not all were satisfied with the conditions were agreed on, and as the expiration date grew closer, indigenous leaders feared that the company would simply pull out without honoring its agreements, and that the government might forgo the consultation altogether in its concern for moving forward with the new bidding process.⁶⁴

In January 2015 the tensions over Lot 192 renewed, as hundreds of indigenous community members took over offices and oil wells on this lot, and blocked passage of boat traffic, demanding to be heard.⁶⁵ After nearly a month, the PCM announced that a commission would be sent to the area to dialogue with protesters, yet at the time of writing there was still uncertainty regarding the commitment of the State or the company to address the conditions of these communities and hence allowing a consultation to go forward regarding the new tender process⁶⁶. In this case as in others, the Ombudsman stepped in with strong criticism of the Executive's lack of commitment to this population and their demands, even suggesting that this could lead to another "*Baguazo*".⁶⁷

Another highly controversial case involves Lot 88, which is also operated by Pluspetrol as part of the consortia of companies operating the huge Camisea natural gas project, based in the Lower Urubamba river basin, in the district of Echarate and province of La Convención in Cusco. In 2005 the Peruvian state signed a contract allocating a share of the production of this lot to the exportation of liquid natural gas. On the campaign trail in 2011, however, Ollanta Humala promised to recover the entire production of this lot for domestic consumption and hence lower costs to consumers. In early 2012, the Humala administration did get a commitment from the companies involved, to substitute Lot 88 reserves for an equal amount from other lots to be exploited, and on August 5, 2014, the contract to formalize this devolution was signed.⁶⁸ Humala announced that 100% of the natural gas reserves from Lot 88, estimated at more than 10 trillion cubic feet (TCF), would be used only for the domestic market⁶⁹.

⁶² <https://redaccion.lamula.pe/2014/09/02/comunidades-indigenas-se-oponen-a-licitacion-del-lote-192-en-loreto/danyvaldez/>

⁶³ SERVINDI (2014b) y <https://agencias.lamula.pe/2014/10/29/la-respuesta-de-pluspetrol-ante-la-toma-de-andoas/agencias/>

⁶⁴ <http://consultape.com/2015/01/14/comunidades-indigenas-de-loreto-alertan-de-un-conflicto-si-el-gobierno-licita-el-lote-192/>

⁶⁵ SERVINDI (2015), <http://elcomercio.pe/economia/peru/cientos-indigenas-toman-pozos-lote-1ab-loreto-noticia-1787506>.

⁶⁶ http://www.rpp.com.pe/2015-02-01-comision-de-alto-nivel-llega-a-acuerdos-con-comunidades-nativas-de-loreto-noticia_765318.html. At time of writing it was proposed that PERUPETRO itself take over or participate in exploitation of this lot; <http://www.aempresarial.com/web/informativo.php?id=28705>

⁶⁷ <http://gestion.pe/impres/nativos-temen-otro-baguazo-disputa-pluspetrol-2122725>

⁶⁸ Sanborn and Dammert (2013). pp. 74-84; <http://www.larepublica.pe/05-08-2014/recuperan-el-lote-88-de-camisea-para-el-mercado-nacional>

⁶⁹ <http://elcomercio.pe/economia/negocios/consorcio-camisea-invertira-mas-us500-mlls-hasta-2016-noticia-1747447>

While the Camisea operation has been widely recognized as incorporating global best practices for protecting biodiversity, its human and social impact has been hotly debated. Roughly two thirds of Lot 88 lies within a reservation established to protect native populations living in voluntary isolation or initial outside contact: the Kugapakori – Nahua – Nanti Territorial Reserve. Indigenous rights organizations have long argued that the Camisea project poses threats to the health and lifestyle of these peoples, charges that the company strongly denies⁷⁰. They also stress that the native peoples willing to engage in contact with outsiders, had not been consulted within the framework of ILO 169.

