THE PATH TO PEACE AND DEVELOPMENT

EMERGING LEGAL FRAMEWORK
FOR THE DEVELOPMENT OF NATURAL RESOURCES
ON INDIGENOUS LANDS

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I. INTRODUCTION

The *Convention on Indigenous and Tribal Peoples in Independent Countries*,[1] ILO Convention 169, is a binding reference point of great importance for the protection of the rights of indigenous peoples. There are other provisions of great importance, such as the United Nations Declaration on the Rights of Indigenous Peoples.[2] Indeed, governments have obligations to indigenous peoples under international law whether or not they have signed the ILO Convention. There is a clear exposition of these principles in Leonardo Alvarado's contribution below. However, the Convention, being a treaty, is binding and has the force of law in the countries that have ratified it. We focus on this because the news we bring is that these international law obligations are now being incorporated into national law, and the numerous national court decisions we discuss are frequently based upon this Convention.

The Convention established, among other things, the right of these communities to participate in decision-making processes that affect their communities, their traditional territories, and their natural resources. These obligations are now being recognized and applied by national courts. Indigenous peoples are not winning all of these cases, but they are winning many of them, and even some of the cases in which indigenous peoples have not prevailed have established legal points helpful to their cause.

There is no doubt that, in many instances, the indigenous perspective on the management of land and natural resources is very different from that of the majority culture. Opening the decision-making process to indigenous participation is not just opening the process to one more stakeholder. Citizen participation contemplated by principles such as Principle 10 of the Rio Declaration is quite different. The indigenous presence is considered a political and cultural entity, and often called a nation. It is not just another NGO or corporation.

The view of some governments has been that the authority of state agencies in natural resource matters is absolute or only limited by property rights and, perhaps, environmental protection laws. It has not been easy for them to recognize a role for indigenous peoples in the process. The result has been decisions that do not sufficiently take into account the interests of indigenous and traditional communities.

The fundamental idea of the Convention has been to establish an equitable framework for shared decision-making. This gives us, at least, the possibility of a less conflictive future that can support sustainable development processes in the country and the communities.

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[1] Official text available on the website of the International Labour Organization https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_345065.pdf. For a comprehensive treatment of this area of law, see S. Janes Anaya, Indigenous Peoples in International Law.

[2] Available at https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

As with most provisions in international law, part of the problem for those who have worked to apply the Convention to concrete circumstances is the lack of effective legal remedies in cases where governments fail to recognize and implement the rights enshrined in the Convention.

To this end, there is a mechanism within the ILO itself. However, "[t]he ILO is based on the principle of tripartism - dialogue and cooperation between governments, employers, and workers,"[3] a structure that does not give an obvious forum for indigenous communities.

> Access to the supervisory mechanisms under ratified Conventions, including Convention No. 169, is regulated by the ILO Constitution and restricted to its tripartite constituents. While this has been criticized by indigenous peoples, it has not been an obstacle in practice, as indigenous peoples have formed alliances, particularly with trade unions, to present information, comments and representations."[4]

We are not sure that this vision of relatively easy access to ILO mechanisms will be shared by all indigenous peoples or those allied with them, who would prefer direct participation.

Another important mechanism has been the Inter-American Court of Human Rights established by the American Convention on Human Rights.[5] Most countries that have ratified ILO Convention 169 are also founders of the American Convention on Human Rights under the Pact of San Jose.

The Inter-American Court has issued rulings of great importance in the development of indigenous jurisprudence. These include the well-known decisions in *Sarayaku*,[6] which taught us much about the nature and characteristics of consultation, and *Saramaka*,[7] which clarified that the rights highlighted in the Convention extend to certain traditional communities that have not always been considered indigenous.

However, this potential recourse has not always been adequate to restrict decisions by states that do not meet the requirements of the Convention.

The notable change, and our focus in this paper, is the wave of decisions by the highest national tribunals that have given the Convention greater force. We have not rigorously searched all the countries that have ratified the Convention, but we have identified more than 25 major rulings in Chile, Colombia, Ecuador, Guatemala, Mexico, and Peru that have frequently overturned government decisions that did not comply with the Convention's requirement of prior consultation. High courts are establishing that the rights inherent in the Convention are important and cannot be ignored. Some of these decisions have had important commercial consequences for the private sector such as the annulment of concessions. We are finding that there are similar decisions in

[3]Tripartite Query, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang--en/index.htm
[4]ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169).* (2013).
[5]https://www.oas.org/dil/esp/tratados_b-32_convencion_americana_sobre_derechos_humanos.htm
[6]Kichwas Indigenous People of Sarayaku v. Ecuador, https://corteidh.or.cr/docs/casos/articulos/seriec_245_esp.pdf
[7]Saramaka Village v. Suriname, https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_enp.pdf

other countries that were not part of this study such as the Argentine case of *Villivar, Silvia Noemí vs. Provincia de Chubut y otros* (2007).

The purpose of our article is not a detailed analysis of all this jurisprudence. That is important, and we hope it will be done in the future.

However, our work is merely a starting point for an in-depth analysis. Our goal is simply to draw attention to the phenomenon and raise some basic questions with a preliminary review of the significance and possible consequences of the trend we have identified.

We also want to express some ideas on how governments, in working with indigenous communities, can achieve more stable and equitable mechanisms to advance the sustainable development of countries and communities that take into account the interests of indigenous peoples. In other words, the vision we seek is shared decision-making in matters of great importance to the future of indigenous peoples, rather than ways to exclude their interests.

Several countries in the region have responded to the decisions of the courts by deciding that the solution is to "regulate the consultation," i.e., to establish specific, clear procedures for the process to which they are obligated under the Convention to incorporate into their decision-making process.

Under Article 6 of the Convention, a law or regulation of this nature *must itself be consulted with indigenous communities* and, because it has been difficult to arrive at laws or regulations, various ministries[8] and, in certain cases, indigenous organizations[9] have published guidelines or protocols that, because they lack the force of law, do not have to be agreed upon. We have several suggestions regarding the rules that should govern consultation.

If the elements of consultation are going to be incorporated into any document, whether it be law, regulation, decree, or protocol, the question would be whether they apply to all relevant government activities or just one ministry. Convention 169 is a commitment of the State. However, the vast majority of regulations or protocols that exist only apply to one government agency. It is far from ideal that the concept of consultation is different for transportation, energy, or oil than it is for mining, for example.

On one hand, it can be said that one of the reasons why we have had so much controversy about consultation is the absence of clear rules about how it should be conducted. The Convention does not contain detailed provisions on the procedures for consultation. A regulation could answer certain basic questions.

[8]For example, in Mexico, there have been guidelines and protocols by the CDI and Protocol for the Implementation of Consultations to Indigenous Communities and Peoples in accordance with the Standards of Convention 169 …(2013); INPI, PROTOCOL OF FREE, PRIOR AND INFORMED CONSULTATION FOR THE PROCESS OF CONSTITUTIONAL AND LEGAL REFORM ON THE RIGHTS OF INDIGENOUS AND AFRO-MEXICAN PEOPLES (2019); Supreme Court, Protocol of Action for those who impart justice in cases related to development and infrastructure projects (2014).

[9]BC First Nations Energy and Mining Council, Indigenous Sovereignty, Consent for Mining on Indigenous Lands (2022).

Who decides when the process begins and who is invited to participate? What are the objectives? Does it have a time frame? What information will participants receive, and how much time do they have to absorb it and discuss it internally? If there are private sector interests involved, how can a company participate in a government-community dialogue? In this sense, it would indeed be useful to have a more well-defined process.

On the other hand, there is a tendency in certain sectors to imagine the regulatory process as another opportunity to limit the participation and rights of indigenous peoples in the interest of supposed efficiency and more expeditious decision-making.

Among these is the idea of placing very short time limits on the process. Some of the proposed regulations recognize that natural resource development proposals are sometimes very complex and that the very governments or companies that want indigenous peoples to respond quickly have usually studied the potential impacts and often dedicated years in that effort. Perhaps there are ways to involve indigenous peoples in the process while the project is still being developed rather than after they are finalized. However, some draft regulations propose that indigenous communities should have as little as 30 days to absorb all this information and express themselves. This gives the impression that the government is not very interested in good-faith negotiations and only wants to wait a few days and then make a unilateral decision.

What we should take into account is that regulating the consultation should not be a unilateral decision of the state. One of the fundamental requirements of the Convention is Article 6(a), which states:

> In applying the provisions of this Convention, governments shall:
>
> (a) consult the peoples concerned through appropriate procedures and, in particular, through their representative institutions whenever consideration is being given to legislative or administrative measures that may directly affect them."

In other words, if we want to "regulate consultation," it has to be through a consultation process and not through a process designed to avoid dialogue and negotiation. This leads us to "consultation about the consultation."

It should be noted that the most recognized experts in negotiation processes are very clear about the need for a preliminary negotiation concerning the rules for negotiation: When and where should the negotiation take place and who should the participants be? Will decision-making be postponed until an agreement is reached, or not?

If this preliminary negotiation leads to an outcome supported by all, it would greatly facilitate the substantive negotiation that follows. Indeed, many negotiation experts suggest that once the preliminary rules are agreed upon, the negotiation that follows over substance is often surprisingly easy.

Background

Convention 169 entered into force in 1991. It has been ratified by 23 countries,[10] of which, 15 are Latin American republics.

> "Convention No. 169 concerns the situation of more than 5,000 indigenous and tribal peoples, constituting a population of more than 370 million, living in more than 70 countries in all regions of the world. These peoples possess diverse languages, cultures, livelihoods, and knowledge systems. However, in most countries, they face discrimination and exploitative labour conditions, which are interconnected with their generalized marginalization and situation of poverty."[11]

Although the indigenous population is no more than five percent of the world's total, indigenous communities occupy nearly 25 percent of the planet's surface, and their territories contain possibly 80 percent of our remaining biodiversity.[12]

> "Indigenous and tribal peoples are found in all regions of the world, from the Arctic to the tropical forests."

> "The situation of indigenous peoples has been a key concern for the ILO since its creation. Discrimination and exploitation of indigenous and tribal workers directly inspired the adoption of labour standards such as the ILO Forced Labour Convention, 1930 (No. 29). During the 1950s, it became increasingly clear that the labour conditions of these peoples were consequences of deep-rooted injustices and prejudices and intrinsically linked to broader issues of identity, language, culture, customs and land. Therefore, in 1957, and on behalf of the UN system, the ILO adopted the Indigenous and Tribal Populations Convention (No. 107). Convention No. 107 was the first international treaty dealing with the rights of indigenous peoples."[13]

The thrust of Convention No. 107 was intrinsically towards assimilation: the view that the only possible future was the integration of indigenous communities into the rest of society and that others had to make decisions about their development.

> In 1986, an expert committee convened by the ILO Governing Body concluded that "the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world." Consequently, the ILO revised Convention No. 107."[14]

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[10]See the ILO website, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300: 0:: NO:: P11300_INSTRUMENT_ID:312314

[11]ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169).* (2013).

[12] G. Raygorodetsky, *Indigenous peoples defend Earth's biodiversity—but they're in danger*, National Geographic, November 16, 2018, https://www.nationalgeographic.com/environment/2018/11/can-indigenous-land-stewardship-protect-biodiversity-/

[13]ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169).* (2013), p. 4.

[14]Idem.

This process led us to the current Convention adopted in 1989. It is important to note that none of the major states colonized by Anglo-Saxons that have indigenous populations have ratified ILO Convention 169, nor have they ratified Convention 107. Leadership in this area has been largely Latin American.[15]

The focus of Convention 169 has been to establish a process of consultation between national governments and indigenous and tribal peoples regarding decisions that are of importance to these communities and governments, as well as investors and others. The Convention established a balance. On one hand, in most circumstances, the Convention does not "provide a right of veto to indigenous peoples."[16] On the other hand, it is clear that "pro forma consultation or mere information will not meet the requirements of the Convention."[17] And in the modern world, it may not make much difference: more and more, companies have little interest in investing in places where they have no social license and are not wanted. And banks and other investors share that sentiment.

Of course, many point to the language of the 2007 United Nations Declaration requiring indigenous consent and the fact that the overwhelming majority of member states voted for it. For purposes of this article, the issue is not when and whether we, as authors, think consent is required, but what national supreme courts are willing to enforce.

The goal is, at a minimum, informed consultation that can reach an agreement and effective participation:

> [i]n order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner in accordance with its customs and traditions within the framework of continuous communication between the parties. Furthermore, the consultations must be undertaken in good faith using culturally-appropriate procedures and must be aimed at reaching an agreement."[18]

There is criticism of the Convention and the 2007 United Nations Declaration, which are said to establish "special" rights for indigenous communities and privilege their position in the decision-making process, putting the indigenous population in permanent conflict with their fellow citizens. However, in all societies, there are obvious differences between the different groups that compose them, and if we respect, for example, the right to control reproduction, which is a right we all have, it is clear that the application of this right will have different implications for women than for men.

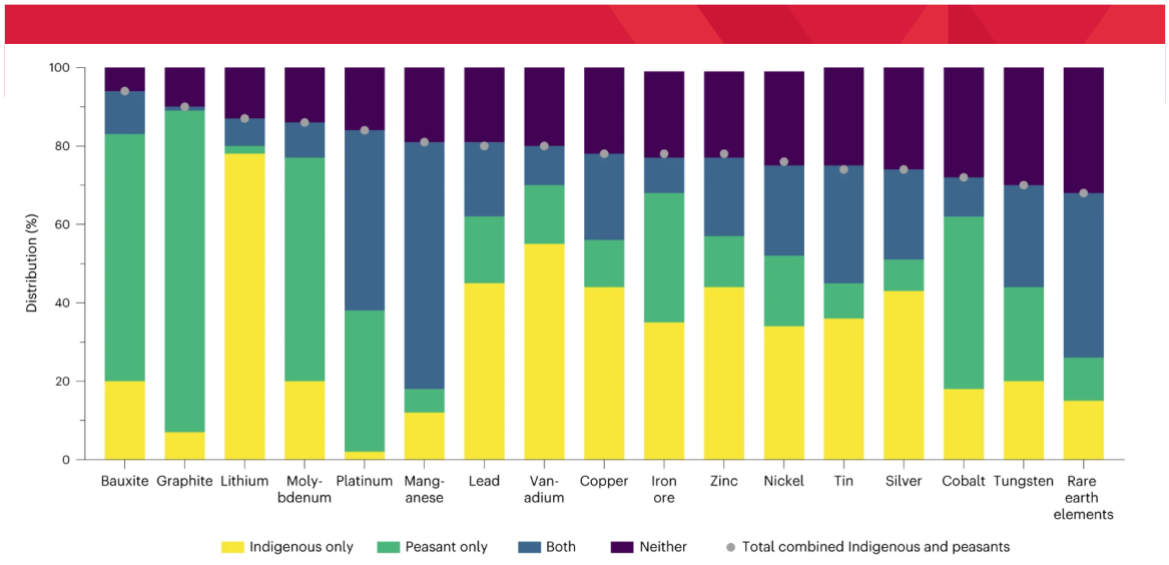
> "**Indigenous peoples' rights are not "special" rights but are articulations of universal human rights, as they apply to indigenous peoples**. This means

[15]Although there are notable advances in the decisions of the courts of Canada, and in provincial legislation such as the United Nations Declaration on the Rights of Indigenous Act of the Province of British Columbia.
[16]ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169).* (2013), p.17.
[17]CEACR, General Comment on Convention No. 169, formulated in 2010 and published in 2011.
[18]Kichwa Indigenous People of Sarayaku v. Ecuador, INTER-AMERICAN COURT OF HUMAN RIGHTS (June 27, 2012), p. 50, https://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

> contextualizing rights to the situation of indigenous peoples and taking the collective aspects of these rights into account. For example, indigenous children have the same right to education as all other children, but their distinct languages, histories, knowledge, values and aspirations should be reflected in education programs and services. The Convention thus provides for special measures to ensure effective equality between indigenous peoples and all other sectors of a given society."[19]

What we present in this paper is an overview of cases in which national courts are deciding that states have failed to properly implement the obligations they have assumed in the Convention. In part, this is due to the absence of laws or regulations that define clear procedures consistent with the Convention and accepted through consensus with affected indigenous and tribal communities. There are those who simply do not want to fulfill the obligations assumed by governments when ratifying the Convention, i.e., to share decision-making when it affects indigenous peoples or the resources and territories that are fundamental to their survival as cultures; however, in our view, this is not the path to development of our countries' indigenous inhabitants, and it is not the path to peace in these tragic, centuries-old conflicts.

We note that, at present, no issue in the minerals industries is more prominent than the issue of how to locate, mine, and process the vast quantities of minerals that will be needed for the transition to renewable energy. Many of these minerals are found on indigenous lands and, therefore, there is some danger that, without adequate recognition of the indigenous right to participate in decision-making, the "green energy" boom may yet be another round of despoliation of indigenous peoples in the search for minerals.



Owen, J.R., Kemp, D., Lechner, A.M. *et al.* Energy transition minerals and their intersection with land-connected peoples. *Nat Sustain* (2022). https://doi.org/10.1038/s41893-022-00994-6

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[19]ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169).* (2013), p. 3. Emphasis added.

Our group of authors is diverse. Some have been advocates for the rights of indigenous communities, others have held important positions in governments, and some have represented corporate interests. We come from a variety of countries, and we hope that this diversity of perspectives can lead us to a deeper understanding of these important issues.

Geographic distribution of Indigenous Chileans *at https://indigenouspeoplenet.wordpress.com/2022/07/04/indigenous-peoples-of-chile/*

II. REGULATION IN CHILE OF INDIGENOUS CONSULTATION UNDER ILO CONVENTION 169 by Sebastián Donoso

The regulation of the right and duty of indigenous consultation in Chile, as in other countries in the region, has been the subject of multiple debates. Although Chile's ratification of Convention No. 169 in 2008 concerning Indigenous and Tribal Peoples in Independent Countries ("Convention 169") was belated in comparison with several Latin American countries, Chile very quickly embarked on an effort to regulate the domestic right and duty of indigenous consultation ("indigenous consultation"). And although the regulation currently in force has been criticized by leaders and institutions representing indigenous peoples, one of its distinctive features is that it was subjected to a process of "consultation about the consultation" with indigenous peoples prior to its enactment.

This work aims to present a synthesis of the process of regulation in Chile of the indigenous consultation of Convention 169 in Chile and what the author considers to be some of the main

lessons learned from this process, with particular reference to the aforementioned process of "consultation about the consultation."

It should be noted, then, that this work does not seek to diagnose the current implementation status of indigenous consultation based on current regulations but rather to provide an overview of these regulations with special attention to the aspects that stand out most in the process of their elaboration, both substantively and procedurally, including those elements that could be improved.

1. Background

As a first step, it is necessary to present the background information that allows contextualizing the regulation of indigenous consultation within the framework of the legislation applicable to indigenous peoples in Chile. For this purpose, both the legal and institutional frameworks are summarily reviewed.

1.1. Legal framework

1.1.1 Constitutional recognition

The Political Constitution of the Republic of 1980 does not include an express recognition of the existence and rights of indigenous peoples. That it does so is a heartfelt demand of indigenous peoples and, until November 2019, it had not been possible to reach a consensus among the indigenous peoples, the executive branch, and the political forces represented in the National Congress on a constitutional reform project aimed at such recognition. However, within the framework of the serious social and political crisis unleashed in Chile in mid-October 2019, the main political parties and forces represented in the National Congress signed a high-level agreement to generate a new constitution, whose roadmap began with a plebiscite[20] that resolved two basic issues: 78.27% voted in favor of generating a new constitution, and 78.99% expressed their will to have the new constitution drafted by a constitutional convention elected entirely by popular vote. In that context, one of the aspects to be addressed was the participation of indigenous peoples in the constitutional convention. This issue was resolved by creating two mechanisms for the participation of indigenous peoples in the constitutional convention: on the one hand, the participation of indigenous peoples in the constitutional convention itself was established through 17 reserved seats (out of a total of 155) representing the 10 indigenous peoples recognized in Chile; on the other hand, the constitutional convention agreed to carry out a consultation process with indigenous peoples regarding the text of the new constitution.[21]

Among the more than 60 provisions concerning the recognition of indigenous peoples that were approved and were part of the proposal for a new constitution delivered to the country on July 4,

[20]Initially scheduled for April 26, 2020, it was rescheduled due to the health emergency caused by the Covid-19 pandemic and finally held on October 26 of the same year.

[21]The consultation process that took place was the subject of numerous criticisms from different actors for its short duration, low level of participation, and low incidence, considering that many of the regulations relating to indigenous peoples were approved and incorporated into the draft of the new constitution even before the beginning of the consultation process.

2022, two of them enshrined the *right and duty of indigenous consultation* at the constitutional level*: one establishing that "The State's pre-existing peoples and nations must be consulted and granted free and informed prior consent in those matters or issues that affect them in their rights recognized in this Constitution*," and another prescribing that "*Indigenous peoples and nations have the right to be consulted prior to the adoption of administrative and legislative measures that affect them. The State guarantees the means for their effective participation through its representative institutions in a prior and free manner through appropriate, informed, and good faith procedures*.

On September 4, 2022, in the so-called "exit plebiscite" that contemplated the constitutional itinerary, almost 62% of voters spoke out rejecting the proposal for a new constitution.

As of the date of the release of this article for publication, political actors have been negotiating the terms of a new constitutional itinerary, in whose debate one of the most relevant issues will undoubtedly be the incorporation of the right to consultation.

1.1.2 Indigenous Act of 1993

In October 1993, Act No. 19,253 on the Protection, Promotion, and Development of Indigenous Peoples (also known as the "Indigenous Act") a body of law came into force that could be considered the "framework law" applicable to the indigenous peoples of Chile. This law regulates a variety of matters but, as far as this work is concerned, it only contains a very generic rule of participation, its article 34,[22] which obliges the services of the State administration to listen to and consider the opinion of indigenous organizations when dealing with matters that have an influence on or relation to indigenous issues.

Article 34 of the Indigenous Act has never been subject to regulation and, in practice, has been scarcely implemented, except to the extent that the first regulation of indigenous consultation in Chile was formally implemented as a regulation of that provision in 2009.[23]

1.1.3 Convention 169

Section 2 explains the process of ratification and entry into force of Convention 169 in greater detail, as well as the itinerary and main characteristics of the process of regulation of indigenous consultation in Chile. For now, it should be noted that two provisions of Convention 169 relate to indigenous consultation and governmental administrative measures concerning productive activities: article 6 No. 1, paragraph a) and No. 2, and article 15, No. 2.

[22] Artículo 34.- The services of the State administration and territorial organizations, when dealing with matters that have an influence on or are related to indigenous issues, must listen to and consider the opinion of the indigenous organizations recognized by this law. Notwithstanding the foregoing, in those regions and communities with a high density of indigenous population, these, through their organizations and when permitted by current legislation, must be represented in the participating bodies that are recognized by other intermediary groups.

[23] This is Supreme Decree No. 124 of the Ministry of Social Development, dated September 4, 2009, referred to below.

1.2. Institutional framework

According to the Indigenous Act, the authorities and bodies of the State administration with responsibilities in matters of public policy toward indigenous peoples are the following:

(i) National Corporation for Indigenous Development (CONADI) is a public service created by the Indigenous Act of 1993 responsible for promoting, coordinating, and executing State action in favor of the integral development of indigenous peoples and communities, especially in economic, social, and cultural areas, and encouraging their participation in national affairs. Its highest governing body is a National Council comprised of 17 members, 8 of whom are elected by indigenous peoples. A National Director, appointed by the executive authority, presides over this council and administers the institution.

(ii) The Ministry of Social Development has the responsibility of overseeing the National Corporation for Indigenous Development.

Notwithstanding the provisions of the law, at the level of the executive branch, the roles and responsibilities in matters of public policy towards indigenous peoples have varied over the years as a reaction to different situations and crises. Thus, in the period from 1993 to 2000, the Director of CONADI had a leading role; between 2000 and 2006 this role passed to the Undersecretary of the Ministry of Social Development (then Ministry of Planning), who received the position of "Coordinator of Indigenous Policies and Programs." In 2008, the post of Presidential Commissioner for Indigenous Affairs emerged. In 2009, it was replaced by a Coordinating Minister for Indigenous Policies and Programmes, the latter of which was the responsibility of the Minister Secretary-General of the Presidency. Between 2010 and 2014, a Special Adviser for Indigenous Affairs acquired a leading role based first in the Ministry of the General Secretariat of the Presidency and subsequently in the Ministry of Social Development, while the head of the latter ministry gained new prominence, a situation that remains to date.

Thus, at present, the Ministry of Social Development is the body that leads the formulation and implementation of public policy towards indigenous peoples in Chile, including all matters related to indigenous consultation, for which it has a specialized department called the "Indigenous Affairs Coordination Unit." The foregoing is notwithstanding the recognition of the important role of other ministries in matters such as Education, Health, Agriculture, Justice and Human Rights, etc., as well as the importance that the role of the Minister of the Interior plays when it comes to matters of security and public order.

2. Chile's Ratification of Convention 169 and Regulation of Indigenous Consultation

Having reviewed the legal and institutional framework that gives context to the subject matter of this paper, it is now necessary to explain the main aspects of the process of ratification of Convention 169 by Chile and the subsequent process of regulation of the rights to indigenous consultation.

2.1. Ratification and entry into force of Convention 169

Convention 169 was ratified by Chile on September 15, 2008 after almost 18 years of parliamentary discussion in the National Congress. Therefore, in accordance with its provisions, Convention 169 entered into force in Chile on September 15, 2009. Although approval in the Senate was conditional on the formulation of an interpretative declaration on the scope of article 35 of Convention 169, such an interpretative declaration was never formulated, which the government at the time justified based on an exchange of correspondence with the office of the International Labour Organization, which would have generated the conviction that such an interpretative declaration was not necessary.

It is important to mention that, between the approval of Convention 169 by the Senate in March 2008 and its entry into force in September 2019, great expectations were generated among indigenous peoples –as was expected– regarding the impacts that the implementation of the treaty would have on domestic regulations. At the same time, the environmental or sectoral permits authorizing the development of several public and private investment projects (some of them emblematic, such as the construction of a new airport in the region of La Araucanía) were challenged in the courts of justice on the grounds that indigenous consultation had not been complied with.

In this scenario, as of 2009, the main objectives of regulation of indigenous consultation under Convention 169 were foreseen as follows:

(i) To comply with the provisions of Convention 169, particularly with respect to the duty of prior indigenous consultation established for governments in Article 6, No.1, paragraph a) and No.2 of said treaty; and
(ii) To provide greater legal certainty to the administrative and legislative activity of the State, and particularly to the development of investment projects.

2.2. Regulation of indigenous consultation

2.2.1 Early regulation of indigenous consultation: Supreme Decree No. 124 of 2009

Only ten days after Convention 169's entry into force in Chile, on September 25, 2009, Supreme Decree No. 124, issued by the Ministry of Social Development, entered into force, whose objective was to regulate indigenous consultation of Convention 169 ("SD 124").[24]

[24]Article 1 of SD 124 established the purpose of this regulation as follows: "Article 1.- Purpose of the Regulation. These regulations regulate the obligation of State administration bodies to hear to and consider the opinion of indigenous organizations when dealing with matters that have an influence on or are related to indigenous issues, established in article 34 of Law No. 19,253. This obligation is embodied in the consultation and participation of indigenous peoples enshrined in article 6, No. 1 paragraph (a) and No. 2, and article 7, paragraph 1, final decision of International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, promulgated by Supreme Decree No. 236 of 2008 of the Ministry of Foreign Affairs."

At this point, it is appropriate to transcribe the text of Article 6 of Convention 169 in the part that enshrines the right to consultation:

> "1. In applying the provisions of this Convention, Governments shall:
>
> (a) consult the peoples concerned, through appropriate procedures and, in particular, through their representative institutions whenever consideration is being given to legislative or administrative measures that may directly affect them (...);
>
> 2. The consultations carried out in application of this Convention shall be undertaken in good faith and a form appropriate to the circumstances with the objective of achieving agreement or consent to the proposed measures."

However, this regulation was not subjected to a process of "consultation about the consultation," which is why it was harshly criticized and resisted by the main indigenous organizations and leaders. The above, although SD 124 itself implied that it was a provisional regulation and that, together with its entry into force, a consultation process of consultation about the consultation should begin immediately.

SD 124 was repealed with the entry into force of the current regulation on indigenous consultation on March 4, 2014.

2.2.2 Regulation of indigenous consultation currently in force

As of March 2010, and given the experience that was accumulating with the implementation of SD 124 and the judicialization of public and private projects, the government at that time decided to move forward with two regulations on indigenous consultation:

(i) Regulation of indigenous consultation of the environmental permit or license insofar as it is the main administrative measure that authorizes investment projects. This effort resulted in the issuance of Supreme Decree No. 40/2012 of the Ministry of the Environment, which entered into force on December 24, 2013 ("SD 40").

(ii) Regulation of indigenous consultation for the rest of the administrative measures as well as legislative measures. This effort resulted in the issuance of Supreme Decree No. 66/2013 of the Ministry of Social Development, which entered into force on March 4, 2014 ("SD 66").

Both regulations will be referred to in greater detail below.

2.3. Consultation about the consultation

It is important to note that both SD 40 and SD 66 were subjected to processes of "consultation about the consultation," even though some details of these processes won't be provided until later on:

- Supreme Decree No. 40: SD 40's consultation about the consultation began in April 2011 and culminated in August 2012.
- Supreme Decree No. 66: SD 66's consultation about the consultation began in March 2011 and culminated on October 29, 2013 with the issuance of the final report of the process.

3. Critical Elements in the Regulation of Indigenous Consultation

This section presents the elements that, according to the Chilean experience, are considered critical in the regulation of indigenous consultation under Convention 169.

3.1. Consultation about the consultation

Processes are as important as results. The Chilean experience shows that the prior development of a process of consultation of the regulation of indigenous consultation, also called "consultation about the consultation," apart from being an obligation, is critical for the regulation to enjoy social legitimacy and, therefore, fulfill the objective for which it is dictated. In fact, if the purpose of any indigenous consultation is to reach an agreement or obtain consent regarding the issuance of the respective measure, it is essential that the regulation of indigenous consultation itself is, in turn, the result of a process that has had the same purpose and resulted in as many agreements as possible on the matters included in said regulation. Section 4 will refer to the lessons learned from the process of consultation about the consultation in Chile.

3.2. Content of the regulation

From the point of view of its content, several regulatory elements appear critical in the regulation of indigenous consultation according to the Chilean experience. The main ones are listed below.

3.2.1 Definition of "administrative measure"

As can be seen in its text already transcribed, article 6 No. 1 paragraph a) of Convention 169 obliges governments to consult the "administrative measures which may directly affect indigenous peoples." From this point of view, the duty of indigenous consultation is a "double entry point;" on the one hand, it requires defining which administrative measures are subject to the duty of consultation; and, on the other hand, when it is understood that a government measure may affect indigenous peoples directly."

With regard to the scope of the concept of "administrative measure," it is critical for two reasons: (i) it requires a definition of which are those that, among the innumerable administrative measures dictated by governments in the exercise of executive power, must be submitted to indigenous consultation since it is the administrative measures that may directly affect them that are subject to this obligation; and (ii) it requires reaching a consensus (or attempting to reach a consensus) with indigenous peoples on this definition.

Here a first and inevitable tension is revealed: As a general rule, governments try to narrow the spectrum of administrative acts included in this definition and therefore subject to indigenous consultation, given the cost, complexity, and longer processing times involved in indigenous consultation processes; meanwhile (also as a general rule), indigenous peoples aspire to include all administrative measures dictated by governments within the scope of the consultation, without distinctions or *a priori* exclusions.

3.2.2 Definition of criteria to ascertain when an administrative measure may affect indigenous peoples directly

A second extremely critical element is the definition of criteria to ascertain when an administrative measure may affect indigenous peoples directly. According to Article 6 No.1 paragraph a) of Convention 169, not all administrative measures potentially affecting indigenous peoples are required to be subjected to indigenous consultation but only those that may "directly" affect them.

A second tension is revealed here: on the one hand, governments try to objectify the criteria, as much as possible, according to which it is considered that an administrative measure may affect indigenous peoples directly; and, on the other hand, indigenous peoples argue such criteria are essentially subjective and that concurrence must be evaluated based on aspects that only they can perceive or determine. Alternatively, at a minimum, indigenous peoples expect the definition of said criteria to include a subjective component, albeit in combination with objective aspects.

3.2.3 Purpose of indigenous consultation: reaching an agreement or obtaining consent

A third element of particular criticality is the purpose of the consultation. According to Article 6, paragraph 2, of Convention No. 169, governments are required to conduct consultations "with the objective of achieving agreement or consent to the proposed measures." It is fundamental and essential that the regulation of consultation expressly establishes this purpose and structures the stages of the process so that this purpose is effectively pursued.

The ILO Committee of Experts on the Application of Conventions and Recommendations established the following concerning the purpose of consultations in its 2011 General Comment on the consultation obligation of Convention 169:[25]

> *1. consultations must be formal, full, and conducted in good faith;* ***there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith, and a sincere desire to reach an agreement****.*

[25] CEACR ILO (2011): General Comment 2011, Indigenous and Tribal Peoples Convention, 1989 (No.169).

> ***<u>Consultations should be conducted to reach an agreement or obtain consent on the proposed measures</u>***.
> ***It follows from the foregoing that pro forma consultations or simple information will not meet the requirements of the Convention***. *At the same time, such consultations do not imply a right of veto nor will their result necessarily be to reach an agreement or obtain consent"* (emphasis added).

Regarding the purpose of the consultation, the Inter-American Court of Human Rights, in its decision dated June 27, 2021, in the case "Kichwa Indigenous People of Sarayaku v. Ecuador," ruled that "*The consultations must be carried out in good faith and a manner appropriate to the circumstances, in order to reach an agreement or obtain consent on the proposed measures. In addition, the consultation should not be exhausted in a mere formal procedure but should be conceived as a true instrument of participation that should respond to the ultimate objective of establishing a dialogue between the parties based on principles of mutual trust and respect, and reach a consensus between them. Good faith requires the absence of any form of coercion by the state or agents or third parties and is incompatible with practices such as attempts to disintegrate the social cohesion of affected communities, whether through the corruption of community leaders or the establishment of parallel leaderships or through negotiations with individual members of communities that are contrary to international standards*.

3.2.4 Defining the influence or "binding nature" of indigenous consultation.

A fourth critical element, closely related to the previous one, is the definition of the type of influence or degree of obligation that the participation and opinion delivered by indigenous peoples generate in an indigenous consultation process.

Here a third tension between governments and indigenous peoples becomes apparent. Governments assert their sovereignty and therefore resist the possibility that the opinion of indigenous peoples may operate as a "right of veto" concerning the decisions they plan to adopt in the exercise of that sovereignty. Meanwhile, indigenous peoples argue that their opinion should be binding on the understanding that the standard of influence of indigenous consultation –insofar as its ultimate basis is the right to freely decide their development priorities in accordance with article 7 of Convention 169– should be equivalent to the standard of free, prior and informed consent established by the United Nations Declaration on the Rights of Indigenous Peoples (2007), assimilating the latter to a right of veto.

In the author's opinion, this discussion is not well-focused and the binding nature of the indigenous consultation must be approached differently. Indeed, if the outcome of an indigenous consultation process is an agreement with the peoples consulted, there can be no doubt that such an agreement is binding on the respective government. On the other hand, if the result of the consultation process is a disagreement with the peoples consulted, it could be argued that the result of said process is not binding in the sense that it does not imply a right of veto, but it can also be understood as

binding insofar as the government must necessarily take into account and consider the opinion received from the indigenous peoples when issuing the respective measure.[26]

3.2.5 Applicable principles

Finally, the definition of the principles applicable to indigenous consultation is also critical. Here the principle of good faith first appears which, having an express basis in Convention 169, requires a greater regulatory density that allows it to be transformed into an operating principle of indigenous consultation. Also relevant as a principle is the search for symmetry or equality between governments and indigenous peoples because a process of indigenous consultation in an "uneven playing field" makes it very difficult for there to be a genuine dialogue and a search for agreements. Finally, the principle of flexibility emanating from article 34 of Convention 169 itself cannot be forgotten, according to which governments have a margin of flexibility to implement Convention 169 (and indigenous consultation as part of it) considering the particularities of the country itself, flexibility that certainly cannot affect rights in their essence.

4. Lessons Learned from the Process of Consultation About Consultation

This section identifies the main lessons learned from the consultation process for the regulation of indigenous consultation (also known as "consultation about the consultation") currently in force in Chile. In fact, as anticipated, both SD 40 and SD 66 were subject to processes of "consultation about the consultation" prior to their issuance, an element that has been indicated as critical in the regulation of the right and duty of indigenous consultation.

4.1. Importance of reaching a consensus on methodology

The first lesson learned is the importance of reaching a consensus with indigenous peoples on the *consultation* methodology or, at least, clearly informing them of such methodology if such consent is not possible in whole or in part. This is a complex issue considering that *consultation about the consultation* is usually conducted without a regulatory parameter at the domestic level regarding the methodology to be observed since such a process seeks precisely that. Thus, the methodology of *consultation about the consultation* is important not only because it must guarantee the exercise of the right to consultation itself, but also because the lack of agreement regarding it could significantly affect the legitimacy of the process and therefore all the effort involved in the regulation of indigenous consultation.

[26]HARTLING, Jay (2017): *Guide to Good Practices for Prior Consultation in the Americas*, Regional Program of "Indigenous Political Participation" in Latin America, Konrad Adenauer Stiftung Foundation, p. 12. Jay Hartling argues that a meaningful consultation is one in which "*the parties should reach agreement on whether or how to proceed with the project. This includes agreements on prevention and mitigation measures, as well as any compensation and/or economic benefits, and others. It is not always possible to reach an agreement. In this case disagreements should also be taken into account and recorded by the process*."

4.2. Critical importance of indigenous representation in the process

The second lesson is the critical importance of indigenous representation in the process. It is not uncommon for indigenous peoples to challenge or criticize consultation processes on the grounds that indigenous participants have not been validated to represent them or do not adequately embody the plurality of visions that exist among them. Governments are always tempted to invite indigenous leaders to these processes with whom there is better dialogue and understanding, or who have a positive attitude towards the project or measure in question. This implies that many highly relevant voices may be left out of the process, including those who have a critical or negative opinion of the project in question and who are therefore very important to consider. The latter not only constitutes a problem in itself but could also become a reason to later challenge the legitimacy of the process.

4.3. Relevance of installing a robust process in all its stages and particularly in the stages of information, internal deliberation, and dialogue to reach agreements

The third lesson learned is the relevance of a *consultation* process being as robust as possible in all its stages, particularly in the stages of information, internal deliberation of indigenous peoples, and dialogue between the government and indigenous peoples, where there must be a genuine willingness on the part of both in order to reach agreements.

In the case of SD 66, between March 2011 and March 2013, the consultation about the consultation had a total of 298 meetings or workshops for information and internal deliberation of indigenous peoples. Meanwhile, as a result of the internal deliberation of the indigenous representatives, the government received 11 counterproposals for the regulation of indigenous consultation. Later, the dialogue stage was especially manifested in the so-called "Consensus Roundtable" with the participation of representatives of the government and indigenous peoples, who met between March and August 2013 –with a total of 22 meetings in 5 months– and worked intensively reviewing each article of the government's regulation proposal until agreeing on its text or placing the disagreement on record regarding all or some of its aspects.

4.4. Participation of the United Nations and other observers

Another lesson learned is the importance of including some kind of participation of the relevant United Nations bodies in the process when dealing with indigenous peoples' rights, as well as the participation of an independent external observer. Both measures provide greater guarantees to indigenous peoples that the process will be carried out with respect for human rights and, in particular, the rights of indigenous peoples. In the case of SD 66, the Chilean government sent the proposed regulation to the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, who, in turn, sent his comments on it and also participated in the opening session of one of the days of the "Consensus Roundtable" by videoconference. In addition, representatives of the United Nations System in Chile and the National Institute of Human Rights of Chile were invited to participate as observers, the latter having prepared a report of their observation in which they reported on the efforts made by both parties to reach agreements.

4.5. Importance of the existence and recording of agreements (and disagreements)

An additional lesson is the importance of the process of explicitly recording agreements and disagreements. If, after a process of *consultation about the consultation* there is no document that clearly and explicitly records the agreements and disagreements that have resulted from the dialogue stage, then it will be difficult to demonstrate that the process was actually carried out with the intention of reaching an agreement and there will be no official evidence that would allow for follow-up and ensuring compliance with the agreements.