When Pluspetrol requested authorization to expand its exploration activities within Lot 88, this generated controversy with the Humala administration. In mid-2013, then - Vice Minister for Interculturalism Paulo Vilca made 83 observations on the company's Environmental Impact Assessment (EIA), which had been approved by the previous government. Vilca claimed the EIA did not adequately protect the rights and welfare of the peoples in the reserve, a position that was supported by the Ombudsman and by some members of Congress from Cuzco, but rejected by the Prime Minister and the Minister of Energy and Mines (MEM)⁷¹. In the face of strong resistance from higher authorities over this, Vilca also resigned.⁷²

According to sources at the MEM, the Vice Minister's observations were based on incomplete information. After reviewing additional volumes of the EIA, Vilca's successor Patricia Balbuena lifted 34 of the observations, yet debate continued over whether this project would in fact threaten people living in isolation, and whether other native groups, already in initial contact with outsiders, had been adequately consulted. In December 2013, the UN's Anaya also visited the area in question and recommended that the government conduct a more comprehensive study of this case, involving all stakeholders and relevant experts about the presence and conditions of the indigenous peoples⁷³. He also recommended that the people living in initial contact be granted the right of prior consultation about this proposal.

Nonetheless, in January 2014 the Vice Ministry for Interculturalism declared that the company had responded to all the observations and gave the project a green light. In regard to consultation, the company was considered to have complied by holding informational workshops and a public hearing about the EIA in diverse native communities in Echarate. The Vice Minister also declared that most of the indigenous peoples of the reservation no longer lived inside the area of Lot 88.⁷⁴ In March 2014, however, representatives of 22 native communities in the area travelled to the city of Cuzco to complain that they had not been consulted about the expansion of Lot 88 at all.⁷⁵

For the Humala Administration this case was disappointing, as the government was criticized for backing down from protection of indigenous rights. In July 2014, the

⁷⁰ Company officials argue that in 11 years of operation they have not had a single encounter with non-contacted tribes, and cite anthropological contingency plans designed to avoid that occurrence. <http://www.miningpress.com.pe/nota/248230/pluspetrol-inversiones-en-lote-88-se-extendera-hasta-el-2016>

⁷¹ <http://gestion.pe/economia/defensoria-pueblo-pide-al-ejecutivo-tomar-acciones-protger-indigenas-lote-88-2072935> and <http://gestion.pe/economia/gobierno-defiende-mas-exploraciones-gas-lote-88-camisea-2073265> and SERVINDI (2013d)

⁷² <http://www.larepublica.pe/26-07-2013/vilca-renuncia-a-cultura-por-tema-del-lote-88>, and SERVINDI (2013e)

⁷³ Anaya (2013)

⁷⁴ <http://elcomercio.pe/peru/cusco/camisea-levantan-observaciones-ampliacion-lote-88-noticia-1705120>.

⁷⁵ <http://www.miningpress.com.pe/nota/253888/ampliacion-de-lote-88-en-problemas-por-oposicion-de-nativos->

government announced the signing of a contract for the Southern Peru Gas Pipeline – another important campaign promise – and the designation of the gas from Lot 88 to feed this mega-project⁷⁶. However, at the time of writing new exploration activities in this area had yet to be undertaken, even while the government announced that the extension of the Camisea pipeline to Lima would take place in 2016.

Although the government continues to promote processes of consultation about hydrocarbon-related initiatives in the Amazon, the cases discussed here demonstrate the complexity involved. Furthermore, the future of these efforts became more uncertain after March 2014, when a new Minister of Energy and Mines announced his agency's intention to accelerate hydrocarbon development by loosening environmental regulations on exploration activity⁷⁷. This set off a new round of intra-governmental conflict, this time involving the Ministry of the Environment, members of Congress, and the leading national Amazonian native organization, AIDESEP.⁷⁸

In April 2014, the Acting Ombudsman, Eduardo Vega, published an open letter to the PCM, urging the government to take more energetic steps towards the implementation of the right of prior consultation, by complying with the agreements made with the indigenous peoples of Loreto and Ucayali, including those related to the creation of the RCA Maijuna Kichwa and the negotiations around Lot 169.⁷⁹ However, in July 2014 the government promoted a new set of policy measures aimed at accelerating investment, including cutbacks on the powers of the Ministry of the Environment, while giving no public response to the demands of the Ombudsman and the country's indigenous organizations. In November 2014, a "package" of new environmental regulatory changes was announced as the product of negotiation between two ministries, MEM and MINAM, as well as with mining and oil industry leaders^{80, 81}.