4.6. Importance of using the language of Convention 169

Another lesson of the Chilean experience is the importance of using the language of Convention 169, especially in those provisions of the regulations that refer to the regulatory standards and fundamental principles of indigenous consultation. Doing so is not only consistent with the nature of the regulation of indigenous consultation when exercising the regulatory power of the regulation that motivates it –Article 6 of Convention 169 –but also generates greater confidence in indigenous peoples.[27]

4.7. Importance of the incidence of indigenous peoples in the text of the regulations

Finally, related to point 4.5 above, it is very important that the regulations resulting from the process of consultation about the consultation can show how indigenous peoples have influenced such regulations. In the case of SD 66, this influence was evidenced by the fact that approximately 80% of the provisions were agreed upon in their text at the Consensus Roundtable and, consequently, were the subject of agreements. In the case of SD 40, the influence of indigenous peoples through consultation is reflected, for example, in Articles 5 to 10 and 85, which regulate the scenarios of significant impacts or susceptibilities to being affected that trigger the need to submit an investment project to indigenous consultation, which, in the originally proposed text, were more limited and, as a result of the consultation, were expanded at the request of the indigenous peoples.

5. Main Elements of the Regulation of Indigenous Consultation in Chile

This section presents the main elements of the regulation of indigenous consultation in Chile.

[27] An example of this is Article 2 of SD 66: "**Article 2.- Consultation.** Consultation is a duty of the organs of the State Administration and a right of indigenous peoples susceptible to being directly affected by the adoption of legislative or administrative measures, which is carried out through an appropriate procedure and in good faith, in order to reach an agreement or obtain consent about the measures likely to directly affect them and which must be carried out in accordance with the principles set out in Title II of these regulations.

5.1. Supreme Decree No. 66/2013 of the Ministry of Social Development – "General Consultation Regulations"[28]

- Scope: it regulates the consultation of all administrative measures, other than the environmental permit or license, as well as the consultation of legislative measures. That is why it is also called "general consultation regulation." According to its Article 7,

> *The bodies of the State Administration indicated in article 4 of these regulations shall consult indigenous peoples whenever administrative or legislative measures susceptible to directly affecting them are foreseen.* (…) *Administrative measures susceptible to directly affecting indigenous peoples are those formal acts issued by the bodies that form part of the State Administration and that contain a declaration of will, whose very non-regulated nature allows these bodies to exercise a margin of discretion that enables them to reach agreements or obtain the consent of indigenous peoples in their adoption; and, when such measures are a direct cause of a significant and specific impact on indigenous peoples in their capacity as such, affecting the exercise of their ancestral traditions and customs, religious, cultural or spiritual practices, or the relationship with their indigenous lands*" (emphasis added).

- Party responsible for developing the consultation: every State administration body that will dictate the respective measure.

- Opportunity: prior to the issuance of the respective measure.

- Participating institutions representing indigenous peoples: these are identified in the resolution initiating the indigenous consultation and include institutions representing indigenous peoples that may be directly affected according to the scope of the respective measure. Excluded institutions may request their inclusion and the respective body must decide by means of a well-founded resolution.

- Stages: a minimum of five stages are established for any "appropriate procedure" for indigenous consultation:

  (i) planning of the consultation process;

  (ii) delivery of information and dissemination of the consultation process;

  (iii) internal deliberation of the indigenous peoples;

[28]Supreme Decree No. 66 of the Ministry of Social Development dated November 15, 2013, which "Approves regulations regulating the indigenous consultation procedure pursuant to Article 6 No.1 paragraph a) and No.2 of Convention No. 169 of the International Labour Organization and repeals the regulations it indicates." It was published in the Official Gazette on March 4, 2014 and entered into force on the same date.

(iv) dialogue; and

(v) systematization, communication of results, and conclusion of the consultation process.

- Deadline for its development: each of the stages must be executed within a period not exceeding 20 working days but, at the planning stage, this deadline can be modified in agreement with the indigenous peoples consulted.[29]

- Contribution of resources for greater symmetry or equality: this is regulated as part of the principle of good faith that governs the consultation, according to which the respective body must contribute resources to favor an equal footing in the development of the process so that the indigenous peoples consulted can hire independent advisors. The amounts to be contributed are left to the good judgment and budgetary availability of the respective body.

- Participation of private parties: not explicitly regulated but not expressly excluded.

- Purpose: by express provision of articles 2, 3, and 8, the purpose of the consultation process must be to reach an agreement or achieve free, prior and informed consent on the respective measure. In fact, under the heading "Fulfillment of the duty of consultation," Article 3 is explicit regarding the standard required of the government:

  > ***The responsible body must make the necessary efforts to reach the agreement or consent of the affected peoples, complying with the principles of consultation through the procedure established in these regulations***. *Under these conditions, the duty of consultation will be considered fulfilled even if it is not possible to achieve this objective*" (emphasis added by the author).

- Recording agreements and disagreements: they must be recorded in minutes that must also give an account of the follow-up and monitoring mechanisms and actions.

- Implementation: to date, more than 100[30] indigenous consultation processes have been carried out or are in progress under this regulation. Consultation processes under these regulations have been concentrated in the Ministry of Social Development (the body in

[29]In the case of consultation of the legislative measures to be initiated by a message from the President of the Republic, each of the stages must be executed within a period not exceeding 25 working days, and the same rule applies to the modification of the deadline for the consultation of the administrative measures.

[30]This is an approximate number since there are no updated and publicly accessible statistics on indigenous consultation processes developed under the current regulations. A report commissioned by the Government of Chile ("Systematization and analysis of experiences of the exercise of the right of prior consultation from the institutional level in Chile," developed by the Faculty of Law of Universidad de Chile) identified a total of 129 consultation processes developed up to December 2017. However, this figure includes all the consultation processes developed in Chile up to that date, covering the previous regulations and both processes developed by the Environmental Assessment Service and by the rest of the administration. Notwithstanding the foregoing, according to unofficial data obtained within the framework of this work, as of November 2021 a total of 102 indigenous consultation processes had been developed or were underway outside the framework of the Environmental Impact Assessment System.

charge of the policy on indigenous peoples) in the sectoral ministries that administer programs relevant to indigenous peoples such as the Ministry of Education, or in ministries whose measures are more susceptible to directly affecting them given their competence such as the Ministry of Public Works, the Ministry of National Assets, the Ministry of Culture, Arts and Heritage and the Ministry of the Environment.

5.2. Supreme Decree No. 40/2012 of the Ministry of the Environment, Regulation of the Environmental Impact Assessment System[31]

- Scope: regulates indigenous consultation only for the administrative measure consisting of the environmental permit or license. This regulation has a broader scope as it regulates the Environmental Impact Assessment System, one of whose instruments of participation is indigenous consultation.

- Party responsible for developing the consultation: the Environmental Assessment Service.

- Opportunity: prior to the issuance of the environmental permit called the "Environmental Qualification Resolution" or "EQR."

- Participating institutions representing indigenous peoples: those identified in the resolution initiating the indigenous consultation process. In the Environmental Impact Assessment System, institutions representing indigenous peoples are called *Human Groups Belonging to Indigenous Peoples* ("GHPPI" for its acronym in Spanish) and include all types of groups and institutions, regardless of their form of organization, provided that they receive significant impacts or susceptibility to being affected by the investment project. Before and after the issuance of the resolution of initiation, the GHPPIs that consider themselves entitled to be consulted may request their inclusion in the process and the Environmental Assessment Service must decide by means of a well-founded resolution.

- Stages: the same stages established by SD 66 apply by express provision of Article 8 of the latter:

> "*The resolution of environmental qualification of projects or activities that enter the Environmental Impact Assessment System, in accordance with the provisions of Article 10 of Law No.19,300, and that requires an indigenous consultation process in accordance with the provisions of said regulations and their rules,* ***will be consulted in accordance with the regulation of the Environmental Impact Assessment System, within the terms established by said regulation but respecting Article 16 of this instrument with regard to the stages of said consultation***" (emphasis added by the author).

[31]Supreme Decree No. 40 of the Ministry of the Environment dated October 30, 2012, which "Approves regulation of the Environmental Impact Assessment System." It was published in the Official Gazette on August 12, 2013 and entered into force on December 24, 2013.

- Deadline for its development: within the term contemplated for the environmental assessment of investment projects but, in any case, it must end before the issuance of the Environmental Qualification Resolution.

- Contribution of resources for greater symmetry or equal footing: there is no express rule in SD 40, but the same principle of SD 66 applies. In fact, the Environmental Assessment Service has budget availability to provide resources to the GHPPI consulted for this purpose.

- Participation of private parties: the SD 40 does not refer to such participation but is expressly included in an ad-hoc instruction issued in August 2016 that is mentioned below and that recommends –for the dialogue stage– the holding of meetings with the project owner applying for the EQR, which have been called "tripartite meetings." This makes sense and is important to the extent that the agreements adopted in the indigenous consultation refer to environmental measures and voluntary commitments that the project owner assumes and must execute and whose compliance is audited by the Superintendency of the Environment.

- Purpose: by express provision of article 85, paragraph 2, of this regulation, the consultation process "shall *involve the affected indigenous peoples exclusively and* ***shall be carried out with the purpose of reaching an agreement or obtaining consent****. However, failure to achieve this purpose does not imply that the right to consultation is affected*" (emphasis added by the author).

- Recording agreements and disagreements: they must appear in a document called the "Final Agreement Protocol in which, according to the instructions mentioned below, "the *final agreements and disagreements reached during the Consultation between the SEA and the consulted GHPPI are placed on record. The Protocol must contain a specific chapter in which the mechanisms and actions for follow-up and monitoring the agreements reached are taken into account*. However, it is a growing practice for consultation processes that end in disagreement to be placed on record in a document that has been called the "Non-Agreement Protocol," a title that is more consistent with the nature of the outcome of the process.

- Implementation: To date, 58[32] indigenous consultation processes have been carried out or are in process under this regulation, a significant number of which have fallen on mining investment projects and electricity generation and transmission projects.

  Through Ordinary Official Letter No. 161116 dated August 24, 2016, the Executive Director of the Environmental Assessment Service issued an "Instruction on Implementation of the Indigenous Peoples Consultation Process in accordance with

[32]See comment included in note 11. Notwithstanding the foregoing, according to unofficial data obtained within the framework of this work, a total of 59 indigenous consultation processes relating to investment projects within the framework of the Environmental Impact Assessment System had been developed or were underway until November 2021.

Convention No. 169 in the Environmental Impact Assessment System," which details the requirements, actors, stages, and milestones of this process.

On the other hand, Ordinary Official Letter No. 202199102543 of the Executive Director of the Environmental Assessment Service, dated July 19, 2021, "Issues *instructions in relation to the application of article 86 of Supreme Decree No. 40 of 2012, of the Ministry of the Environment*." Although these meetings are not strictly part of the indigenous consultation process, they are key for several purposes, one of which is that they can generate relevant inputs for the decision to be made by the Environmental Assessment Service regarding which GHPPI to include in the indigenous consultation process, or regarding what effects generated by the respective project should be included in the scope of the process.

6. Final Reflections and Some Suggestions for Improvement to the Regulation of Indigenous Consultation

Below, by way of closure, are some reflections and suggestions for improving the regulation of indigenous consultation based on expert opinions concerning the experience accumulated in its implementation. These reflections and suggestions relate mainly to the regulation of the consultation of the EQR or administrative measure authorizing an investment project.

6.1. Continuous improvement

The current regulation of indigenous consultation in Chile represents an important institutional effort to fully implement the right and duty of indigenous consultation. However, naturally, it is a regulation that can and should be refined as experience is accumulated in its implementation. On the other hand, the fact that there are sensitive aspects of this regulation that were not subject to agreement with indigenous peoples in the process of "consultation about the consultation" –such as the definition of administrative measures subject to the duty of consultation and the definition of criteria to ascertain when an administrative measure may affect indigenous peoples directly– suggests that there must be openness on the part of all parties but especially the State of Chile to continue the dialogue in the search for consensus on these aspects. From this point of view, it can be said that any regulation on indigenous consultation must be open to a process of "continuous improvement" to introduce those adjustments that are deemed necessary to achieve processes that adequately comply with the objective of the consultation.

6.2. Scope of indigenous consultation concerning the definition of administrative measures subject to the obligation of consultation and the definition of criteria to ascertain when an administrative measure may directly affect indigenous peoples

As indicated above, the definition of administrative measures that are subject to the obligation of consultation and the criteria to ascertain when an administrative measure may affect indigenous peoples directly are areas of tension between Governments and indigenous peoples. This work is

not intended to –nor could it– exhaust the discussion in this regard. It does, however, propose to contribute some reflections that will help to properly situate the debate.

In fact, both definitions –the scope of the measures requiring consultation and the definition of criteria to ascertain when an administrative measure may affect indigenous peoples directly– move along the same axis: the extension or restriction of the hypothesis of administrative measures that must be subject to consultation. In the case of the indigenous consultation of the EQR (a measure that authorizes investment projects or not), Professor Manuel Núñez argues that the requirement of the regulation in terms of the "duration," "extension" or "magnitude" that an impact must have for the consultation to proceed "*must be interpreted as an objective requirement necessary to maintain the concept of "direct impact" within margins that prevent emptying its content. This is a natural consequence of the proportionality requirements that prevent two possible absurd senses of Convention 169: that everything should be consulted or that nothing should be consulted. To avoid the first extreme (that everything is consulted), these criteria of significance make it possible to discern situations that are irrelevant in terms of perception or impact from those that are sufficiently important to reasonably affect a human group. On the other hand, to avoid the second extreme (that nothing is consulted), this minimum objectification must be complemented with the weighting of "ways not felt by others in society" as a pattern to discern the need for consultation*.[33]

A similar tension arises regarding the nature of the regulatory criteria that allow for determining when an administrative measure may directly affect indigenous peoples. In this regard, Professor Núñez argues that a *"combination of objective and subjective criteria, based on a reading of the law that is in accordance with international law, has the advantage of not leaving all the weighting of the premises of the consultation in the hands of the State (with the consequent restriction or distortion that worries international observers) nor the conditions of validity of all administrative measures at the mercy of purely subjective assessments (with the consequent uncertainty that would result for all activities susceptible to being objected to because of the interests of the communities).*"[34]

The question of the scope of the consultation is and will continue to be a matter of debate. Within the framework of the Environmental Impact Assessment System, one of the aspects that generates the greatest tension is the fact that the consultation is only appropriate in projects that are evaluated through the tool known as the Environmental Impact Study in circumstances where the vast majority of investment initiatives are evaluated through the instrument known as the Environmental Impact Statement. While the above has a regulatory rationale and justification, it cannot be ignored that it is a definition that strains the system as a whole. In the case of the actions of the rest of the State administration bodies, one of the aspects that strains the system is the regulatory definition with respect to what measures the consultation is appropriate and when indigenous peoples may be directly affected. On all these points there is not only academic debate but also judicial decisions that have been evolving as briefly discussed at the end of this work.

[33]NÚÑEZ, Manuel (2014): "The indigenous consultation in the environmental qualification procedure: regulatory development and judicial configuration," *Public Law Yearbook 2014*, Diego Portales University, p. 329.
[34]NÚÑEZ, Manuel (2014): "The indigenous consultation in the environmental qualification procedure: regulatory development and judicial configuration," *Public Law Yearbook 2014*, Diego Portales University, p. 330.

6.3. Recourse and access to justice

Availability of remedies and access to justice are aspects highlighted in the Final Report of the Presidential Advisory Commission for the Evaluation of the Environmental Impact Assessment System published in 2016:[35] "*communities that participate in an indigenous consultation process are not entitled to appeal against the EQR, except for the remedies supplementarily established in Law No. 19,880*." The regulation of the indigenous consultation was the consequence of an amendment introduced in 2010 to Chile's environmental framework law, which was followed by the enactment of the law that created the environmental courts and defined their competence. Both legislative initiatives failed to establish the power of indigenous peoples participating in an indigenous consultation process to have a remedy against the EQR (a measure that authorizes investment projects or not) in the event that the right to consultation is not respected. This failure is unjustified since anyone who makes observations on an investment project within the framework of citizen environmental participation (generic participation procedure open to non-indigenous and indigenous people) has the right to appeal against the EQR if their observations are not considered. Therefore, with equal or greater reason, this right should be recognized for groups belonging to indigenous peoples that participate in a consultation process, considering that the purpose of this last process must be to reach an agreement or obtain consent, i.e., a degree of stronger influence than that of general citizen participation. Because of this omission, indigenous groups that want to protect their right to claim against the EQR are forced to make observations in the general citizen environmental participation procedure, which is a contradiction in terms since a participatory procedure has been established –indigenous consultation– which is ad-hoc and exclusive for indigenous peoples.

6.4. Jurisprudence

In the first years after the entry into force of Convention 169 in Chile (2009-2014), especially in the period that elapsed under the first regulation on consultation, challenges to decisions of the authorities in which, according to indigenous peoples, the right to consultation had not been respected were almost exclusively channeled through a constitutional action known as a "remedy of protection" or injunction. Through this "remedy of protection," indigenous peoples challenged these decisions by arguing, materially, the omission of indigenous consultation but basing the challenge on the violation of guarantees and rights that have constitutional consecration, such as the guarantee of equality before the law or the right to live in an environment free of pollution. At this stage, most of the remedies claimed the absolute omission of the duty of consultation or challenged the suitability of processes of citizen environmental participation through which the administration claimed to have developed indigenous consultation or channeled indigenous participation.

At present, despite challenges calling for the absolute omission of the duty of indigenous consultation, as the implementation of the latter is strengthened, an increasing number of actions are filed by groups belonging to indigenous peoples that claim their exclusion from the consultation processes that have been developed. In this context, unlike the first stage mentioned above, an increasing number of actions are currently being heard in the administrative seat and

[35]PRESIDENTIAL ADVISORY COMMISSION FOR THE EVALUATION OF THE SEIA (2016): Final Report, Ministry of the Environment, p. 121.

environmental courts, a specialized jurisdiction created in 2012. This trend has been largely due to the jurisprudence of the Supreme Court, which has held in numerous rulings that the remedy of protection is a constitutional action that is reserved for those cases in which there is a need for an "urgent precautionary measure" of fundamental rights.

Thus, in such cases where there is no need for such an "urgent precautionary measure," the highest court has decided that the route to challenge is that of the remedies that must be presented before the environmental courts.[36] Although this jurisprudence makes sense in the case of claimants who do not belong to indigenous peoples, the lack of a specific remedy expressed in the previous point poses a situation that needs to be treated in a different way. The remedy of protection, says Professor Núñez, "*would continue to be the ideal one to protect those communities and other subjects that lack active legitimacy before the environmental courts*."[37]

On the other hand, it has been argued that there would be an effect of "displacement of the rights of indigenous peoples" whereby the judiciary, in ruling on cases where compliance with the obligation to consult is challenged within the framework of investment project's environmental assessment processes, has tended to focus on procedural or methodological issues rather than substantive issues. The "displacement" effect would be generated by the use of restrictive interpretations as to when indigenous consultation should be carried out and its nature. As Carmona says: "*In recent years, a part of the deficit of the consultation to ensure the protection of the substantive rights of indigenous peoples in the SEIA would be explained, to some extent, by the so-called "displacement effect." This effect refers to how consultation displaces discussions on substantive issues with debates of a procedural and methodological nature. The problem with this phenomenon is that this displacement is always temporary and partial. Substantive disagreements that may exist between indigenous communities and the State on a given project, even if they try to dissolve them or displace them in formal debates, will re-emerge. And this, possibly, both through non-violent means (judicial or administrative actions in other instances) and violent (direct/police actions to prevent/ensure the realization of the project)*.[38]

However, this thesis has at least two problems: on the one hand, it does not take into account that the indigenous consultation processes that are judicialized are only a minor fraction of the total number of processes, many of which result in an agreement and are not challenged so that the "displacement" theory could only refer to that limited universe of processes.

On the other hand, there is a recent trend of the ordinary courts of justice that goes in precisely the opposite direction of what the "displacement effect" thesis maintains, i.e., decisions that focus on the review of substantive aspects rather than on procedural or methodological issues, even ignoring domestic regulatory provisions when they are considered as limiting the right to consultation. Indeed, this jurisprudence has held that consultation is appropriate whenever legislative or administrative measures are envisaged that may directly affect indigenous peoples, as indicated in article 6 of Convention 169, and domestic law cannot be invoked to breach an obligation assumed

[36]See, for example, Supreme Court Decision dated March 14, 2016, Role No. 37.777-2015.
[37]NÚÑEZ, Manuel (2014): "The indigenous consultation in the environmental qualification procedure: regulatory development and judicial configuration," *Public Law Yearbook 2014*, Diego Portales University, p. 328.
[38]CARMONA, Cristóbal (2020): "Environmental assessment, indigenous consultation and the "displacement of the rights of indigenous peoples," *Revista de Derecho* de la Universidad de Concepción, N°248, p. 227.

under an international treaty ratified by Chile. Thus, in one case, it ruled that what was argued by the defendant –that, due to the regulated nature of the approval of a request for groundwater exploration, such decision is not included within those administrative measures that must be consulted with the indigenous peoples concerned– was not acceptable since consultation is appropriate whenever legislative or administrative measures are foreseen that may directly affect indigenous peoples, as indicated in article 6 of the Convention, and domestic law cannot be invoked to breach an obligation assumed under an international treaty ratified by Chile.[39]

III. THE COLOMBIAN EXPERIENCE AFTER THE RATIFICATION OF ILO CONVENTION 169 by Carlos Cante Puentes

1. Ratification of ILO Convention 169

Colombia adopted ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries by means of Act No. 21 of 1991, which was subsequently ratified on August 7, 1991, and which was based, in turn, on the paragraph in article 330 of the Political Constitution that was proclaimed at about the same time, and which states that "The exploitation of natural resources in indigenous territories shall take place without detriment to the cultural, social and economic integrity of indigenous communities. In the decisions adopted with respect to such exploitation, the government shall encourage the participation of the representatives of the respective communities."

2. Recognition of Fundamental Rights for Black Communities

Additionally, as a constitutional development of the same Convention, Act 70 was enacted in 1993, based on the notion that the black population shares a common history and culture and especially traditional production practices, which served as a basis for defining their ethnic character and, thus, also establishing that their territorial rights, like those of the indigenous, should be collective. The purpose of this law, which developed constitutional transitional article 55, was to establish mechanisms for the protection of the cultural identity and rights of the black communities of Colombia as an ethnic group, and the promotion of their economic and social development in order

[39]Decision of the Court of Appeals of Antofagasta, October 30, 2020, "*Atacameña Indigenous Community of Peine v. General Directorate of Waters*," role no. 05-2020 (Cont. Adm.), recitals 6 and 7; and decision of the First Environmental Court, April 21, 2021, "*Colla Río Jorquera Indigenous Community and Its Affluents with Environmental Assessment Commission of the Atacama Region*," role no. R-38-2020, confirmed by the Supreme Court on December 13, 2021, role no. 35,692-2021.

to ensure that these communities obtain real conditions of equal opportunities with the rest of Colombian society.

Thus, through article 3, paragraph 3 of Act 70, the Black, Raizal, and Palenquero communities have recognized the right to free, prior and informed consultation through "the participation of black communities and their organizations without detriment to their autonomy in the decisions that affect them and in those of the entire Nation on an equal footing in accordance with the law," matching their rights with those of indigenous communities.

One of the first decisions that dealt with the debate on the ownership of the fundamental rights of Afro-Colombians and the conceptual categories of race, ethnicity, culture, and territory with which their status as subjects of special constitutional protection has been linked was decision T-422 of 1996, whose precepts were subsequently clarified and reinforced through decision C-169 of 2001, which is considered the first decision that harmonized the ethnicity of black communities with the characterization made of them by Act 70 of 1993. The black community, understood as a "group of families of Afro-Colombian descent who possess their own culture, share a history and have their own traditions and customs within the rural-populated relationship, which reveal and preserve an awareness of identity (…)," was thus recognized as having collective rights similar to those that the Constitution and the constitutional block had recognized for indigenous communities.

Since then, Colombia has been applying, among many other developments of Agreement 169, the mandate on free, prior and informed consultation, with a total of nearly 1,500 consultations with about 9,000 communities.

3. On its regulation

Despite several attempts to regulate free, prior and informed consultation in Colombia, it has not been possible to have a statutory law that establishes the minimum parameters for its exercise, and therefore, it has been the constitutional development that, through various rulings of the Constitutional Court, has marked the way for its implementation through the interpretation of international jurisprudence and constitutional mandates, which have focused on the consideration of prior consultation as a fundamental right of indigenous, black, raizal and palenquera communities, as well as Gypsy or Roma communities.

Thus, in one of the first decisions produced by the court in this regard, the Decision SU-039 of 1997, it recognizes that: "(...) The exploitation of natural resources in indigenous territories must be made compatible with the protection that the State must provide to the social, cultural, and economic integrity of indigenous communities, an integrity that constitutes a fundamental right for the community because it is linked to its subsistence as a human group and as a culture. In order to ensure such subsistence, when it comes to the exploitation of natural resources in indigenous territories, the participation of the community in the decisions adopted to authorize such exploitation has been foreseen. Thus, the fundamental right of the community to preserve its

integrity is guaranteed and made effective through the exercise of another right that is also fundamental, namely, the right of the community to participate in the adoption of such decisions. The participation of indigenous communities in decisions that may affect them concerning the exploitation of natural resources offers, as a peculiarity, the fact that the aforementioned participation, through the mechanism of consultation, acquires the connotation of a fundamental right since it is erected as an instrument that is basic to preserve the ethnic, social, economic and cultural integrity of indigenous communities and to ensure, therefore, their subsistence as a social group.

Under this premise, the Court establishes a clear differentiation between the administrative action of the general right of participation that citizens have in the process of environmental licensing of projects versus the differential fundamental right to a free, and informed consultation when it establishes "(...) Thus, participation is not merely reduced to an intervention in the administrative action aimed at ensuring the right of defense of those who will be affected by the authorization of the environmental license, but it has a greater significance due to the high interests that it seeks to protect, such as those related to the definition of the destiny and the security of the subsistence of the referenced communities."

4. About the Process of Prior Consultation

Since 2011 with decision T-129, the Court has pronounced the minimum required elements that allow a process of prior consultation with ethnic communities to be regarded as adequate. In 2015 a new decision, T-766 of 2015 reiterated the same elements that have finally been collected in decision C-389 of 2016 focusing on the general criteria to advance the consultative process in the following terms: "General criteria for the application of the consultation:

(i) the objective of the consultation is to achieve the free, prior and informed consent of indigenous and Afro-descendant communities on measures that affect them (that is, regulations, policies, plans, programs, etc.);

(ii) the principle of good faith must guide the actions of the parties, an essential condition for their understanding and trust and, therefore, for the effectiveness of the consultation;

(iii) active and effective participation of the peoples concerned must be ensured through the consultations. The fact that participation is active means that it is not equivalent to simply notifying the peoples concerned or holding informative meetings, and that it is effective, indicates that their point of view must have an impact on the decision adopted by the authorities concerned;

(iv) consultation is a process of dialogue between equals; it does not, therefore, constitute a right of veto of the target communities to which ILO Convention 169 applies; finally,

(v) the consultation must be flexible so that it is adapted to the needs of each issue, and the diversity of indigenous peoples and Afro-descendant communities."

In this way, and faced with the inability, to this date, to reach agreements with ethnic communities regarding the regulation of the process of prior consultation, in November 2013, the national government decided to adopt Presidential Directive 010 "Guide for conducting prior consultation with ethnic communities" which establishes the inter-institutional coordination procedures for the development of prior consultations with ethnic communities in their different stages, which, despite not having been an administrative act consulted with the communities themselves, has not been subject to a lawsuit and therefore is still in force without being the best of the tool to carry out the more than 10,000 consultations that are currently pending for more than 1,700 projects.

Since 2011, the national government has been constructing a draft statutory Law that regulates all the elements enshrined in constitutional jurisprudence, which concluded in 2017 with a text of 124 articles, on which, to date, it has not been possible to reach an agreement with the ethnic communities about the process of their consultation. However, and due to the different letters rogatory in recent years by the Constitutional Court, mainly the one established in Decision 123 of 2018, where the national government is ordered to make adjustments in the institutionality in such a way that there is administrative and financial autonomy of the entity in charge of the respective procedures leading to the realization of prior consultations is that, through Decree 2353 of 2019, the Directorate of the National Authority of Prior Consultation was created as an autonomous administrative and financial entity with the main function of leading, directing and coordinating everything that refers to the exercise of the right to prior consultation.

Recently, the Colombian government warned that, due to the crisis generated by the COVID-19 emergency, it would be necessary to suspend verification visits and face-to-face meetings for prior consultation with ethnic communities and, through Notification CIR 2020-29 of the Ministry of the Interior, the intention was to modify the procedure used to carry out the prior consultations, moving from face-to-face to virtual. However, the measure was short-lived in the face of the demonstrations of disagreement from the different indigenous organizations and Afro-Colombian communities, who argued that the measure violated the fundamental rights to prior consultation and should therefore be repealed.

The ethnic communities reminded the Colombian government of the latest pronouncement of the Constitutional Court that Decision T-038 of 2018 stated: "Through consultations, active and effective participation of the peoples concerned must be ensured. That participation is active means that it is not equivalent to simply notifying the peoples concerned or holding informative meetings and that it is effective; it indicates that their point of view must have an impact on the decision adopted by the authorities concerned" and that, virtuality, with the difficulties inherent to Internet access in ethnic territories, did not allow guaranteeing active and, much less, effective participation. Finally, the measure was repealed shortly after its enactment as a result of the demonstration of disagreement of the Colombian business class.

5. About the timing of the consultation

As established by jurisprudence and ILO Convention 169, for the development of mining activity, in collective territories or with a collective vocation of ethnic communities, the process of prior consultation begins at the prospecting stage. The next question is, before entering into the mining concession contract, should the prior consultation process be carried out? This of course has been a major discussion in recent years in Colombia, especially when, starting from Act 685 of 2001 (Mining Code), Colombia went from having 2,900 to about 9,000 mining titles in different areas of the country, which eventually covered about 4% of the national territory. Many of them were granted in collective territories with the premise that the prior consultation was activated for the time prior to the exploration stage, provided that communities belonging to ethnic groups can be affected in the development of the activity. Thus, it was clear to everyone that prior consultation should be carried out just before starting the exploration stage, i.e., after the mining title was granted, which, it is worth mentioning, under Colombian law, does not require an environmental license as such for the development of this stage, although it does require a series of permits for exploitation.

However, the jurisprudential line changes radically with Decision SU-133 of 2017 when the Court specifically refers to the moment of activation of prior consultation as follows:

> "The Court, in conclusion, has found that the delimitation of strategic areas for the exercise of mining, the granting of mining concession contracts, exploration activities, the delivery of environmental licenses for exploitation, the exploitation itself, the adoption of relocation plans aimed at averting the polluting effects of mining, and the transport and collection of these resources have generated social, cultural, economic and environmental impacts on indigenous and Afro-descendant communities that, as scenarios of potential direct impact, activate the obligation of prior consultation."

6. On direct impact

The basis of prior consultation as established by ILO Convention 169 is direct impact, which is analyzed in Act T-766 of 2015 through a set of standards that allow assessing whether a regulation, measure, or project directly affects indigenous and tribal peoples as follows: Directly affecting indigenous and Afro-descendant communities with a legislative or administrative measure can be verified in three scenarios:

(i) when the measure is aimed at regulating a topic that, by express constitutional provision, must be subjected to decision-making processes that have the participation of ethnic communities, as happens with the exploitation of natural resources;

(ii) when, despite the fact that it is not about these matters, the matter regulated by the measure is linked to elements that make up the particular identity of the differentiated communities; and

(iii) <when, although it is a general measure, it systematically regulates matters that make up the identity of traditional communities, which may generate either a possible impact, a lack of protection of the rights of the communities, or a relative legislative omission that discriminates against them. (…)"

On this point, the concept of direct impact differs from that of the area of influence, since the latter refers to a purely technical requirement that determines the impacts on a geographical space in which an exploration and exploitation project will be developed.

Case Study: Awá La Cabaña Indigenous Community versus Consorcio Colombia Energy. Unification Decision 123 of 2018 of the Constitutional Court of Colombia.

The indigenous community Awá La Cabaña, filed a tutela action against the Ministry of the Interior, the National Environmental Licensing Authority and the Colombia Energy Consortium because oil exploitation is advancing in the wells of the Quinde, Cohembí, and Quillacinga areas without having carried out prior consultation with that community. The Colombia Energy Consortium that was responsible for the project argued that this indigenous community was outside the perimeter of the area of influence, highlighting that the overall environmental license of the project was granted by the Ministry of Environment, Housing and Territorial Development in 2009 and that it was accompanied, as required by its procedure, by the certificate of ethnic groups, issued by the Ministry of the Interior in 2008, which indicates that there are no indigenous or black communities in the area of production and exploitation.

In the ruling of the tutela action that was issued as a unification decision in October 2018, the Constitutional Court considered that the area of direct influence of the project was used to identify the applicability of the prior consultation, without noticing that there were effects that undermine the Awá community "La Cabaña" by harming its environment, health, and its territory and. Therefore. considers it an error to have focused on verifying whether there was an overlap of the area of influence of the project with the titled lands of the community, an evaluation that ruled out the broad and cultural vision of territory, as well as the other criteria of direct impact, such as cultural, environmental or health disturbances of diverse ethnic groups, in the terms indicated by constitutional jurisprudence.

Finally, the Constitutional Court determined that there was a violation of the right to prior consultation of the Awá La Cabaña indigenous community and that, since this action was omitted, the duty of consultation does not disappear with the initiation of the project since the obligation to it must govern all stages of the development of the programs and plans so that there is an obligation to keep the channels of dialogue open throughout the monitoring of the project and that any substantial change in the conditions of the project that imply the adoption of new measures, or significantly alter the meaning of the measures already taken, renews the duty of prior consultation.

7. Regarding the need for prior consent

The Constitutional Court has been emphatic in pointing out that sometimes the development of mining activity can intensely affect ethnic groups, especially in the exercise of the attributes of a property, which necessarily implies free, prior and informed consent, without constituting a right of veto, as in Act C-389 of 2016 where it states: "(…) The sub-rule on consent may raise some concerns. Apparently, this is because it could be incompatible with the principle that consultation is a dialogue between equals and not a veto right enshrined in the head of indigenous or tribal communities so that a regulatory contradiction could arise when, in a given event where the rule of consent is applicable, a measure fails to achieve the acceptance of the community or people concerned because, in practical terms, the measure cannot be carried out, so the community concerned would have vetoed it. The Constitutional Court, however, has stated that while prior consultation with indigenous communities is the general standard, free, prior and informed consent is an exceptional standard that proceeds in the events described by constitutional jurisprudence and international law associated with the transfer or relocation of a community due to the threat of physical or cultural extinction or use of hazardous materials in their land and territories…"

IV. PRIOR CONSULTATION IN ECUADOR: APPROACHES AND STATE OF THE ART by Daniel Barragán and Volker Frank

1. Evolution of free, prior and informed consultation in Ecuador and its regulatory framework

When speaking of the right to free, prior and informed consultation, it is important to address the relationship between three fundamental elements: territory, natural resources, and communities. The use made of the territory and the resources it contains generally affects the levels of conflict, as in the case of Ecuador where "although indigenous peoples have the right to ownership of the land, the ownership of the resources of the subsoil is reserved for the State" (DPLF & Oxfam, 2011, p.62).

Conflicts over territory and natural resources could be reduced if communities were consulted. However, in Ecuador, so far, prior consultations that are in accordance with international standards and respect the right of indigenous peoples and nationalities to self-determination have not taken place (ILO, 2014; CEDA, ASIES & SPDA, 2014). Regarding the mining industry, Tello (2016) points out that the investment cycle does not consider that "the territories where the mining deposits are located are not empty, but occupied by natural capital and local populations who

defend the possession and productive vocation of their territory, as well as their identity processes and the rights of nature" (Tello, 2016).

In this context, the Ecuadorian case presents a long history of conflicts associated with the oil industry and poses new scenarios of conflict in the face of the expansion of mining policy. Fontaine (2004) reports on cases of opposition, confrontation among communities, and rejection of pre-bid consultations in the oil industry in the publication *Oil and Sustainable Development in Ecuador*. On the other hand, in recent times, the demand for consultation regarding mining projects is evidence of the existing environment of conflict.[40]

At the regulatory level, the 1998 Constitution already introduced the recognition of several collective rights of indigenous peoples and nationalities, including the right to be consulted on "plans and programs for the prospecting and exploitation of non-renewable resources that are on their lands and that may affect them environmentally or culturally."[41] Subsequently, the Constitution adopted in 2008 recognizes and guarantees indigenous nations and communities the collective right to free, prior and informed consultation.[42]

At the constitutional level, a positive evolution is evident in the fact that the 2008 Constitution establishes criteria regarding the reasonableness of the term, the purpose of the consultation,[43] and the opportunity and obligation of the same. However, it also states that "[…] if the consent of the consulted community is not obtained, it will proceed according to the Constitution and the law,"[44] which "has generated uncertainty about the way the State should proceed and about the requirements of the decisions it adopts when it does not have the consent of the affected communities" (Due Process of Law Foundation & Oxfam, 2011).

Concerning the adoption of legislative measures that may affect collective rights, the Constitution establishes the right of indigenous nations and communities to be consulted.[45] To this end, the Legislative Administration Council[46] approved the Instructions for the Application of the Pre-legislative Consultation of the National Assembly.[47] Although the instruction meets minimum consultation requirements, this mechanism only serves as "input in favor of the legislative and as

[40]It should be added that the protest that had developed in October 2019 for the increase in the price of fuel included a rejection of the expansion of mining activities by the Confederation of Indigenous Nationalities of Ecuador.
[41]Political Constitution of Ecuador, 1998. Art. 84.
[42]Constitution of the Republic of Ecuador. Art. 57.
[43]Ibíd. It is established that the consultation will be "on plans and programs for the prospecting, exploitation and commercialization of non-renewable resources."
[44]Ibíd.
[45]Constitution of the Republic of Ecuador, Official Register 449 of October 20, 2008. Art. 57, paragraph 17.
[46] The CAL is the highest legislative administration body and will be made up of the President of the National Assembly, two Vice Presidents and four additional members.
[47]Instructions for the Implementation of the Pre-legislative Consultation of the National Assembly. Official Journal Supplement 733 of 27 June 2012.

a channel for direct participation of the collective of indigenous peoples and nationalities" (Martínez & Aguilar, 2015).

On the other hand, the Constitution also recognizes the duty of the State to consult decisions that may affect the environment in advance.[48]

At the level of secondary legislation, the Organic Law on Citizen Participation (LOPC for its acronym in Spanish) replicates the constitutional[49] provisions regarding the fundamental substantive aspects of consultation: i) who to consult, ii) what and when to consult and iii) the scope of the consultation (CEDA, ASIES & SPDA, 2014). However, these substantive aspects need to be regulated in a way that provides a clear procedural framework.

The LOCP emphasizes prior consultation regarding plans and programs for the prospecting, exploitation, and commercialization of non-renewable resources that are found in territories and lands of indigenous nations, indigenous communities, Afro-American towns, and recognized mestizo communities and in the participation of the benefits that these projects report. It also highlights the obligation to receive compensation for any damages that the projects may cause them[50] and establishes environmental consultation with the community regarding State decisions that may affect the environment.[51]

In 2012, the government issued Decree 1247 to regulate prior consultation in hydrocarbon-block tendering processes.[52] The competent authority of the hydrocarbon sector has the responsibility for carrying out the consultation and the subjects of the consultation are the indigenous communities and peoples settled in the area of influence of the project. The objectives of the consultation are to consider the observations of indigenous organizations and to encourage their participation in decision-making. The consultation period is a maximum of 30 calendar days.

[48]Constitution of the Republic of Ecuador Art. 398

[49]Organizational Act on Citizen Participation Art. 81. Free and informed prior consultation- indigenous nations, indigenous communities, Afro-American towns, and recognized mestizo communities shall be recognized and guaranteed the collective right to free and informed prior consultation within a reasonable period of time.
In the case of prior consultation regarding plans and programs for the prospecting, exploitation and commercialization of non-renewable resources that are in their territories and lands, the indigenous nations, indigenous communities, Afro-American towns, and recognized mestizo communities, through their legitimate authorities, will participate in the benefits that these projects will report; they will also receive compensation for any social, cultural and environmental damages caused to them.
The consultation to be carried out by the competent authorities will be mandatory and timely. If the consent of the consulted collective subject is not obtained, it will proceed in accordance with the Constitution and the law.

[50]Ibíd.

[51]Organic Law on Citizen Participation, Official Register Supplement 175 of April 20, 2010. Art. 8.2 Environmental consultation with the community. Any state decision or authorization that may affect the environment must be consulted with the community, for which it will be informed widely and in a timely manner. The Consultant subject will be the State.
The State shall consider the opinion of the community according to the criteria established by law and international human rights instruments.

[52]http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98181/116733/F1965072964/ECU98181.pdf

Justified observations should be integrated into community relations and environmental management plans. If agreements are reached, these would be binding on all parties.

In response to Decree 1247, the Committee on Economic, Social and Cultural Rights of the United Nations expressed concern that the content of the decree was not consulted with indigenous peoples and that the planned activities "are limited to the socialization of projects and remain insufficient to allow intercultural dialogue and the expression of the consent of indigenous peoples, communities, and nationalities, within the framework of their right to consultation."[53] The Committee recommended suspending the decree and designing the respective regulations in a participatory manner with indigenous peoples.