C. Mining for Conflict? The Case of Cañaris

While the cases discussed above involve efforts to implement ILO 169 with native Amazonian peoples whose right to consultation is largely recognized by the government, there are numerous cases in which such rights have not been recognized by Peruvian authorities.

One of these involves the community of *San Juan Bautista de Cañaris* (SJB Cañaris), located in the northern highlands of the Lambayeque region and near the border with Cajamarca. Members of this community have drawn international attention for their efforts to obtain the right of prior consultation regarding a mining project located on their territory. Since the 1990s, most of the subsoil under their lands has been conceded to private operators for mineral exploration. The people of SJB Cañaris, around 4,000, were not officially consulted about these concessions, and have yet to reap significant benefits from them.

⁷⁶ Dube (2013)

⁷⁷ <http://elcomercio.pe/economia/peru/conviene-eliminar-eia-exploracion-sismica-peru-noticia-1714861>

⁷⁸ <http://gestion.pe/economia/exploracion-lotes-petroleros-estaran-exonerados-estudios-impacto-ambiental-2090978> and AIDESEP (2014)

⁷⁹ <http://www.andina.com.pe/espanol/noticia-defensoria-recomienda-cumplir-acuerdos-pueblos-indigenas-loreto-y-ucayali-504011.aspx#.U3bMuPI5OSo>.

⁸⁰ Ministerio de Energía y Minas (2014a)

⁸¹ <http://gestion.pe/economia/snmpe-nuevo-reglamento-ambiental-sector-hidrocarburos-permitira-destrabar-inversiones-2113811>

In this case, the majority of residents claim direct descent from the Kañaris subgroup of the Quechua peoples; they continue to speak a variant of this language. The community was recognized as indigenous by the State in 1956⁸², they appear on the registry of indigenous peoples of the Ministry of Culture, and the Ombudsman and two Vice Ministers of Culture have supported their claim. However, to date the Ministry of Energy and Mines has not formally recognized their right to *consulta*. Indeed, this was one of the factors leading to the resignation of Vice Minister Ivan Lanegra in 2013.⁸³

Who are the Cañaris and what is at stake?

While the district of Cañaris has around 14,000 residents, the community of SJB Cañaris has approximately 4,000 members (called *comuneros*), who are governed by a special legal regime that includes norms regarding the use of commonly held property.⁸⁴ The majority of inhabitants of the district are descendants of the Kañaris culture, and 65% of its population is native Quechua speakers, reaching up to 95% of the people of SJB Cañaris. These are the only people in Peru who speak this variant of the Quechua language.⁸⁵

The area in which these people live has enormous biodiversity, including natural aquifers and springs whose full capacity for providing water resources have not yet been recorded, a lush cloud forest, and numerous lakes, rivers and streams. The area is inhabited by anteaters, spectacled bears, the mountain tapir, puma, deer, wild turkeys and other protected species of wildlife, as well as rare plants such as the Andean palm (*chonta*), unique orchids, plants used for medicinal purposes and traditional dyes, and various endangered varieties of timber.⁸⁶

Despite their abundant natural resources, the people of Cañaris live in considerable poverty, and their district is one of the least developed in Peru. Around 83% of the residents are engaged in subsistence farming, 78% are poor by Peruvian government standards, and 39.7% extremely poor. Around 40% are illiterate, and the average monthly family income is around 105 soles, or less than 1/8 of the national minimum wage⁸⁷. In 2012, the Ministry for Social Inclusion determined that 86% of the population of Cañaris was “in process of inclusion”, meaning that their households had at least three of the following characteristics: rural, ethnic minority, mothers with incomplete primary education, and belonging to the lowest income quintile⁸⁸. According to a recent study by health authorities, over 50% of the children under five in Cañaris are chronically malnourished.⁸⁹

Although Cañaris is adjacent to Cajamarca and is also rich in minerals, it does not have a history of mining activity. The Ministry of Energy and Mines awarded the first private concessions to outside operators in Cañaris in 1995, which is after Peru signed ILO 169 but before it was incorporated into national law. According to press reports, at present there are over 40 active mineral concessions in the district. Depending on the source, these involve between 55% and 96% of the territory of that district, including a

⁸²Ministerio de Trabajo y Asuntos Indígenas (1956); and also <http://www.larepublica.pe/30-04-2013/canaris-debe-ser-declarado-pueblo-indigena-e-ir-consulta-previa>; and López y Agurto (2014)

⁸³ Presidencia del Consejo de Ministros. Oficina Nacional de Diálogo y Sostenibilidad. (2013)

⁸⁴ “Community” here refers to a legally recognized unit. However, in the media and numerous reports on this case, the specific population group in question is often unclear.

⁸⁵ Presidencia del Consejo de Ministros. Oficina Nacional de Diálogo y Sostenibilidad (2014) More recent estimates place the district at over 14,000, and the SJB community over 4000. This is important for voting on land use and other issues. From: INEI (2009)

⁸⁶ Video prepared by conservationist NGOs. <http://www.youtube.com/watch?v=DCwg8MryH8Q>

⁸⁷ Presidencia del Consejo de Ministros. Oficina Nacional de Diálogo y Sostenibilidad. (2013)

⁸⁸ Ministerio de Desarrollo e Inclusión Social (2013)

⁸⁹ <http://elcomercio.pe/peru/lambayequ/mas-50-ninos-canaris-incahuasi-estan-desnutridos-noticia-1727722>

considerable share of the lands occupied by the SJB Cañaris. At least 14 operators hold these concessions, including Candente Copper, Newmont, Barrick and Milpo. Most of the projects are still in exploration stages, and no mine has yet been built in the area.⁹⁰

As mentioned, neither the community of SJB nor the broader population of the district was officially consulted by the State before these concessions were granted. Yet initially, at least a part of the community welcomed mineral exploration in the area and expected to benefit from it in some way. Over the years, however, this situation changed.

A Decade of Dispute

This case also involves Candente Copper Corporation, a Canadian mining firm dedicated to exploration and quoted on the Lima and Toronto stock exchanges. A share of the community's lands were licensed to a subsidiary of this company, Cañariaco Copper Peru SA, in order to develop a polymetallic mine project that contains copper, gold and silver. The company was granted the concession in 2001 and has been engaged in exploration off and on since 2004. Estimated investment in this project is nearly US\$2 billion; mine construction was slated to begin in 2014 and the projected life of the mine is 22 years. However, development of this project has stagnated, due to lack of resources as well as increasing community resistance.

During the first few years the relationship with the community was apparently constructive, with hundreds of *comuneros* hired by the firm to help drill over 240 pits.⁹¹ However, disgruntled community leaders say that by 2005 there were tensions with workers protesting low wages and mistreatment, and some *comuneros* were already demanding that the company depart. Yet the company persisted, and in 2008 Exploraciones Milenio (a subsidiary of Candente) obtained authorization from the community of San Juan de Cañaris to use part of its lands to undertake further exploration activities and initial work on its Environmental Impact Assessment. This authorization was for one year and expired on January 6, 2009.

Things began to worsen in 2008, however, when *comuneros* opposed to the presence of the company had a violent confrontation with the police. One of the leaders of that group was Cristobal Barrios, a local *rondero* leader and former Army reservist who would later be accused and jailed briefly for instigating these events. Barrios was elected President of SJB Cañaris in 2009 and held that post through early 2013. Under his leadership the relationship with the company became more confrontational and the conflict attracted nationwide attention. During 2010 and 2011, community members apparently held numerous assemblies to debate the presence of the company, with opponents of mining gaining the upper hand. Their arguments were no longer about labor conditions, but rather involved deeper concerns about the fate of their clean water supply and other natural resources, once a large open-pit mine was built.⁹²

⁹⁰ While news reports may say that the majority of the "district" is in concession, what the State actually concedes is rights to explore or exploit the subsoil. This means that each concessionary must still obtain authorization from landowners to initiate activities of any kind in such territories. See for example: <http://elcomercio.pe/peru/lima/canaris-incahuasi-tienen-concesiones-mineras-mas-50-sus-terrenos-noticia-1532830> and <http://www.larepublica.pe/15-02-2013/catorce-empresas-mineras-tienen-concesionados-el-96-de-los-terrenos-de-canaris>.