Also important to mention is the regulation of consultation through Ministerial Agreement 116 of November 7, 2016, which establishes the REDD+ Action Plan "Forests for Good Living" and the guidelines for the implementation of REDD+ in Ecuador. Within this framework, the consultation for the implementation of REDD+ actions in collective lands and territories is proposed[54] through the National Consultation Guide for the implementation of REDD+ actions in collective lands or territories.

The approach taken in this instrument is interesting as it establishes that "consultation seeks to establish a process of dialogue with the collective to inform and inquire about the design and implementation of REDD+ actions on their lands or in their territories to obtain their consent,"[55] ensuring that they are mandatory, prior, free, informed, participatory, equal, in equity between men and women, and carried out in the territory of the collective.

It also addresses the substantive aspects of the consultation:[56]

i) Who to consult: indigenous peoples, communities and nationalities, Afro-Ecuadorian and Montubio people, and other groups that depend on forest resources for their livelihood.
ii) What and when to consult: implementation of REDD+ actions. The consultation will be carried out in advance and a term is proposed for the collective to analyze the information and make a decision; the term will be determined by the customs of the collective or it will be possible to engage in dialogue with the collective to reach an agreement.
iii) Scope of the consultation: to obtain the consent of the group expressed through an Agreement or Consent Agreement.

[53]Committee on Economic, Social and Cultural Rights (13 December 2012). Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14 - 30 November 2012) United Nations
[54]Ministerial Agreement No. 116, Official Register Special Edition 985 of March 29, 2017. Art. 10.
[55]Ministerial Agreement No. 116, Official Register Special Edition 985 of March 29, 2017. Annex 1.
[56]Ibíd.

It is also worth noting the existence of other regulatory bodies that establish provisions related to the promotion of the prior consultation mechanism: i) the Organic Law on Water Resources, on Uses and Use of Water establishes the obligation to consult "in a prior, free, informed, mandatory manner and within a reasonable time with the users' organizations on all relevant matters related to the integrated management of water resources that may affect them,"[57] ii) the Organic Code of Territorial Organization, Autonomy, and Decentralization establishes the obligation of the decentralized autonomous municipal governments to regulate prior consultation within the framework of their competence to exploit arid[58] and stone materials and iii) Ombudsman's Resolution 21, through which the Ombudsman's Office issues the criteria for the supervision of due process in the processes of free, prior and informed consultation in good faith and environmental consultation.[59] This resolution seeks to monitor and verify the due process of the consultations in their preparatory and implementation phases at the request of the party.

Finally, from the perspective of regulating the right to free, prior and informed consultation, it is important to note that, in 2012, two consultation bills were presented at the National Assembly; however, these did not prosper (Carrión, 2012). In the first half of 2022, the Pachakutik party, together with the Ombudsman's Office, presented the draft of the Organic Code of Free, Prior and Informed Consultation.[60] Finally, as part of the agreements of the dialogue tables between the indigenous movement and the national government, which emerged after the national strike of June 2022, it was agreed to not grant any new mining concessions until there is a regulation on consultation. For its elaboration, it was expected that a technical roundtable would be formed between both parties in the last quarter of 2022.[61]

2. Jurisprudential development of free, prior and informed consultation

Faced with insufficient legislation to regulate prior consultation in Ecuador, in recent years, a series of decisions have been presented by the judicial system that will force the Ecuadorian Government to rethink the practice of prior consultation in the future.

In 2010, the Constitutional Court issued Decision 001-10-SIN-CC, regarding the claim of unconstitutionality filed by Marlon Santi, then president of the Confederation of Indigenous

[57]Organic Law on Water Resources, Water Uses and Use, Official Register Supplement 305 of August 6, 2014. Art. 68

[58]Organic Code of Territorial Organization, Autonomy and Decentralization, Official Register Supplement 303 of 19-Oct.2010. Art. 141

[59]Criteria for the monitoring of due process in the processes of free, prior and informed consultation in good faith and environmental consultation. Official Register 465 of April 10, 2019.

[60]Prense.ec (May 2022): They propose a bill to regulate free, prior and informed, environmental, legislative and popular consultations. Retrieved from https://prensa.ec/2022/05/11/proponen-proyecto-de-ley-para-normar-las-consultas-previa-libre-e-informada-ambiental-legislativa-y-popular/.

[61] Until February 2023, there was no progress on this issue.

Nationalities of Ecuador (CONAIE), and Carlos "Yaku" Pérez, against the Mining Law (2009).[62] The decision established some criteria for the consultation processes such as the following:[63]

- The process must be carried out and concluded before the beginning of each stage of the activity.
- The public and informed nature of the consultation.
- A preliminary consultation over the steps for the negotiation process.
- The definition of consultation as a systematic process of dialogue between legitimate representatives of the parties.
- An obligation to define the parties of the consultation in advance.
- Respect for the systems of authority and representation of the consulted people.

Regarding the scope of the consultation, the Constitutional Court established that "the opinion of the peoples consulted does have a special legal connotation, (…) without this implying the imposition of the will of the indigenous peoples on the Government" (id. 127). In this regard, it adds that the opinion of the indigenous peoples consulted should be close to *soft law* in international law and must be legally relevant.

Moreover, in 2012, the Inter-American Court of Human Rights established in its decision in the *Sarayaku v. Ecuador* case that the State breached its obligations by not establishing measures so the people of Sarayaku could participate "in decision-making on matters and policies that affected or could affect their territory, life, and cultural and social identity, affecting their rights to communal property and cultural identity."[64] The extension of the right to consultation to cases in which a project affects not only the territory but also life and cultural identity can lead to a reconsideration of the application of the consultation for mining, hydrocarbon, and energy projects whose area of influence does not coincide with an indigenous territory but whose environmental, social and cultural impacts directly affect the lives of indigenous peoples.

In 2018, the Provincial Court of Sucumbíos canceled 52 mining concessions (20 granted and 32 pending) in which both the right to prior consultation and "the constitutional rights of the A'I Cofán de Sinangoe community to water, a healthy environment, culture, and territory, as well as the rights

[62] García Cevallos, J. (May 2015): Prior consultation as indigenous peoples' rights. Decision No. 001-10-SIN-CC, Cases 0008-09-IN and 0011-09-IN (Accumulated) Declaration of unconstitutionality due to the form and substance of the Mining Law. Journal of Environmental Law (University of Palermo) 4(1), p. 59-131. Retrieved from https://www.palermo.edu/derecho/pdf/publicaciones/Revista_DerechoAmbiental_Ano4-N1_04.pdf.
[63] See: DPLf / Oxfam (2018). Implementation of free, prior and informed consent and consultation. Comparative experiences in Latin America and discussions on a consultation law in Mexico, p. 30. Oxfam: Mexico City; and: Bustamante de Almenara, M, and Cabanillas Linares, C. (2017): Good practices of the ombudsmen of Bolivia, Colombia, Ecuador and Peru in prior consultation processes, p. 70-1. Defensoría del Pueblo.
[64] Inter-American Court of Human Rights (June 27, 2012): Decision - Kichwa Indigenous People of Sarayaku v. Ecuador Retrieved from http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_enp.pdf.

of nature" were violated,[65] expanding the concept of environmental impact significantly. The decision recognized the violation of the rights of the A'I Cofán de Sinangoe indigenous people who have filed the complaint against the mining concessions since the "concessions granted and those planned [...] would irrefutably bring negative consequences, immediate, medium and long term negative impacts, to the detriment of the environment and the population living in the surroundings of the mines and deposits, downstream or downwind."[66] The Constitutional Court accepted this case to generate national regulations on prior consultation.

More recently, in July 2019, the Provincial Court of Pastaza ruled against a claim brought by the Waorani people against the Ecuadorian State regarding the application of Decree 1247 where "the consultation was not carried out in good faith;" in addition, it established that "the consultation was not intercultural since the internal decision-making structures of the community were not respected."[67] Also, the decision established a relationship between prior consultation and self-determination, considering prior consultation as a tool for the territorial, cultural, and socio-political aspirations to be considered by the Ecuadorian State.

In September 2021, the Constitutional Court clarified that the environmental consultation stipulated in article 184 of the Organic Code of the Environment (2018) "does not apply or replace the right to free, prior and informed consultation of indigenous nations and communities." Additionally, it declared an article of the regulation to the Organic Code of the Environment unconstitutional since it seeks to regulate prior consultation in a way contrary to what has been established by the Constitutional Court in previous decisions.[68] In this context, it refers specifically to the 2010 decision and the 2012 decision of the Inter-American Court of Human Rights, both summarized at the top of this section.

Finally, in November 2021, the Constitutional Court of Ecuador declared the violation of the rights of nature of the Protected Forest of Los Cedros, the Canton Santa Ana de Cotacachi, and the province of Imbabura, as well as the right to environmental consultation. Concerning the environmental consultation, the Court declared that the consultation must be as broad and democratic as possible, a non-delegable obligation of the State, and must be carried out in accompaniment with the Ombudsman's Office. In addition, it established that the consultation must be carried out at least before the environmental permit is granted and prior to the issuance of the

[65]Constitutional Court of Ecuador. Case N°; 0920-19-EP. Auto Admin Room. Retrieved from https://portal.corteconstitucional.gob.ec/BoletinOctubre/0920-19-EP.pdf.
[66]Quevedo / Ponce (2018): Judges of the Civil and Commercial Chamber of the Sucumbíos Provincial Court of Justice, p. 4. Currently, there is a lawsuit against this decision in the Constitutional Court.
[67]Amazon Frontlines (2019): 16 Waorani communities in Pastaza win historic appeal against the Ecuadorian government. https://www.amazonfrontlines.org/chronicles/waorani-ecuador-victoria-apelacion/; see also: https://notimundo.com.ec/corte-provincial-de-pastaza-confirma-fallo-que-veta-ingreso-de-petroleras-en-territorio-waorani/
[68]Constitutional Court of Ecuador. Decision No. 22-18-IB/21 of September 8, 2021. Retrieved from http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOic2MTA4MTNhYy1lMTgxLTQ3YWEtOGJmYS0wYzc4ZWI1YzBlZmQucGRmJ30=.

license. Finally, it ruled that the environmental consultation must comply with the parameters of free, prior and informed consultation and everything applicable to it.

Relevant decisions

Notable decision No. 1149-19-JP/21[69]

In 1994, an area of 6400 hectares in the municipality of Cotacachi, Imbabura province was declared as Los Cedro Protected Forest. This is a private protected area of high biodiversity.[70]

In 2017, the Ministry of Mining granted metallic mineral concessions and, in the same year, the Ministry of Environment issued the environmental registration for the initial exploration phase of the mining project. Faced with this action, the Municipality of Cotacachi filed an action of protection against the Minister of Environment and the National Mining Company of Ecuador (ENAMI EP) for affecting the rights of nature by allowing mining activity within the Protected Forest. In addition, they indicated that the constitutional provisions on environmental consultation and the consultation of indigenous peoples and communities had not been complied with.[71]

In June 2019, the Provincial Court of Imbabura ruled in favor of the Municipality of Cotacachi, alleging the lack of an environmental consultation. Despite this decision, ENAMI EP continued with the exploration activities and, at the same time, filed an action with the Constitutional Court to appeal the decision against it.[72]

In November 2021, the Constitutional Court ratified the decision of the Provincial Court of Imbabura and annulled the permits for mining concessions in the Los Cedros Protected Forest.

The Constitutional Court concluded that the environmental consultation must be as broad and democratic as possible, that it is the State that must carry out the consultation, that the consultation must take place before all phases of mining activity, and that it must comply with the parameters of free, prior and informed consultation.

[69]Constitutional Court of Ecuador. Decision No. 1149-19-JP/21. Retrieved from https://www.corteconstitucional.gob.ec/index.php/boletines-de-prensa/item/1262-caso-nro-1149-19-jp-21-revisi%C3%B3n-de-sentencia-de-acci%C3%B3n-de-protecci%C3%B3n-bosque-protector-los-cedros.html.
[70]https://www.goraymi.com/en-ec/ Zimbabwe/cotacachi/bosques/bosque-protector-cedros-ani2koej1
[71]https://observatoriop10.cepal.org/en/jurisprudencia/sentencia-la-corte-constitucional-ecuador-1149-19-jp21
[72]https://en.mongabay.com/2022/01/ecuador-las-sentencias-que-le-dieron-la-razon-a-los-defensores-del-parque-yasuni-y-del-bosque-los-cedros/

Decision No. 22-18-IN/21[73]

The Ecuadorian Coordinator of Organizations for the Defense of Nature and Environment, the Free Animal Association of Ecuador, and Ecological Action filed a public action of unconstitutionality with respect to articles 104 (7), 121, 184, and 320 of the Organic Code of the Environment in June 2018. In April 2019, the Constitutional Court admitted the case. Later, in June 2019, the claimants filed a brief with the Court arguing that, by Executive Decree No. 752 of May 21, 2019, the Regulation of the Organic Code of the Environment was issued, which regulates articles 104 (7) and 184 of the Code, which has been challenged and requested that articles 278, 462 and 463 be declared unconstitutional.

On September 8, 2021, the Constitutional Court partially accepted the public action for unconstitutionality filed. Concerning the right to prior consultation, the Court ruled that "article 184 of the Organic Code of the Environment does not apply to or replace the right to free, prior and informed consultation of indigenous nations and communities; and, it shall be constitutionally provided that its purpose and content are interpreted and complemented by the constitutional provisions that establish the right to environmental consultation, the jurisprudence of the Court on applicable prior consultation, the provisions of the Escazú Agreement, and with the provisions of this decision, which determine the elements necessary to guarantee this right."

Previously, in its analysis, the Court pointed out that, although article 184 does not expressly mention prior consultation or environmental consultation, it is within the chapter referring to the instruments of environmental regularization concerning citizen participation in administrative decisions on which the rights to prior consultation and environmental consultation fall.

In this sense, the application of the law can lead to misunderstandings given that, from the Court's point of view, its scope does not include and should not replace prior consultation with indigenous nations, indigenous communities, Afro-American towns, and recognized mestizo communities. In addition, he pointed out that, in the case of indigenous peoples, the contested articles will be applied as well as the standards of the right to prior consultation.

Concerning article 462 of the Regulations of the Organic Code of the Environment, the Court finds that its purpose is to regulate the right to prior consultation, which is contrary to the principle of reservation of organic law, the provisions of article 57 (7) of the Constitution, the provisions of the jurisprudence of the Court, and the essential elements that the right must have in accordance with the Sarayaku v. Ecuador decision of the Inter-American Court of Human Rights, for which its unconstitutionality was declared.

[73]Constitutional Court of Ecuador. Decision No. 22-18-IB/21 of September 8, 2021. Retrieved from https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?documentnumber=22-18-IN/21.

3. Citizen participation concerning free, prior and informed consultation

Free, prior and informed consultation is conceived as a "mechanism for participation in environmental matters with a special dedication to indigenous and Afro-Ecuadorian peoples and nationalities" (CEDA, ASIES & SPDA, 2014), particularly for making viable the right to protection and access to resources found in their territories, fundamental for the "survival, development, and continuity of the lifestyle of these peoples" (IACHR, 2017). From an environmental democracy perspective, free, prior and informed consultation pursues greater openness, inclusion, and participation of people in decisions on the use and exploitation of natural resources.

In the Ecuadorian case, the Constitutional Court clarified in 2010, through Decision No. 001-10-SIN-CC, the different levels of participation that exist –with constitutional recognition- regarding the adoption of administrative and legislative measures. In particular, the Constitutional Court identified three types of consultation that need to be differentiated in terms of their purpose as a mechanism for citizen participation: (i) prior consultation, including pre-legislative consultation; (ii) popular consultation; and (iii) prior environmental consultation.

Free, prior and informed consultation, recognized in article 57 of the Constitution, is specific to the collective rights of indigenous nations and communities and differentiates the consultation with respect to administrative measures and legislative measures:

[…] Art. 57. 7. The free, prior and informed consultation, within a reasonable time, on plans and programs for the prospecting, exploitation, and commercialization of non-renewable resources that are on their lands and that may affect them environmentally or culturally; participate in the benefits that these projects report and receive compensation for the social, cultural and environmental damages caused to them. The consultation to be carried out by the competent authorities will be mandatory and timely. If the consent of the consulted community is not obtained, the Constitution and the law shall proceed.

[…] Art. 57. 17. To be consulted before the adoption of a legislative measure that may affect any of their collective rights.

In the case of pre-legislative consultation, the Constitutional Court considers that this constitutes a prior requirement of a substantial, non-formal nature, and *sine qua non* that conditions the constitutionality of any legislative measure that could affect collective rights.
Popular consultation, on the other hand, is established as a mechanism of direct democracy for the exercise of the rights of all citizens in any field.[74] Likewise, environmental consultation[75] is

[74]Constitution of the Republic of Ecuador Art. 104
[75]Constitution of the Republic of Ecuador Art. 398

oriented to the community in general without any differentiation regarding decisions or authorizations of the State that may affect the environment. Thus, both popular consultation and environmental consultation differ from prior consultation, mainly because of the non-differentiation of the subject to be consulted: it is open to all citizens and not only indigenous nations, indigenous communities, and Afro-American towns.

In environmental matters, the Organic Code of the Environment additionally recognizes informed citizen participation in two areas: one related to the cycle of environmental policies,[76] and another linked to the processes of environmental regularization of projects, works, or activities.[77]

Regarding the first area, two specific mechanisms for citizen participation in environmental management are established for public deliberation between the State, at its different levels of government, and society: i) the Sectoral Citizen Council, for the Decentralized Environmental Management System; and, ii) the Local Advisory Councils, for the formulation, observation, follow-up, oversight, and evaluation of public policies in environmental matters of Decentralized Autonomous Governments.

Concerning environmental regularization, the Regulation to the Organic Code of the Environment establishes the process of citizen participation,[78] indicating its mandatory nature in works or activities of medium and high environmental impact[79] aimed at collecting opinions and observations of the population of the area of direct influence[80] to the Environmental Impact Studies. In this context, the Regulation also establishes the mechanisms for citizen participation applicable to environmental regularization processes, including a public presentation assembly, environmental socialization workshops, distribution of informative documentation, a website, and a Public Information Center, and foresees other future mechanisms that may be established later through a technical standard (regulation).

4. Popular consultation in the mining area

Popular consultation in Ecuador is a legal tool for submitting regulations or administrative acts to the popular vote. The procedure, the subject of the consultation, and the objective are different from the free, prior and informed consultation.

[76]Organic Code of the Environment, Official Register Supplement 983 of 12-Apr.-2017Art. 18.
[77]Organic Code of the Environment, Official Register Supplement 983 of 12-Apr.-2017 Art. 184
[78]Regulation of the Organic Code of the Environment. Official Register Supplement 507 of June 12, 2019, TITLE IV Process of Citizen Participation for Environmental Regularization.
[79]Regulations to the Organic Code of the Environment, Official Register Supplement 507 of June 12, 2019. Art. 464
[80]Regulations to the Organic Code of the Environment, Official Register Supplement 507 of June 12, 2019. Art. 467

This mechanism of direct democracy is guaranteed at the constitutional level[81] and regulated in the Organic Law of Citizen Participation[82] and the Organic Law of Elections and Political Organizations (Code of Democracy).[83] The vote in popular consultation is mandatory and the result is binding if it is approved with a majority of the valid votes cast.[84] Popular consultation can be convened by the President of the Republic, the Decentralized Autonomous Governments (GAD for its acronym in Spanish) with three-quarters of its members, or by citizen initiative with an endorsement of signatures of 5% of the people at the national level registered in the electoral register, and with 10% at the local level respectively.

The topics on which a popular consultation can be convened are defined quite broadly. The Constitution provides for prior consultation on matters of major importance. The Organic Law of Citizen Participation indicates that the GAD can submit their jurisdiction's issues of interest to popular consultation, and consultation by citizen initiative can refer to "any matter." The only exceptions are matters relating to taxes, public spending of the central government, or the political and administrative organization of the country. In any case, the Constitutional Court has the final decision on the issues of the popular consultation and their respective feasibility.[85]

In recent years, opponents of extractive activities have used popular consultation to seek the citizen vote to decide on the existence of mining projects at the local level. However, there is still no legal certainty as to whether the application of this mechanism on such matters is constitutional. So far, the Constitutional Court has issued several decisions.