⁹¹ See: Candente Copper Corp. (2008)

⁹² According to the Pre-Feasibility Study, the open-pit mine would be located by the Cañariaco river, which crosses SJB Cañaris. Candente Copper Corp. (2011)

When the Law of Prior Consultation was promulgated by President Humala in 2011, the community of Cañaris was ready to demand its right to a process of informed, prior consultation regarding mineral concessions in its territory. However, this demand was rejected by the company's CEO, and by representatives of the Ministry of Energy and Mines, who argued that the law could not be applied retroactively. Community leaders took their case to the Regional Government of Lambayeque, whose President initially supported their demands, as well as did the Ombudsman, Congressmen, and some national media.⁹³

In 2012, the MEM approved the company's EIA and Candente asked the community for a new authorization to use their surface land for further drilling for exploration. Apparently, company officials also offered to finance development projects in the community over the next three years, for a total of S/. 1'500,000 (roughly USD \$500,000) and the CEO offered to give the community shares of the company when initiating the mine construction.⁹⁴

At this point the story gets more complicated, with disputed reports regarding decision-making within the community itself. The highest authority in SJB Cañaris is the Communal Assembly, which requires a minimum number of registered members to vote and make decisions for the entire population. An Assembly was held on July 8, 2012, to decide whether to allow future exploration activities by the mining company, and although just a minority of community members attended (reports range from 200 to 725 participants), 70% of them voted in favor of renewing this activity, and this was accepted as legal by government authorities.⁹⁵ However, this vote was not accepted by community president Barrios and his supporters, who convened a new "*Consulta Popular*" on September 30, 2012.

According to the Ombudsman and other independent sources, in this second *consulta* an estimated 1700 to 1900 community members participated and around 95% voted *against* renewing the company's authorization. Although supporters also charged the company with trying to sabotage the process, numerous observers - including representatives from the Regional Government of Lambayeque and the Ministry of Agriculture, as well as from national and regional Indigenous rights and environmental organizations - claimed it was a genuinely participatory process in which voters had to present identification cards and were verified by voting rolls. Under the watchful eye of some 120 policemen, community members voted in three different polling areas, some of them walking three to five hours from their villages to do so.⁹⁶ Yet neither the central government nor the company accepted this second consultation as legitimate. Both the ministers of Mining and the Environment questioned the number and origins of the participants in the process, the secret nature of the vote, and the convening authority of community president Barrios himself.⁹⁷ They continued to accept the validity of the July 8 process, in which a smaller number of voters approved the mining activities.

Hence by late 2012, the company held a legal concession, an EIA approved by the

⁹³ Media also reported that relatives of the regional president had mining concessions of their own in Cañaris. <http://peru21.pe/politica/interes-minero-acuna-peralta-canaris-2117310>

⁹⁴ <http://gestion.pe/empresas/minera-candente-solo-espera-permiso-agua-avanzar-proyecto-canariaco-2053396>

⁹⁵ Sources are contradictory regarding the origin of this vote (if it was convened on request of the firm, or by a group of *comuneros* themselves), and the number of participants. See: Ministerio de Energía y Minas (2012); <http://elcomercio.pe/actualidad/1481186/noticia-ministerio-energia-minas-desconoce-consulta-popular-contra-canariaco> and

http://internacional.elpais.com/internacional/2013/04/08/actualidad/1365372367_034355.html

⁹⁶ See <http://celendinlibre.wordpress.com/2012/10/02/>

⁹⁷ http://www.youtube.com/watch?v=qh_mN7TfARQ

government, and a dubious claim to community consent. However, it did not have a clear “social license” to resume exploration on communally held lands, and hence the project could not move forward on the ground. The *comuneros*’ protests became more radicalized, and on December 5, 2012, protesters closed down a major highway to the area and took hostage a group of geologists working for the company. In violent confrontations with police some twenty people were wounded and part of the mining camp was burned down. Despite these problems, on December 26, 2012, the MEM and Candente Copper signed a contract allowing the company to invest in exploration activities in eight lots involving some 7,500 hectares, all within surface lands owned by SJB Cañaris.⁹⁸

The violence in this case ultimately generated a second response from the central government, through the National Office for Dialogue and Sustainability (ONDS), which is part of the Office of the Prime Minister (PCM). After visiting the area, then- Commissioner Vladimiro Huaroc and his staff proposed a new “*mesa de desarrollo intersectorial*”, or Inter-Sectorial Development Roundtable, to begin in January 2013. The “*Mesa de Trabajo para el Desarrollo de Cañaris*”, would involve representatives of the Executive (including the ministries of Mines, Agriculture, Education, and Construction), regional and local government, the peasant communities and the mining company, in monthly meetings aimed at identifying priority needs for public and private social investment and funding concrete development projects, not just in Cañaris but in neighboring districts of Incahuasi and Salas as well. The Mesa would be chaired by Fernando Castillo, head of the Social Management office within the Ministry of Energy and Mines. This was distinct from previously held “*Mesas de Dialogo*”, which focused more specifically on conflict resolution around extractive activities.

During January 2013 the roadblocks and violent confrontations with police continued, as more radical community leaders demanded that the company leave the area for good. Their position was supported by a small group of congresspeople, leaders and social organizations from other communities in Northern Peru, and the leftist Tierra y Libertad party, founded in 2009 by Father Marco Arana, a priest from the nearby region of Cajamarca who was outspoken in his criticism of large-scale mining activity.⁹⁹ For their part, the company CEO, other mining industry leaders and some conservative media charged that former terrorists and more radical left sympathizers had infiltrated the movement against Candente.

By March 2013, however, the meetings of the *Mesas de Desarrollo* were under way. By this point, Barrios had also been prohibited from running for a third consecutive term as President of SJB Cañaris, and a more moderate list was elected. Within the Mesa framework, an initial set of 49 investment projects was approved for the districts of Cañaris, Incahuasi and Salas. Among the main items approved were the creation of health posts, reservoirs and irrigation canals, improved communications and transportation, improved educational infrastructure and rural electrification.¹⁰⁰

The meetings continued to the end of 2013, and in January 2014 a three month extension

⁹⁸ Ministerio de Energía y Minas (2012) y Ministerio de Energía y Minas (2013)

⁹⁹ <http://www.noticiasser.pe/28/01/2013/nacional/comando-unitario-de-lucha-de-lambayeque-apoyara-comuneros-de-canaris-con-paro-in>

¹⁰⁰ CooperAcción. Acción solidaria para el desarrollo. (2013)

was granted from the PCM to comply with the agreements and execute more ambitious development projects. Operating on a limited budget, the company also continued to support some social programs in the area.¹⁰¹ The continuity of the mining project per se, however, was not on the table for discussion.

Roughly a year later, in early 2014, the company presented a new EIA for its exploration activities and held at least one informational workshop in Cañaris, attended by mayors and community members and aimed at securing support for new drilling in the area.¹⁰² Apparently, community members and their leaders remained divided, with some rejecting all mining activity, and others were open to such a possibility if the community received concrete benefits.¹⁰³ In April 2014, after 11 sessions and over a year of deliberation, the Ministry of Energy and Mines declared that the *Mesa de Trabajo para el Desarrollo de Cañaris, Salas e Incahuasi* had successfully completed its labors, making a total investment commitment of over S/ 87 million for a variety of projects including rural electrification, roads, irrigation, education and housing.¹⁰⁴ Of that sum, around S/ 60 million was destined for Cañaris, some of which involved projects that were completed and others still awaiting implementation.

Meanwhile, the future of the Cañariaco mine project was uncertain. The company was still hoping for a green light from community to resume exploration activities on the ground, which the opposition group within the community continued to insist on their right to a formal process of consultation. Impatient with this situation, and charging that they were excluded, this group of Cañaris leaders decided to take their demands to the international level. On October 31, 2014, with support from the International Institute on Law and Society (IILS) - a Peruvian indigenous rights organization - Cañaris leader Rosa Sara Huamán joined representatives from two Amazonian native communities of Peru, in a hearing before the Interamerican Human Rights Commission (CIDH) of the OAS in Washington, DC.¹⁰⁵ 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 CIDH issued a statement encouraging the Peruvian state to comply with its international obligations.¹⁰⁶

Taking this case before the Commission was a controversial move within Peru's human rights community, as some argued that the Cañaris had not exhausted the legal and administrative channels within Peru to demand recognition of their right to prior consultation.¹⁰⁷ However, it was apparently a symbolic hearing that did not result in international legal action against Perú, while it did catch the attention of local media and international rights activists.¹⁰⁸ Meanwhile, in January 2015, the IILS signed an agreement with the newly elected mayor and city council of the Municipality of Cañaris, to provide training and technical assistance, help them incorporate an intercultural focus in

the local administration, and assist with implementation of a new Development Plan that

¹⁰¹ Interview with James Armstrong, Manager of Corporate Social Responsibility, Candente Copper Corporation, February 7, 2014.