Regarding the popular consultation in the Girón canton, which was allowed by the National Electoral Council, the Constitutional Court declared on March 18, 2019, that this case was sent in 2012 and that the previous Constitutional Court did not decide it. Therefore, the processing of the case exceeded the time limit provided for in article 105 of the Organic Law on Jurisdictional Guarantees and Constitutional Control. Based on this, it was concluded that the Constitutional Court lacks the competence to rule on the constitutionality of the issues.[86]

The second time that the Constitutional Court issued an opinion on the constitutionality of popular consultation for the mining issue was on June 20, 2019.[87] A group of citizens belonging to the

[81]Official Gazette 449 of 20 October 2008. Art. 104.
[82]Organic Law on Citizen Participation, Official Register Supplement 175 of April 20, 2010. Articles 19:24.
[83]Organic Electoral and Political Organizations Act, Official Register Supplement 578 of 27 April 2009. Articles 25, 195.
[84]Organic Electoral and Political Organizations Act, Official Register Supplement 578 of 27 April 2009. Art. 195.
[85]In an April 16, 2019 decision, the Constitutional Court changed the procedure. Whereas previously the Claimants for a popular consultation had to first deliver the lists with the signatures to the Electoral Court, now the first step is for the Constitutional Court to decide on the constitutionality of the questions. Only in a second step, if the opinion is favorable, is the collection of signatures.
[86]http://portal.corteconstitucional.gob.ec/Raiz/2014/004-14-DCP-CC/REL_SENTENCIA_004-14-DCP-CC.pdf
[87]http://casos.corteconstitucional.gob.ec:8080/search/pdf2.php?fc=http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/89a2fd83-8425-42b8-beb2-5f699e275cb3/0002-19-cp-dic.pdf?guest=true

parishes of Lita, Carolina, Jijón y Caamaño, and Goaltal from the provinces of Carchi and Imbabura asked about the constitutionality of a question on mining projects. The Court rejected the request because they considered that the formulation of the question did not meet the requirements set forth in the regulations.[88] The Constitutional Court clarified that "the Court has not entered into examining and deciding on the constitutional legitimacy or not of popular consultations on mining."

Finally, in September 2019, the Constitutional Court decided on the request for a popular consultation on mining activities in ecologically fragile areas in the province of Azuay.[89] In its opinion, the Court rejected popular consultation as it did not meet the formal requirements in formulating the question.[90] The Court indicated that the question "does not provide the voter with specific information that allows contextualizing the specific problem" and that this will not guarantee full freedom to the voter.[91]

However, the opinion stated that popular consultation could be applied to mining activities. In a separate paragraph of the decision, the Court referred to the right of citizen participation and the rights of nature enshrined in the Constitution. It also indicated that the competencies of the GAD are related to the management of mineral resources. The Court determined that, in the future, it will decide on requests for popular consultation on mining activities "on a case-by-case basis" and verify "that the proposed consultation does not incur constitutional prohibitions, that the matter is adequate for the proposed path, or that it does not reform the Constitution or violate or restrict constitutional rights and guarantees.[92]

In a recent case, on January 12, 2022, the Constitutional Court ruled on two requests for popular consultation on the exploitation of artisanal, small, medium, and large-scale metal mining within the territories of the parishes of Nono, Calacalí, Nanegal, Nanegalito, Gualea, and Pacto, which make up the Andean Chocó Commonwealth, a mega-diverse territory that is among the most biodiverse hotspots on the planet. The Court ruled on the properness of popular consultations emphasizing that the effects of the same, if affirmative, would be "only for the future and may not exceed the scope of constitutional and legal competencies established for each level of

[88]The requirements are found in articles 104 and 127 of the Organic Law on Jurisdictional Guarantees and Constitutional Control (2009).
[89]The question posed was: Do you agree with the prohibition, without exception, of prospecting, exploration and exploitation of metallic mining activities in water sources, recharge, discharge and water regulation zones, moors, wetlands, protective forests and fragile ecosystems in the province of Azuay?
[90]http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/3ace9ac3-28f9-4bc4-99e0-05a00073cc78/0009-19-cp-dictamenyvotoconcurrente.pdf?guest=true
[91]Opinion, p. 13
[92]Opinion, p. 12

government, which includes decentralized autonomous governments and national government."[9394]

5. Final thoughts: the future of free, prior and informed consultation in Ecuador

Recent decisions in the judicial field show the need for improving the procedure of free, prior and informed consultation in force in Ecuador both at the administrative and legislative levels, and regulate it appropriately in accordance with "constitutional provisions, decisions of the Constitutional Court, the IACHR, ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples" (Carrión, 2012).

In the same way, important precedents of regulation of prior consultation at the national level are preserved, such as, for example, the procedure provided for in the REDD+ Action Plan. This regulation constitutes an experience that opens opportunities to advance with regulation for prior consultation that exceeds the limitations of Decree 1247 (2012).

The regulation of the right to free, prior and informed consultation must be carried out through Organic Law when regulating collective rights and must necessarily establish clear and objective mechanisms that guarantee the effective applicability of collective rights in order to reduce existing social tension and avoid the escalation of socio-environmental conflicts in the future (CEDA, ASIES & SPDA, 2014; Carrión, 2012). In any case, it is necessary to differentiate between the regulation of prior consultation related to administrative and legislative measures as established by the Constitution and Decision No. 001-10-SIN-CC of the Constitutional Court so that it is not restricted in its scope, its application, and effective compliance with the law.

Having clear and objective regulation is important in the social, political, and economic context of the country. The escalation of social conflicts, whether due to the extraction of natural resources or due to real and potential impacts on ecosystems and natural resources, shows the need to have mechanisms that not only avoid the violation of collective rights but also guarantee the use and exploitation of natural resources by the entire population.

Faced with this situation, since May 2022, the draft of the Organic Code of Free, Prior and Informed, Environmental and Legislative Consultation has been in process as a joint initiative between the National Assembly and the Ombudsman's Office.[95] The Technical Roundtable

[93]Constitutional Court of Ecuador. Decision No. 7-21-CP and accumulated/22 of January 12, 2022. Retrieved from http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOic3ZmFhMzk0Mi1lYjdmLTQ4YzYtODVjZS02ZmQ1ODkwYjcxZGEucGRmJ30=.

[94]In February 2023, the National Electoral Council confirmed the sufficient number of signatures to convene the popular consultation in the course of 2023.

[95]https://prensa.ec/2022/05/11/propose-law-project-for-normar-las-consultas-previa-libre-e-informada-ambiental-legislativa-y-popular/

between the indigenous movement and the government that is intended to convene at the end of 2022 could promote a process of intercultural dialogue in good faith on free, prior and informed consultation and overcome the dichotomy on the scope of the consultation and its binding or non-binding nature

The protests of October 2019, under the leadership of the Confederation of Indigenous Nationalities of Ecuador (CONAIE), such as the national strike of 2022, evidenced the distrust that exists between the indigenous sector and the government sector. Dialogue on consultation requires a certain level of trust and the willingness of all parties to accept an eventual agreement and translate it into public policy.

One of the fundamental elements that must be considered is related to the capacities of the related actors. In the case of Ecuador, if we consider the jurisprudential development of the consultation that has been evidenced in recent years, an important challenge relates to the strengthening of the judiciary and the development of specific capacities in the administrators of justice that allow them to effectively resolve and expedite cases related to the violation of the right to consultation.

V. SOME APPROACHES ON THE IMPLEMENTATION OF THE RIGHT TO PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN PERU by Flavia Noejovich

1. Introduction

Peru was one of the first countries to ratify ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) by Legislative Resolution No. 26253 of 2 December 1993, which entered into force on February 2, 1995. This coincided with the opening to foreign investment and a series of legislative decrees that facilitated, among others, activities of exploration and exploitation of hydrocarbons, with high expectations on gas fields. International experiences and previous extractive activities in the country highlighted not only the vulnerability of indigenous peoples' rights but also the effectiveness of campaigns promoted by international organizations. This was a determining factor so that the companies that arrived in Peru came with a more advanced social and environmental agenda than existed in the country at that time, starting a new debate on collective rights in the light of Convention 169. Likewise, the 1990s and 2000s marked the beginning of legislative development in environmental matters aligned with the international commitments assumed at the 1992 Rio Summit, including the regulation of environmental impact studies, citizen participation, access to information, and incorporation of rights for indigenous peoples in environmental legislation.

However, the implementation of prior consultation established in Convention 169 had to wait several years until 2011 when the Law of Prior Consultation was approved after a long and difficult path of debates, conflicts, and negotiations. The Constitutional Court also had a role in interpreting the scope of the consultation with some controversial and contradictory decisions, but also marking positions and demonstrating a process of reflection and learning at the highest level of the three branches of government.

This section briefly explains the legal framework related to prior consultation in Peru, mentioning the main rulings of the Constitutional Court and examples of cases of prior consultation, as well as some reflections on the difficulties and challenges that remain for the effective implementation of the Right to Prior Consultation established in Convention 169.

2. Background: From Convention 169 to the Law of Prior Consultation

ILO Convention 169 was ratified in 1993 and entered into force in Peru in February 1995. Between these two dates, Peru enacted a new Constitution in 1993 that entered into force on January 1, 1994, and a series of legislative decrees that would regulate various environmental issues and extractive activities. Despite the coincidence in time, none of this legislation developed or took into account the provisions of Convention 169.

Although the 1993 Constitution did not clearly establish the constitutional status of international treaties, subsequent rulings of the Constitutional Court (TC, for the acronym of its Spanish equivalent, *Tribunal Constitucional)*[96] noted that human rights treaties have constitutional status. Specifically, the decision in Case file No.03343-2007- PA/TC (see table 1) recognized the constitutional status of ILO Convention 169 and, in addition, urged the Congress of the Republic to develop legislation on prior consultation. The recognition of the constitutional status of the Convention implied that it should be applied by the State, without its implementation being conditional on legislative development (La Rosa Calle, 2012).

Furthermore, the Constitution states in its Fourth Final Provision that constitutional norms relating to rights and freedoms must be interpreted in accordance with treaties on the same subject. The provisions of the Constitution applicable to indigenous peoples should therefore be interpreted in the light of Convention 169. This has made it possible to file actions with the TC for non-compliance with the provisions of Convention 169, forcing the Court to establish a position and reflect on the subject of the consultation, even though some of its decisions have been contradictory and its interpretations questionable (La Rosa Calle, 2012).

[96]Decision on files No. 0025- 2005-PI/TC and No. 0026- 2005-PI/TC.

TABLE 1

Cordillera Escalera Case

Case file No.03343-2007- PA/TC

Claimant: Hans Bustamante Johnson

Respondents: Talisman Petrolera del Perú, LLC Sucursal del Perú; Repsol Exploración Perú, Sucursal del Perú, and Petrobras Energía Perú S.A.

Relevance: Recognizes the constitutional status of ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries

Subject Matter: Claim for protection due to threats to the following constitutional rights: to enjoy a balanced environment suitable for the development of their lives; to life, free development and well-being; to the protection of health, the family environment, and the community, as well as the duty to contribute to their promotion and defense; to demand that the State promote the conservation of biological diversity and protected natural areas; and, to food and water.

Claimant's claim: That the state of affairs be restored to the moment in which the aforementioned rights began to be affected and that the exploitation and eventual exploration of hydrocarbons be suspended in the oil lot (103) that overlaps with the Cordillera Escalera Regional Conservation Area (created by Supreme Decree 045-2005-AG).

Relevant findings on collective rights

Although this case concerns the right to a balanced environment claimed by a citizen and not by a community (the decision declared the claim founded), the TC considered it pertinent to rule, tangentially, on the rights of indigenous peoples, based on a technical report from the Ministry of Women and Social Development that reported the presence of 64 native communities belonging to the Cocama Cocamilla and Chayahuita ethnic groups in lot 103 (Finding 26). This motivated the TC to include the constitutional right to ethnic and cultural identity in the analysis of the constitutional rights affected, and its relationship with Convention 169 and prior consultation.

Relevance of the court decision

This decision has been substantial in the process of reflection and analysis, and the grounds for successive TC decisions on the right to prior consultation by recognizing, for the first time in a TC decision, the constitutional rank of Convention 169 (Finding 31) and urging Congress to develop a law on prior consultation (Finding 40). It also included important criteria and guidelines for understanding ethnic diversity and its relationship to cultural diversity (Findings 27-30).

To read the court decision, go to: https://derechodelacultura.org/wp-content/uploads/2015/03/Corte-superior-justicia-de-San-Mart%C3%ADn.pdf?view=download

It should be noted that, unlike other countries in the region, Peru did not incorporate the term indigenous people in the constitutional text, maintaining the concepts of peasant and native communities, while recognizing the fundamental right to ethnic and cultural identity, and protecting the ethnic and cultural plurality of the Nation.[97] This has generated various debates and interpretations regarding who has the right to consultation, with some questioning whether all communities (in particular the peasant communities of the highlands and coast) can be considered indigenous peoples as they have lost their traditional language and/or institutions.[98]

However, this legal development was not sufficient to generate a culture of application of prior consultation in State institutions. The events of Bagua of 2009,[99] which occurred following the demands of indigenous peoples against the approval without prior consultation of regulations that affected their rights, would prompt the approval of norms for prior consultation in Peru. The first response was the creation of a National Coordination Group for the Development of Amazonian Peoples, within the framework of which a consensual proposal was developed between the State and Amazonian indigenous organizations on the right to prior consultation. In addition, several proposals were presented to Congress to regulate this right, succeeding in approving a written law in May 2010. However, the Executive Branch, during the government of President Alan García, made observations on the Congressional text when there was little time left before the end of his term, so the law had to wait for the next government to be enacted in August 2011 (La Rosa Calle, 2012).

A few months before the enactment of the Law of Prior Consultation, the Ministry of Energy and Mines (Minem) approved a norm regulating the prior consultation procedure for energy mining activities.[100] Prior to that decision, Minem had been applying its regulation on public participation

[97]See article 2.19, Constitution 1993 and jurisprudence of the TC: Case file No. 01126-2011-HC/TC; Case file No. 00032-2010-PI/TC.
[98]See Leyva, 2018 and Working Group on Indigenous Peoples of the National Coordinator of Human Rights, 2019.
[99]See: After the Baguazo: reports, dialogue and debates. Workbook No. 13. Omar Cavero September 2011 for a detailed account and analysis of the events and their results.
[100]Supreme Decree No. 023-2011-EM, published on May 12, 2011.

for consultations with indigenous peoples. However, a TC ruling[101] clarified that these regulations did not adequately develop the right to prior consultation and ordered Minem to develop a consultation procedure for activities within the framework of its responsibilities (La Rosa Calle, 2012).

TABLE 2

Case: Tuanama Tuanama

Case file No. 0022-2009-PI/TC

Claimant: Gonzalo Tuanama Tuanama, representing more than 5000 citizens.

Relevance of the Decision: This decision identified the elements and characteristics of prior consultation, delimited the constitutionally protected content of the right to prior consultation, and defined the position of the TC regarding the direct impact on indigenous peoples in order to determine if consultation is applicable. In addition, it acknowledged that this right involves an intercultural dialogue.

Subject: Claim of unconstitutionality filed against Legislative Decree No. 1089, which regulates the Extraordinary Temporary Regime of Formalization and Titling of Rural Properties, published in the official newspaper, *El Peruano,* on June 28, 2008.

Claimant's claim: The Claimant claims that the contested legislation is unconstitutional because it was approved without prior and informed consultation with indigenous peoples, as stipulated in ILO Convention No. 169 and articles 19, 30, and 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In addition, it affects other fundamental rights of indigenous peoples contained in ILO Convention 169 on ancestral territories, land ownership and possession, self-determination, and development (arts. 6, 13-19).

Answer to the Claim: The Executive Branch, through the Public Prosecutor of the Presidency of the Council of Ministers, alleges that Legislative Decree No. 1089 has given a regulatory framework to simplify and optimize the procedures for formalizing rural property, creating the ideal conditions for farmers to obtain ownership over their lands and provide legal certainty over land tenure. It questions the application of ILO Convention 169 to peasant communities and points out that the aforementioned legislative decree is temporary and does not legislate on the fundamental rights of indigenous peoples. It also considers that it is not possible to allege the unconstitutionality of the norm in question based on the claim that there has not been a prior consultation, because… *"no norm establishes who the indigenous peoples are in our country, where issues must be consulted, and under what procedure the consultation will take place."*

[101]Jurisprudence of the TC: Case file: N° 05427- 2009-PC/TC.

A brief overview of the Basics of the TC decision

In this decision, the TC established some guidelines and elements for prior consultation. First, it concluded that the right to consultation also constitutes an intercultural dialogue (Finding 17). This dialogue should be activated whenever an administrative or legislative measure is likely to directly affect indigenous peoples. The TC also established that, although according to article 6 of the Convention that consultation must be carried out "in order to reach an agreement or obtain consent on the proposed measures," this does not imply a right of veto (Findings 24 and 25).

The TC identified the following elements of prior consultation based on the provisions of Convention 169: the principle of good faith, which constitutes the essential core of the right to consultation; the objective of reaching an agreement; transparency; and that the consultation process must be prior to the decision (Findings 27 to 36).

In addition, he specified that the principle of flexibility in the application of the consultation, depending on the measures or projects that imply a greater or lesser intervention and, therefore, a greater or lesser involvement, must be "taken *into account when analyzing the realization of the right to consultation and the consensus reached. Thus, the greater the intensity of intervention foreseen, the greater the scrutiny that will have to exist when reviewing the consultation process. This is because we are facing an intervention that, in principle, will be important and have a greater level of impact" (*Findings 31-32).

Regarding the determination of the matter to be consulted, the TC established its position regarding the direct impact on determining the appropriateness of the consultation. It points out that prior consultation does not apply to all types of administrative or legislative measures that affect indigenous and native communities, but only against those measures that directly affect them, i.e., that imply relevant and direct changes to their legal situation (Findings 19 and 20). To this end, the TC identified three types of legislative measures: 1. Measures that exclusively regulate aspects relevant to indigenous peoples, for which consultation will be mandatory because it directly affects them; 2. Rules of general scope, which could imply an indirect impact on indigenous peoples, where consultation would not be mandatory; and, 3. Certain topics included in a standard of general scope that requires establishing, in some points, specific references to indigenous peoples. "*…In such cases, if these normative references directly modify the legal situation of the members of indigenous peoples on relevant issues and in a substantial way, it is clear that such points will have to be the subject of a consultation.* (Finding 22).

In addition, this decision delimited the constitutionally protected content of the right to consultation, noting that it consists of: i) access to consultation, ii) respect for the essential characteristics of the consultation process; and, iii) the guarantee of compliance with the agreements reached in the consultation. The veto of the legislative or administrative measure and the refusal of indigenous peoples to consult do not form part of the content of this right (Finding 37).

In addition, in this decision, the TC specified its position regarding the relationship between possession and ownership of the territories of indigenous peoples (ground 50) in accordance with

the decision of the IACHR Court in the decision of the Sawhoyamaxa Indigenous Community v. Paraguay Case (para. 128), which states:

"(1) the traditional possession of indigenous peoples over their lands has effects equivalent to the title of full ownership granted by the State; (2) traditional possession grants indigenous peoples the right to demand official recognition of ownership and registration; (3) members of indigenous peoples who, for reasons beyond their control, have left or lost possession of their traditional lands maintain the right to own them, even in the absence of a legal title, except when the lands have been legitimately transferred to third parties in good faith; and (4) members of indigenous peoples who have involuntarily lost possession of their lands, and these lands have been legitimately transferred to innocent third parties, have the right to recover them or to obtain other lands of equal extension and quality. Consequently, possession is not a requirement that conditions the existence of the right to the recovery of indigenous lands."

Court Decision

Although the TC declared the claim of unconstitutionality against Legislative Decree No. 1089 unfounded, it established that this legislative decree does not apply to indigenous peoples. In addition, the territories of peasant and native communities, registered or not, must be identified in advance in order to ensure that the procedure established in the regulation of the Legislative Decree in question (Supreme Decree No. 032-2008- VIVIENDA) is not applied on their territories.

To review the full text of the court decision, go to:
https://tc.gob.pe/jurisprudencia/2010/00022-2009-AI.pdf

A recent decision of the TC,[102] in July 2021, provides new contributions to the implementation of prior consultation and clarifies the legal path for the defense of this right based on a lawsuit filed by the Institute for Legal Defense of the Environment and Sustainable Development of Peru (IDLADS for its acronym in Spanish) against Ministerial Resolution 209-2015-MEM/DM, which implements prior consultation on hydrocarbons and electricity projects, regulating administrative procedures in which it is appropriate to carry out the prior consultation process, the opportunity in which it will be carried out, and the Office in charge of consultation (see Table 3). The decision determined that when the administrative acts violate or constitute a certain and imminent threat to a fundamental right for which consultation is required, the appropriate way to require prior consultation is the amparo action. This opens a range of possibilities to demand consultation, for example, for laws and the approval of environmental impact studies (Quispe Mamani, 2021). Another notable element of this ruling is that it establishes a precision on the opportunity of the consultation (Finding 51).

[102]The TC decision can be accessed at: https://tc.gob.pe/jurisprudencia/2021/01717-2014-AC.pdf

TABLE 3

Case: IDLADS Peru

Case file. No. 01717-2014-PC/TC

Claimant: IDLADS Peru

Respondent: Ministry of Energy and Mines.

Relevance: Determines the appropriate legal channel to demand prior consultation, establishes criteria for interpretation on the opportunity for prior consultation, the administrative procedure, and the Ministry of Energy and Mines in charge of carrying it out.

Subject: Claim filed by the Institute of Legal Defense for the Environment and Sustainable Development of Peru (IDLADS Peru) against the resolution dated November 21, 2013, issued by the Sixth Civil Chamber of the Superior Court of Justice of Lima, which declared the claim of compliance against the Ministry of Energy and Mines inadmissible.

Preliminary issues: To reconvert the claim of compliance into an amparo claim since the claim is to question the validity of a norm; to admit the request of the National Agrarian Confederation as an optional joint litigant to consider and admit the accumulation of the Ministerial Resolution 362-2015-MEM/DM to the process.

Claimant's claim: That Ministerial Resolution 350-2012-MEM/DM and Ministerial Resolution 209-2015-MEM/DM, regulations that approve the administrative procedures in which it corresponds to carry out the prior consultation process, the opportunity in which it will be carried out and the management in charge, have been issued without taking into account the provisions of Law 29785 (Law on the Right to Prior Consultation of Indigenous or Native Peoples) since they have not been subjected to prior consultation for approval. In addition, the competence of the Energy and Mines Sector to determine the exact moment in which the prior consultation is carried out is questioned.

Answer to the claim: The respondent maintains that the Ministerial Resolution does not violate the right to prior consultation since it only approves the administrative procedures through which the consultation will be carried out, the opportunity in which it will be carried out, and the office within the Minem responsible for consultations. Nor does it directly affect indigenous peoples since it does not grant any land concessions, does not authorize the use of any property or land for mining activities, does not authorize the exploration or exploitation of minerals on the lands of indigenous peoples, and does not contain information on mining projects.

A brief overview of the TC Decision findings

Regarding the office of Minem in charge of carrying out the prior consultation

The TC established that the office in charge of the consultation referred to in Ministerial Resolution 209-2015-MEM/DM, must respect the characteristics and principles of the right to prior consultation indicated in finding 35:

The body responsible for prior consultation must ensure that the prior consultation procedure is carried out taking into account the characteristics and principles of the right to prior consultation. To this end, among other measures, it must facilitate dialogue between the parties; coordinate effectively and efficiently with all sectors involved; coordinate the effective protection of leaders and indigenous or native communities that are at risk due to their participation in the prior consultation procedure; and channel the claims made by indigenous or native communities. Thus, the body in charge of prior consultation must promote the effective participation of indigenous or aboriginal peoples, helping to strengthen democracy and promoting the guarantee of the social state clause.

Regarding the opportunity in which the prior consultation will be carried out

The TC established that the opportunity for prior consultation of legislative or administrative measures that directly affect indigenous or native communities must be prior to the approval, adoption, or authorization of the legislative or administrative measure that directly affects indigenous or native communities. The exact timing of the prior consultation could not be determined as a standard interchangeably applicable to every community. The opportunity of the prior consultation should consider the uses and customs of indigenous and native communities for decision-making and the type of measure intended to be approved. In addition, it is not limited to a single moment, it must be a constant dialogue throughout the process of elaboration and implementation of the measure. (Findings 41, 42, and 43).

Prior consultation should also be appropriate, guided by the principles and characteristics of the right to prior consultation, such as good faith, flexibility, the aim of reaching an agreement, transparency, and prior implementation of the consultation process. The deadlines established in prior consultation are decisive for ensuring the real participation of indigenous or native communities (Findings 44 and 48).

"… *from an interpretation in accordance with the content of the right to prior consultation, and taking into account the pro persona principle, which obliges interpreting the regulations that enshrine fundamental rights in the broad sense, the section of the Ministerial Resolution 209-2015-MEM/DM that determines the opportunity for prior consultation should be understood as a process in which the channels of dialogue are kept open throughout the monitoring of the project, plan, work or program. It should also be bear in mind that the determination of the exact moment of prior consultation must be prior and appropriate, observing, among other measures and principles, the organization of the indigenous community with a view to its real and effective participation in the consultation, having*

*reasonable terms that allow agreements to be made in the indigenous community, applying the principle of flexibility and taking compensatory measures to strengthen the position of these communities…¨ (*Finding 51).

Regarding the approval of the administrative procedures in which the prior consultation is to be carried out

The TC concludes that *"(...) the identification of the administrative procedures provided for in Ministerial Resolution 209-2015- MEM/DM cannot be interpreted in a restricted sense, but in a broad one in accordance with the content of the right to prior consultation, under which the administrative procedures subject to prior consultation in matters of hydrocarbons and electricity are not limited to those listed in said resolution.¨ (Finding 57). (…) the identification of administrative procedures in hydrocarbon and electricity activities established in Ministerial Resolution 209-2015-MEM/DM, considering a broad interpretation, although it impacts indigenous communities when referring to the prior consultation of those administrative procedures, does not pose a prescription or obligation of any conduct that has the potential to directly alter the social, economic, environmental, territorial or legal structure of said population. Likewise, to the extent that it has been noted that the determination of the body in charge and the terms in which the opportunity for prior consultation of the administrative procedures identified is raised do not generate a direct impact on the indigenous communities, it is concluded that this end of Ministerial Resolution 209-2015-MEM/DM does not trigger the obligation to be previously consulted.¨* (Finding 59).

Court Decision

Even though the decision declares the claim unfounded, it orders the interpretation of Ministerial Resolution 209-2015-MEM/DM in accordance with findings 40, 51, 57, and 59 of this decision and urges the Executive Branch to include the participation of indigenous and native communities in the implementation of the prior consultation procedure.

To review the full text of the court decision, go to:
https://tc.gob.pe/jurisprudencia/2021/01717-2014-AC.pdf

3. Current legal framework on Prior Consultation

In August 2011, Congress approved Law 29785, Law of Prior Consultation, which entered into force in December of that year; and, in April 2012, its regulation was approved by Supreme Decree 001-2012-MC. Subsequently, other regulations would be approved for the creation and registration

of interpreters and facilitators, the operation of the Official Database of Indigenous Peoples, and the procedure for indigenous peoples' right to petition.[103]

The Law on Prior Consultation (PC) avoided addressing the regularization of the measures that would have been carried out without prior consultation between 1995 and December 2011 and settled the issue by stating that the previous acts would be subject to the rules of citizen participation. In addition, although, on the one hand, the Law on Prior Consultation repealed Supreme Decree No. 023-2011-EM that regulated prior consultation in the mining-energy field, on the other hand, it validated the administrative acts carried out before said Law's entry into force.[104] However, criticism quickly followed. In fact, although the aforementioned Supreme Decree included workshops for consultation with the communities as part of the participatory process, they could not be considered a mechanism for prior consultation as established by Convention 169 (Ruiz Molleda, 2014).

3.1 Law on Prior Consultation and its regulation

The Law on Prior Consultation regulates the right recognized in ILO Convention 169 for indigenous or aboriginal peoples to be consulted regarding legislative or administrative measures that directly affect their collective rights related to their physical existence, cultural identity, quality of life, or development, including national and regional development plans, programs and projects, in order to reach an agreement between the State and indigenous peoples regarding the consulted measure.[105] In addition, it includes a series of principles that should govern consultation based on Convention 169 such as opportunity, interculturality, good faith, flexibility, reasonable time, absence of coercion, and timely information.[106]

The State entity promoting the legislative or administrative measure is responsible for determining whether such a measure will directly affect an indigenous people and, therefore, requiring a consultation process before being approved.[107]

The Law on Prior Consultation does not define what is meant by direct impact, but it is the regulation that specified it, noting that: "*a legislative or administrative measure is considered to directly affect indigenous peoples when it contains aspects that may produce changes in the legal situation or the exercise of the collective rights of such peoples.*"[108]

Indigenous peoples participate in the consultation through their elected representatives in accordance with their uses and customs. To determine who indigenous peoples are, the law has

[103]For a complete and updated list of the rules linked to Prior Consultation go to: http://consultaprevia.cultura.gob.pe/normas-legales/.
[104]Second Final Supplementary Provision.
[105]Articles 1, 2 and 3.
[106]Article 4.
[107]Article 9.
[108]Article 3.

established a series of objective and subjective criteria based on Convention 169, although with some additional details that have been questioned by some experts.[109] These criteria are:

- direct descent of the populations originating in the national territory;
- lifestyles and spiritual and historical ties to the territory they traditionally use or occupy;
- their own social institutions and customs;
- cultural patterns and lifestyles different from those of other sectors of the national population; and,
- the subjective criterion of the self-identification or awareness of the collective group of having an indigenous or aboriginal identity.

Some criticize the inclusion of the requirement of "direct descent" from aboriginal populations not only because Convention 169 does not require it but also because this can lead to restrictive or exclusive interpretations since the Law on Prior Consultation has not specified how direct descent is defined and can be proven (Duque Morales and Mosquera Monelos, 2018).

The requirement of links with the territory is also questioned because historical changes, such as terrorism, colonization, and expropriation, among others, have forced some peoples to move to other lands, so they do not always continue using or occupying their ancestral territory (Duque Morales and Mosquera Monelos, 2018).

To provide guidance for the identification of the subjects of prior consultation, the Law on Prior Consultation created the Official Database of Indigenous Peoples under the responsibility of the Vice-Ministry of Interculturality of the Ministry of Culture (hereinafter VMI).[110] The regulation of the Law on Prior Consultation (article 29.1) clarifies that the database does not constitute rights and, therefore, is merely referential to help the entities promoting the measures to identify indigenous peoples. Even so, a complementary rule[111] that establishes the guidelines for the identification of indigenous peoples adds some elements as additional information for the evaluation of the objective and subjective criteria of the Law on Prior Consultation such as indigenous language, social and political organization, and use of territory, among others (see 7.1.2 of Directive N° 001-2014-VMI-MC). These additional requirements could exclude peasant communities from the database situated on the coast or in Andean areas that no longer retain their indigenous language, going beyond the provisions of Convention 169 (La Rosa Calle, 2012).

[109]Article 7.
[110]Article 29 of the Law on Prior Consultation and article 29 of its regulations, and Ministerial Resolution 202-2012/MC.
[111]Vice-Ministerial Resolution No.004-2014-VMI-MC, Guidelines that establish instruments for collecting social information and set the criteria for its application within the framework of the identification of indigenous or aboriginal peoples.

In October 2013, the Ministry of Culture published the Official Database of Indigenous Peoples with information on the indigenous peoples of the Amazon. Peasant communities were included only in 2015, due to the debate as to whether they could be considered indigenous peoples.[112]

To date, the VMI has identified 55 indigenous peoples, 51 in the Amazon and four in the Andes, and eight representative organizations.[113] According to a report published by Oxfam (Leyva, 2018), a large number of communities belonging to indigenous peoples would still need to be included in the Database.

The Regulation of the Law on Prior Consultation had established, in its Fifteenth Complementary, Transitional, and Final Provision, exceptions to the consultation for the construction and maintenance of infrastructure in health, education, and public services. These exceptions were questioned by indigenous organizations,[114] and legal action was taken to repeal them. Finally, a recent Supreme Court decision, in January of 2021, after a process that lasted five years, ruled in favor of the position of indigenous peoples and ordered the repeal of the aforementioned provision, declaring its nullity with retroactive effects.[115]

The Law on Prior Consultation establishes seven stages for prior consultation, and a preparatory stage in which the promoting entity may hold meetings with the representative organizations and inform them about the consultation plan.[116] This preparatory stage, which could be very useful to define common rules and a methodology that allows a true intercultural dialogue, is usually not well used and is generally used to define the timeline without addressing such topics as important as the methodology; in addition, the content of the plan is usually similar in all the entity's consultations instead of adapting them to the specific characteristics of each community and sociocultural context (Leyva, 2018).

3.2 Stages of the prior consultation process[117]

1. **Identification of the administrative or legislative measure to be consulted by the state entity or authority promoting said measure.** If the promoting entity does not call for prior consultation, indigenous peoples may request it from said entity, exercising their right to

[112]Working Group on Indigenous Peoples of the National Coordinator of Human Rights (2019) What about Indigenous Peoples in Peru? Compliance with the 30-year obligations of the Peruvian State under ILO Convention 169, CAAAP.

[113]For detailed information on Amazonian and Andean indigenous peoples, organized in native and peasant communities and other localities, go to: https://bdpi.cultura.gob.pe/.

[114]"Indigenous Peoples of Peru: 2014 Report on Compliance with ILO Convention 169." Organizations that make up the Unity Pact of Indigenous Organizations of Peru, and the Interethnic Association of Development of the Peruvian Jungle -AIDESEP, 2015.

[115]For a summary of the decision, go to: https://dar.org.pe/corte-suprema-anula-disposicion-que-recortaba-derecho-a-consulta-previa/. The decision can be reviewed at: https://dar.org.pe/wp-content/uploads/2021/01/Accion-Popular-contra-el-Reglament-de-la-Ley-de-Consulta-Previa-por-exonerar-de-consulta-previa-los-servicios-publicos.pdf.

[116]Articles 15 and 16.

[117]Articles 8 to 16 of the Law on Prior Consultation and 14 to 26 PC Regulation.

petition. This right may also be invoked by indigenous peoples who consider themselves excluded from a consultation. If the application is denied, they may appeal this decision to the VMI.

2. **Identification of the indigenous or aboriginal peoples to be consulted by the authority promoting the measure.** As mentioned, the identification must take into account the information contained in the Official Database of Indigenous Peoples, but the entity could include other peoples or communities not registered in said database.
3. **Publicity of the legislative or administrative measure.** The promoting entity shall deliver the measure to be consulted, as well as the consultation plan to the representative organizations of the peoples to be consulted, using culturally appropriate methods and procedures, considering the languages of said peoples.
4. **Information on the legislative or administrative measure.** The entity must provide information, from the beginning of the process and with due anticipation, to indigenous peoples and their representatives on the reasons, implications, impacts, and consequences of the measure to be consulted.
5. **Internal evaluation in the institutions and organizations of indigenous or aboriginal peoples on the legislative or administrative measure that directly affects them.** A reasonable period should be provided to assess the scope and impact of the measure on their collective rights.
6. **Intercultural dialogue process between representatives of the State and representatives of indigenous peoples.** The dialogue takes place on the basis and possible consequences of the measures, as well as on the suggestions and recommendations made. The dialogue process should be reflected in a consultation document.
7. **Decision**: The final decision is up to the promoting state entity, which must be duly motivated. The decision may or may not result in an agreement. If no agreement is reached, the entity must adopt measures to guarantee respect for the collective rights to life, integrity, and development of the peoples consulted. If an agreement is reached, the content of the agreement is binding between the parties and administratively and judicially enforceable.

3.3 Cases before the Law of Prior Consultation

A subject of debate that is still open and has been the subject of lawsuits through judicial channels refers to administrative acts or measures adopted since the entry into force of Convention 169 and prior to the Law on Prior Consultation. The Second Final and Complementary Provision of the Law on Prior Consultation established the validity of these administrative acts including those approved within the framework of the regulation on public participation. In addition, article 2 of Supreme Decree 001-2012-MC approving Prior Consultation Regulation elaborates on this point, specifying that regulation will only apply to administrative and regulatory acts after it enters into force. For some authors, this would imply that the measures adopted within the validity of ILO Convention 169, initiated on February 2, 1995, and prior to the promulgation of the Law on Prior

Consultation would not be subject to consultation, ignoring Convention 169 itself and the jurisprudence of the Constitutional Court (Ruiz Molleda, 2014).[118]

However, another interpretation that could be invoked is that the Regulations of the Law on Prior Consultation would not deny the right to consultation for measures prior to the Law on Prior Consultation but would only be excluding them from the application of the procedure approved by the latter. Thus, measures adopted between the entry into force of Convention 169 and the Law on Prior Consultation that should have been consulted could be the subject of a claim through an amparo action. This interpretation would be consistent with the TC's pronouncement.[119]

4. Implementation of Prior Consultation

As of October 2022, 81 consultation processes have been initiated, with 70 processes implemented and 11 still in progress.[120] More than half of these processes are mining and hydrocarbon projects. There are also some prior consultations by regional governments related to protected natural areas in Loreto, Cusco, and Ucayali. Among the national measures consulted and agreed upon are: the regulation of the 2011 Forest and Wildlife Law;[121] the regulation of the Climate Change Law;[122] and measures related to the creation of protected areas, zoning, and updating of master plans for these areas;[123] in addition, the Intercultural Health Policy,[124] the National Intercultural Bilingual Education Plan,[125] and the Regulation of the Indigenous or Aboriginal Languages Law have been submitted for consultation.[126] All the consultations have been carried out at the initiative of the promoting entity, except for the consultation for the Hidrovía Amazónica project, regarding the clauses of the concession contract and the proposal for a Directors' Resolution approving the Terms of Reference for the elaboration of the Environmental

[118]TC Case law: Case file 00025-2009-PI/TC, which specified that prior consultation is required since the entry into force of ILO Convention 169.
[119]Decision on Case file No. 02420-2012-PC/TC.
[120]To see the current status of the consultation processes, go to: https://centroderecursos.cultura.pe/es/registrobibliografico/datos-y-cifras-de-la-consulta-previa.
[121]For detailed information on the prior consultation process on the regulations of the Forest and Wildlife Law (Law 29763) and its agreements, go to: https://consultaprevia.cultura.gob.pe/proceso/reglament-de-la-ley-forestal-y-fauna-silvestre .
[122]For detailed information on the prior consultation process on the regulations of the Framework Law on Climate Change (Law 30754) and its agreements, go to: https://consultaprevia.cultura.gob.pe/proceso/reglament-de-la-ley-marco-sobre-cambio-climatico.
[123]See Presidential Resolution No. 136-2020-SERNANP.
[124]For detailed information on this prior consultation process, go to: https://consultaprevia.cultura.gob.pe/proceso/politica-sectorial-de-salud-intercultural.
[125]For detailed information on this prior consultation process go to: http://www.minedu.gob.pe/campanias/consulta-previa-del-plan-nacional-de-educacion-intercultural-bilingue.php.
[126]For detailed information on this prior consultation process, go to: https://consultaprevia.cultura.gob.pe/proceso/reglament-de-la-ley-de-lenguas-indigenas.

Impact Study, which was carried out by court order;[127] and the consultation for the regulation of Climate Change Law, for which the indigenous organizations had to make use of their right to petition.[128] However, despite the advances, important issues such as contracts for exploration and exploitation of hydrocarbons, granting of mining concessions, and environmental impact studies are not consulted with indigenous peoples (Leyva, 2018).

During the State of Emergency declared by the government to address the health emergency due to Covid-19, a series of measures were issued that determined the temporary suspension of the ongoing consultation processes.[129] During President Vizcarra's administration, the Minister of Economy suggested that, due to Covid-19, part of the consultation (i.e., the stages prior to the dialogue stage) be carried out virtually (Arana and Barrero, 2021). However, this proposal was rejected in the face of opposition from various indigenous organizations and the Inter-American Commission on Human Rights (IACHR), which pointed out that this would violate the right to consultation since it is not possible to guarantee an informed and inclusive process for peoples without access to the Internet and difficulty in participating effectively in a virtual process.[130] Even so, the gradual resumption of the consultation processes did consider that some preparatory and coordination actions could be carried out virtually in agreement with indigenous peoples. Indeed, at the beginning of April 2020, the Ministry of Culture suspended the activities of prior consultation processes by public entities that involved direct contact with indigenous peoples. Although consultations continued to be suspended, the following month, it did authorize preparatory activities that did not involve direct contact, such as coordination, preparation, design, and preparation of documents and methodologies to be implemented in the consultation process once the restrictions were lifted.[131] In addition, it established that the determination of other mechanisms to carry out consultation processes that do not involve direct contact must be agreed upon in advance with indigenous peoples and must guarantee the right to prior consultation.[132]

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[127]For detailed information on this prior consultation process, go to: https://consultaprevia.cultura.gob.pe/proceso/proyecto-hidrovia-amazonica and https://es.mongabay.com/2021/01/hydrovia-amazonia-peru-consulta-previa-pueblos-indigenas/. and for detailed information on the Hidrovías Project and the main milestones go to: https://www.dar.org.pe/inframazonia/informacion-ambiental/.

[128]See Servindi's page: https://www.servindi.org/actualidad-noticias/22/11/2018/triunfo-indigena-reglament-de-ley-sobre-cambio-climatico-ira.