¹⁰² <http://www.miningpress.com.pe/nota/251767/candente-present-nuevo-eia-de-caariaco>

¹⁰³ <http://elcomercio.pe/peru/lambayeque/comuneros-reinician-protestas-contracanariaco-noticia-1711567>; Valdez, Dany (2014)

¹⁰⁴ Ministerio de Energía y Minas (2014b)

¹⁰⁵ Derecho y Sociedad (2015a)

¹⁰⁶ http://www.rpp.com.pe/2013-06-11-lambayeque-caso-canaris-sera-llevado-a-la-cidh-noticia_603459.html

¹⁰⁷ In interviews with the authors, this opinion was stressed by Ivan Lanegra, former Vice Minister for Interculturalism (January 30, 2014), and Rolando Luque, Commissioner for the Prevention of Conflicts of the Ombudsman Office (January 31, 2014).

¹⁰⁸ <http://diariocorreo.pe/ciudad/cidh-se-pronuncio-sobre-canariaco-89359/>, and <http://www.larepublica.pe/12-06-2013/cidh-exhorta-al-estado-a-responder-sobre-canaris>

respects the lifestyle and rights of the Cañaris people and strengthens their indigenous identity.¹⁰⁹ That same month, the President of the community announced they would resist any efforts to reinitiate exploration by the company, suggesting an apparently broader agreement among members against the proposed mine.¹¹⁰ For its part, by early 2015 the company was hampered not just by the lack of full community acceptance but also the lack of finance in a declining market.

This case has several interesting features. First of all, it involves an indigenous community with a legitimate claim to the right to prior consultation under ILO 169, yet both the company involved and the central government have continued to deny them this right, even as new administrative measures were undertaken (such as granting permission for resuming exploration) after the 2011 Peruvian law was passed. Decisions made in the *asambleas* of July and September 2012 are contradictory and do not resolve this issue.

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 celebre* involving diverse regional and central government agencies, members of Congress, leftist parties and NGOs, and international organizations. While the initial concerns of the Cañaris people were more focused on jobs and fair treatment, over time they became more aware of their rights as indigenous people, and more concerned about the environmental implications of having a large open-pit mine in their midst. As in many poor regions in Peru, the people of Cañaris want development, with productive investment and not just handouts. Today they also want respect for their new-found rights to be consulted about such a major project in their midst, one that will not go forward otherwise.

IV. Getting it right? Learning from the Peruvian experience

As we have seen, the right to prior consultation for indigenous and native peoples has been recognized by the Peruvian state since 1994 and incorporated into national legislation since 2011. However, as these cases demonstrate, putting this right into practice has been extremely challenging.

The major challenge has been resistance from those within the same government that implemented the new law in 2011, as the Executive became increasingly concerned about sustaining macroeconomic growth, and promoting new investment in Peru's important mining and hydrocarbons sectors. Although indigenous rights were a part of the Humala program from the start, large-scale mining is central to the country's economy and exploitation of oil and natural gas is fundamental to the country's plans for energy security and reducing dependence on imports. Both activities often take place on or near lands traditionally claimed by indigenous and native peoples, and hence the main problems involved in implementing *consulta* to date have involved the granting of concessions to current or potential investors. This resistance is shared by corporate interest groups themselves, although in a few cases multinational firms have included a commitment to consultation in their statutes and may be more willing to engage with indigenous groups than their local private or public sector counterparts¹¹¹.

On the other extreme, there are NGOs and social movements in Peru that oppose virtually

¹⁰⁹ Derecho y Sociedad (2015b)

¹¹⁰ http://www.rpp.com.pe/2015-01-30-lambayeque-comuneros-de-canaris-alertas-por-reinicio-de-actividades-mineras-noticia_764877.html

¹¹¹ See for example Oxfam America (2012) and the ICMM (2013)

all large-scale extractive activity, on environmental, social or human rights grounds, and they have criticized the Peruvian law as being too weak. Their demands include providing communities with a mechanism to grant consent or to veto investment projects, as well as making *consulta* retroactive to any measures taken since 1995. The fragmentation of indigenous organizations themselves also bears a toll on their efforts to put this right into practice, as they often do not speak with one voice on such issues, nor are there significant political parties that stand for indigenous rights in this context. The weakness and lack of experience of within the public bureaucracy itself, as we have seen, is also a factor that hinders adequate implementation of this law.

Beyond these immediate factors, lies the underlying inability of the Peruvian State, political and economic elites and others in society, to recognize indigenous people as full citizens – and at the same time, to recognize them as distinct from the majority. This includes not only language and customs, but also the relationships historically established with nature itself and with the use of natural resources. Protecting the rights of minorities is not easy for any society, and especially not for one such as Peru’s, still marked by a colonial legacy in which indigenous peoples have been dispossessed, exploited and then excluded from basic citizenship.

As the saying goes, Peru’s authorities – and the country’s indigenous citizens – are “*haciendo camino al andar*”¹¹² - blazing trails, or making it up as they go along. What lessons can we draw so far?

First, despite the problems involved, the effort to implement *consulta previa* in Peru has been a step in the right direction. As Rolando Luque of the Ombudsman’s Office has said, the 2011 law is the most important effort made by the Peruvian State to include Indigenous peoples in public decision-making since the inclusion of universal suffrage in the Constitution of 1979.¹¹³ The law has given at least some indigenous Peruvians an opportunity to be heard by authorities, in their own language and forms, and to challenge traditionally powerful political and economic elites. By granting new rights and opportunities, many people and communities of indigenous descent have recovered pride in their roots, and in some cases, have been encouraged to claim forms of identity that may have been suppressed or not assumed in the past. In the short term, it is unrealistic to expect that such an effort will lead to a reduction of social conflict. When powerful interests are challenged, resistance and struggle are more likely outcomes. People of indigenous and native descent in Peru have longstanding demands to present to the State, which in many cases will need to be addressed before entering into consultation about new policy measures or investment projects.

Nonetheless, because the implementation of Peru’s new law represents an evolving effort to institutionalize intercultural dialogue, with more committed national political leadership it could develop into a more effective mechanism to address the underlying roots of conflict. Through the *Mesas de Diálogo* (Dialogue Roundtables) and *Mesas de Desarrollo* (Development Roundtables), for example, indigenous leaders have been able to formulate their longstanding demands in ways others in society can understand. The national and international media are now paying attention and so are political party leaders who will complete in new national elections in 2016¹¹⁴.

¹¹² From a widely cited poem by Antonio Machado.

¹¹³ Interview with authors, Lima, January 31, 2014.

¹¹⁴ PUINAMUDT. Observatorio Petrolero de la Amazonía Norte (2014), <http://www.larepublica.pe/05-05-2014/consulta-previa-en-proyectos-que-afecten-pueblos-indigenas-es-obligatoria-recuerda-defensoria>, <http://www.elperuano.com.pe/edicion/noticia-guardianas-los-bosques-25659.aspx#.VMuwdGiUddw> and Fraser (2015)

A key actor in this story has been the Ombudsman (*Defensor del Pueblo*), a semi-autonomous agency within the Peruvian government, that has consistently taken a stand in defense of the right to consulta previa and full implementation of the Peruvian 2011 law. This agency, designed to defend the rights of citizens vis-à-vis the State, does not have the power to sanction other government agencies, but it does draw attention to abuses or the denial of constitutional rights by public authorities. Operating nationwide, Ombudsman personnel have been close to indigenous communities and make a strong effort to understand their needs.

As a result of all of this effort, the Ministry of Culture and the various line ministries and subnational authorities involved also have to listen – not just to people speaking different languages, but to different forms of expression by citizens. While no one should imagine that social conflict will disappear in a country with such a long history of racism and exclusion, it is realistic to hope that the violence involved will be reduced as new institutional channels are created, and political learning will take place on all sides.

With this in mind, it is also reasonable to conclude that new investment and prior consultation are not irreconcilable. On the contrary, the Peruvian case shows that the costs of *not* making the effort to consult, listen and seek consensus can be even higher, involving not only economic losses and delays in investment projects, but also human costs that transcend the present and shape the broader relationship between the State and civil society.

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