[129]See Supreme Decree No. 008-2020-SA and Supreme Decree No. 044-2020-PCM that declare the Health Emergency and the State of Emergency, as well as their successive extensions.

[130]See the CAAAP document at: https://www.caaap.org.pe/website/2020/07/13/hay-nueve-consultas-previas-que-se-retomaran/.

[131]For an example of a pre-consultation plan developed during the Health Emergency caused by Covid19, see the San Gabriel Mining Project Consultation Plan, http://www.minem.gob.pe/minem/archivos/file/Consulta % 20previa % 20-%20mineria/En % 20Proceso/03% 20San % 20Gabriel/Plan%20de%20CP% 20Corire%20c completo %20_con%20anexos.pdf.

[132]Ministry of Energy and Mines (2021) San Gabriel Mining Project Consultation Plan, http://www.minem.gob.pe/minem/archivos/file/Consulta % 20previa % 20-%20mineria/En% 20Proceso/03% 20San % 20Gabriel/Plan%20de%20CP% 20Corirecompleto%20c %20_con%20anexos.pdf.

After Supreme Decree No. 117-2020-PCM was approved on June 30, 2020, for the gradual and progressive resumption of economic activities within the framework of the State of Emergency as a result of Covid-19, the Ministry of Culture, through Official Letter No. 000524-2020-DGPI/MC, of July 2, 2020, established that face-to-face meetings could be held exceptionally with the agreement of the parties, provided that public health is not put at risk. One of the processes restarted was the prior consultation of Lot 192, which culminated in August 2021 with an agreement.[133]

4.1 Consultations in mining and hydrocarbons

Based on the Law on Prior Consultation, Minem has defined, through sectoral rules,[134] the topics that will be the subject of consultation in its sector, including the start/restart of exploration, development, preparation, exploitation in metallic/non-metallic mining concessions and modifications; and excluding important measures such as the content of hydrocarbon exploration and exploitation contracts, the granting of mining concessions, environmental impact studies, and resettlement or installation of toxic waste in indigenous territories. According to the regulations of this sector, when the beneficiation concession, the mining plan,[135] and the mining transport concession are part of the same project, a single prior consultation process must be carried out if the direct impact is on the same indigenous people (Leyva, 2018).

Minem does not consult the granting of the mining concession because it understands that it constitutes an expectative right, and, therefore, the impact on the rights of the communities will depend on whether the mining activity is carried out in the future. However, this is debatable since the mere fact of having granted a mining concession, even if it is not used, establishes limitations to the community and activities that can be carried out in the concession area, for example, private conservation areas cannot be established (Leyva, 2018).

The case of the Lot 192 consultation[136] is interesting since the communities have experience in the matter of impacts of hydrocarbon activity, being an area of exploitation for more than 40 years.

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[133]See CAAAP: https://www.caaap.org.pe/website/2020/07/13/hay-nueve-consultas-previas-que-se-retomaran/.

[134]Ministerial Resolution No. 003-2013-MEM/DM and Ministerial Resolution No. 444-2016-MEM/DM, Ministerial Resolution No. 522-2016-MEM/DM, and in December 2017, Ministerial Resolution No. 514-2017-MEM/DM was issued.

[135]"The mining plan is the document that contains all the activities or actions to be carried out during the period of one year and that includes, among others: the identification of the limits of the areas of exploration, preparation, exploitation, benefit and other inherent activities, methodology and working parameters, equipment to be used, budgets and costs, personnel, Occupational Safety and Health measures, and possible impacts on the environment and measures to be taken in the face of possible adverse events, quantifying the goals to be achieved¨*DS 024-2016-EM, article 7). It is regulated by the Occupational Safety and Health Regulations in Mining (DS 0024-2016-EM) and its amendment DS 0023-2017-EM. To review the regulations, go to: http://www.minem.gob.pe/minem/archivos/file/Mineria/PUBLICACIONES/LIBROS/RSSO/RSSO2020.pdf.

[136]The oil lot 192 has 2 query processes. One of them culminated in 2015 and another started in 2019, due to the fact that the lot incorporates additional areas for exploitation. This process was interrupted in 2020 due to the Health Emergency declared by the government due to Covid19, and completed in August 2021. See:

Even so, in one of the consultation processes for this lot, they failed to include significant agreements to reduce impacts or protection measures or repairs against constant spills in the area. However, they were able to include 0.75% of the royalties as benefits (Leyva, 2018).

To date, there are approximately 23 cases of constitutional claims by indigenous peoples referring to the right to prior consultation, with six rulings in favor, including the Atuncolla cases, whose decision established that a mining concession cannot be granted in that area without having first carried out a prior consultation;[137] and the Jatucachi case,[138] in which the nullity of a regulatory act was declared due to omission of prior consultation. Although these decisions only apply to the cases filed, they constitute important precedents for advancing the improvement of the regulations for similar cases. They have also demanded through the judicial process the fulfillment of the right to consult the granting of exploitation licenses or concessions of oil lots, such as the case of the Matsés people who filed an amparo action referring to their right to prior consultation in the oil lots granted to the companies Maurel et Prom and Pacific Rubiales,[139] whose decisions in the first and second instance have been in favor of the indigenous peoples.[140] Even when the decision is final, it does not annul the award of the lots but only pronounces the obligation of prior consultation, ordering the suspension of activities until such consultation is carried out (O' Diana Rocca, 2020).

Although most TC rulings have been unfavorable to indigenous peoples' claims, in some cases, as we have analyzed here, they have clarified the scope of prior consultation, with important positions defined by the TC regarding the constitutional rank of Convention 169, criteria, and elements of interpretation on consultation and other collective rights. However, sometimes the TC or some of its members revise their own interpretations, which could undermine the legal certainty and consistency of the decisions of the constitutional control body. An example of this is the recent TC decision on Case file No. 03066-2019-PA/TC which has generated concern by questioning the constitutional rank of Convention 169. While it is not a position shared by most TC members nor does it leave the TC's previous position on this issue without effect, it can be seen as a warning sign of a possible setback in this and other interpretations of the right to consultation. This decision concerns an amparo lawsuit that requests the nullity of the mining concessions granted in favor of the mining company Cemento Sur S.A. that overlaps more than 50% of the territory of the community of Chilla Chambilla because said concession has been granted without respecting the right to prior consultation, the right to communal property, the right to self-determination of peoples to cultural and religious identity. The decision declares the amparo claim inadmissible and

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http://consultaprevia.cultura.gob.pe/proceso/proceso-de-consulta-previa-sobre-el-lote-192-2019/ and https://elperuano.pe/noticia/127045-lote-192-volvera-a-operar-tras-finalizar-la-consulta-previa.

[137]For a detailed analysis of this decision, go to: https://www.enfoquederecho.com/2019/06/04/poder-judicial-nulas-concesiones-mineras-y-eia-por-falta-de-consulta-previa-en-la-cordillera-del-condor/.

[138]To read the decision, go to: https://ia600100.us.archive.org/34/items/SentenciaJatucachi./Judgment%20Jatucachi.pdf

[139]Working Group on Indigenous Peoples of the National Coordinator of Human Rights (2019) What about Indigenous Peoples in Peru? Compliance with the 30-year obligations of the Peruvian State under ILO Convention 169. CAAAP.

[140]http://www.parthenon.pe/columnas/la-jauria-hortelano/ una-sentencia-historica-el-lote-116-y-la-obligacion-de-realizar-de-realizar-la-consulta-previa-des-1995/.

confirms its position expressed in previous decisions that, in the case of natural resources, Convention 169 provides for consultation with the peoples concerned prior to the exploration or exploitation of these resources, but not prior to granting legal rights.[141]

The Ombudsman's Office has also marked its position regarding the quality of the consultation processes carried out by the Minem, noting the inadequacy of the opportunity for consultation that does not allow indigenous peoples to reach agreements linked to the design of the project and influence the concrete protection of their collective rights and, therefore, the agreements reached generally concern State functions recognized in the regulations, such as supervising, transferring complaints or obtaining copies of documents (Leyva, 2018). In addition, the Ombudsman's Office commented on the need for consultations on environmental impact studies (EIAs). Along these lines, indigenous organizations submitted a petition to the Ministry of the Environment (Minam) for prior consultation of the draft Supreme Decree amending the Regulation of Law No. 27446, Law on the National Environmental Impact Assessment System, to include the obligation to carry out prior consultation for the approval of EIAs,[142] without a favorable response to date. [143]

Other questions about the processes carried out by Minem have been described by Leyva (2018) after a thorough evaluation of the consultation processes, including the need to improve the opportunity for consultation in mining and hydrocarbon projects since these are developed within a process with several stages and decisions in which collective rights could be affected. The author (Leyva, 2018) points out that consultations in this sector focus on the impacts of extractive activity on collective rights, but the impact matrix delivered to representative organizations is not sufficiently detailed to make substantial contributions. Added to this is the lack of experience and technical knowledge of those consulted on the activities. Consequently, the discussions lead to very general demands for measures to avoid, eliminate or mitigate these impacts, which have no greater impact on the protection of collective rights (Leyva, 2018).

5. Challenges of Prior Consultation Processes

As a starting point, it is essential to complete the Official Database of Indigenous Peoples to give clarity and certainty about who the peoples entitled to prior consultation are, and avoid endless debates and lawsuits with the consequent cost for the State and the indigenous peoples themselves, which undermines legal certainty. This process must be carried out with the participation and consultation of these peoples, with criteria aligned with Convention 169 and other international commitments adopted by Peru.

[141]See the full text of the ruling here: https://tc.gob.pe/jurisprudencia/2022/03066-2019-AA.pdf.
[142]Working Group on Indigenous Peoples of the National Coordinator of Human Rights (2019).
[143]To view the request, go to: http://www.orpio.org.pe/wp-content/uploads/2019/10/Cargo-de-Carta-de-Petici%C3%B3n-de-Consulta-Previa-de-Orpio.pdf .

Another challenge is to understand the justification of the right to consultation and that this is different from the rationale for the right to public participation. This would help to reduce the difficulties in defining and implementing an adequate consultation process and avoid the refusal of a sector of the population to recognize the need and importance of prior consultation with indigenous peoples. Obviously, the asymmetry and inequality between the parties, the core of the relationship between the State, business, and indigenous peoples, constitute a limitation of the consultation process that will be difficult to modify in the medium term (Hallazi, 2019); therefore, the officials responsible for the definition and implementation of these processes must be aware of this asymmetry and establish mechanisms to reduce or compensate for it. For example, reduce the asymmetry in the access to and understanding of information related to the measure to consult and establish a true intercultural dialogue (Hallazi, 2019).

A basic condition of the right to prior consultation is to obtain consent, even if the consultation is not subject to a right of veto.[144] Indeed, the absence of a veto does not prevent the will of the parties from being directed toward reaching an agreement satisfactory to all concerned; otherwise, all efforts would never be put into the process and the consultation would end up being a mere formality with general, imprecise agreements that are difficult to enforce through the courts, with the consequent wear and tear and distrust of indigenous peoples, spending resources and time in processes that do not guarantee respect for their rights or reduce conflicts.

According to reports on the Law on Prior Consultation, among the problems identified in the consultations, in addition to the asymmetry between the parties, include the difficulty in ensuring the participation of representatives, gender equity, logistics, adequacy of information, and technical-legal advice for each case. However, despite the latent skepticism regarding the effectiveness of the consultation,[145] the indigenous representatives who participate in these processes point out that, in various cases such as the approval of regulations, plans, and policies, they have managed to influence the final text (Leyva, 2018) and continued to participate because, in practice, these consultation procedures are also a way to improve negotiations with the State and companies as well as a space to raise their claims and oppose some measures.[146]

The content of the agreements, as well as their follow-up and enforcement, has also been subject to criticism. As Hallazi (2019) observes, a limitation on the effectiveness of the consultation lies in the very design of the process, which does not offer enough space to delve into the issues, which is reflected in the proposals of the consulted communities and the low level of implementation of the agreements derived from the consultation.

[144]Working Group on Indigenous Peoples of the National Coordinator of Human Rights (2019).

[145]See: "Indigenous Peoples of Peru: 2014 Report on Compliance with ILO Convention 169." Organizations that make up the Pact of Unity of Indigenous Organizations of Peru, and the Interethnic Association of Development of the Peruvian Jungle -AIDESEP, 2015.

[146]Working Group on Indigenous Peoples of the National Coordinator of Human Rights (2019).

In addition, the need to strengthen indigenous organizations and the role of the Vice-Ministry of Interculturality has been highlighted for better monitoring of the quality of the consultation processes and their agreements (World Bank, 2016). On the other hand, it has been pointed out that it is necessary to improve the procedure, to ensure that the consultation meets its objective and does not become a process whose purpose is only to comply with a formality (Lanegra, 2017).

Since communities take advantage of these processes to incorporate all their demands, regardless of whether or not they are linked to the matter to be consulted, for some experts, a way to make consultations more efficient would be to include the various authorities on which the agreements may fall in the process (Leyva, 2018). However, others warn that this could distort the purpose of the consultation, focusing on generalities and demands far from the subject in question as has been happening (Leyva, 2018). One solution would be that the demands of issues outside the measure being consulted, defined at the beginning of the process,[147] could not be included in the discussion and only incorporated at the end of the consultation.

Agreements on obligations that the State or company is obliged to perform by law and do not require an agreement between parties for compliance should also be excluded from the consultation process. For this, it would be necessary for the communities to have a legal advisor. This would make the processes more cost-efficient and facilitate the monitoring of compliance with the commitments of the consultation agreement, placing greater emphasis on prevention and mitigation obligations, and stipulating economic reparations, with legal mechanisms to demand them. This, of course, requires that agreements be drafted as precise and enforceable contractual clauses, underpinned by Convention 169 itself. For example, all agreements relating to mining and oil should include benefit and reparation or compensation clauses in the event of damage as provided for in Article 15 (2) of said Convention, and claims on issues not directly related to the measure consulted should be included in a separate document or annex.

6. Conclusions

Ten years after approval of the Prior Consultation Regulation, 70 processes have been completed that have reached agreements between the State and the consulted communities, although without clear evidence of the effectiveness or positive impact of their implementation, except in the case of consultations on norms such as the norms of the Forest Law and the Climate Change Law.

There is no doubt that the right to prior consultation is necessary. However, its effective implementation is a huge challenge for both the State and the communities themselves and their representative organizations. If they are national consultations, the challenge is even greater,

[147] To see the stages of the consultation process, including the conditions for determining the measure to consult go to: https://consultaprevia.cultura.gob.pe/tapas.

considering the breadth of the Peruvian territory, the diversity of indigenous peoples, and the cultural differences between the Andean and Amazonian peoples.

Well-applied consultation requires time, preparation, and the capacity to agree, as well as the ability to engage in a true intercultural dialogue with sustained contributions, an exhaustive and specialized analysis of the measure, and the elimination of asymmetry between the parties. It is important to avoid the consultation becoming a mere formality with agreements on generalities or commitments that the State or the company would be obliged to fulfill within the legal framework and which should not require an additional agreement with the communities.

Another key point is the delimitation of the measure to be consulted and the specific elements of this measure. It is not possible to consult everything, but it is also not possible to leave fundamental measures out of the consultation such as environmental impact studies.

Another pending issue remains the identification of who has the right to be consulted and the criteria for determining who is part of an indigenous people. The Indigenous Peoples Database is a fundamental instrument and should be completed with the support of specialists, authorities, and indigenous organizations.

Although language is important for the identification of indigenous peoples, it cannot be an *a priori* exclusive element, nor can ancestral occupation, which, in some cases, has been disrupted by conflicts outside the communities that have forced them to relocate. This leads us to reflect on the need for the prior consultation process to be sufficiently agile and flexible to adapt to the processes of cultural change and the characteristics of each people or community, and the nature of their transit through those changes.

Also, some guidelines must be defined for the implementation of article 15.2 of Convention 169 directly associated with the consultation for resource exploitation activities, such as mining and hydrocarbons, in order to incorporate benefits and compensation in the agreements adopted within the framework of processes of prior consultation.

Another pending issue is the definition of a procedure by Congress for prior consultation on laws that may affect the rights of indigenous peoples.[148] To date, Congress has not held any prior consultations.

Finally, the debate is still open on the measures not consulted between the date of entry into force of Convention 169 and the adoption of the norms on prior consultation, and how this issue should be addressed in practice.

[148]"Indigenous Peoples of Peru: 2014 Report on Compliance with ILO Convention 169." Organizations that make up the Pact of Unity of Indigenous Organizations of Peru, and the Interethnic Association of Development of the Peruvian Jungle - AIDESEP, 2015

Photo Credit: PUINAMUDT. Prior consultation for lot 192 in 2015 at https://www.iwgia.org/en/news/3918-consultation-or-non-consultation-here-lies-the-dilemma.html

VI. RELEVANT JURISPRUDENCE IN SOME OTHER JURISDICTIONS ADHERING TO THE CONVENTION: A LOOK AT MEXICO AND GUATEMALA by Jose Mozo

Conflicts with communities are a risk inherent to extractive projects. These conflicts become more relevant when we talk about projects that seek to develop in areas of indigenous communities located in a country that has ratified ILO Convention 169. There are cases where countries have actively sought (with greater or lesser enthusiasm) to regulate the consultation that seeks to obtain the free prior and informed consent of the communities guaranteed by the convention.

However, experience shows that, in many countries, while this convention has been ratified, no adequate regulation or political consensus has been reached as to how this process should be regulated. Thus, it has been the courts that have resolved the disputes that arise concerning this right of indigenous peoples and Afro-descendants who have had to take the judicial path in the absence of a specific procedure. The courts have then ruled and have exhorted the other branches of government to take action or have ended up regulating due to the lack of response from other governmental branches on an issue that is the State's responsibility.

The following is a brief description of recent situations in Mexico and Guatemala that seem to be relevant in this regard and which also represent two ways of approaching the situation of prior consultation.

1. Mexico

Mexico ratified the convention in 1990 and, since 1992, has constitutionally recognized the multicultural nature of its society. Since 2011, international human rights treaties have been granted constitutional status and, therefore, Convention 169 enjoys this status. However, it has not been possible for Mexico to develop a consistent public policy to protect the rights of indigenous and Afro-descendant peoples and much less to enact a law regulating the general framework of prior consultation established by Convention 169. Thus, the guidelines established by the Supreme Courts of Justice are the guidance to be followed.

Over the past decade, valuable decisions have been obtained from the Mexican Supreme Court (SCJN for its acronym in Spanish). Thus, we identify the decisions of the conflicts that have arisen with the Yaqui (2013), Maya (2015), and Zapoteca (2020) communities and, more recently, that of the Nahua community of Tecoltemi, which achieved a historic suspension of mining concession titles granted without consultation.

a. Independencia Aqueduct and the Yaqui Tribe

The conflict with the Yaqui Tribe arose after the tender carried out by the Sonora state government for the construction and operation of the "Independencia Aqueduct" that sought to transfer water from the Yaqui River basin to the Sonora River basin for the city of Hermosillo. This plan was authorized by the environmental authority ignoring the Yaqui people who had rights over the flow of these waters. Faced with this problem, the representatives of the tribe filed an appeal for protection due to violations of their human rights to territory, consultation, and a healthy environment. The appeal –filed in 2011 and ruled on in the first instance in 2012– recognizes that the environmental authority violated the right to consultation of indigenous peoples by granting the environmental impact permit. This resolution was confirmed a year later by Mexico's Supreme Court. Among the most notable paragraphs of this decision is the reference to the criteria of Convention 169 regarding the manner of consultation and seeking agreement expressed by the Inter-American Court in *Sarayaku vs. Ecuador*.

> *Under these parameters, the minimum characteristics that this type of consultation must have are the following:*
>
> *-Consultation must be prior (…)*
>
> *-Consultation must be culturally adequate (…)*
>
> *-Consultation must be informed (…)*
>
> *-Consultation must be in good faith in order to reach an agreement. (…) The obligation of the State is to ensure that all projects in indigenous areas or that affect their habitat or*

culture are processed and decided on with participation and consultation with the peoples.[149]

Regarding the distinction made between consent and consultation, the obligation is to carry out the consultation, not to obtain consent; this issue has long been criticized by human rights organizations because, according to them, it would go against the trend of International Humanitarian Law. *"[T]his First Chamber considers it appropriate to highlight the difference between consultation and consent since, even though any consultation process must pursue the objective of consent, in some cases, its absence may not prevent the authorities from decreeing the corresponding actions, which will depend on the level of impact that the functioning or operation of the Independencia Aqueduct will have on the indigenous community or group, having to weigh the social interests at stake, i.e., both those affected and those benefited by the work, leaving the corresponding authorities in a position to decree, to the extent of their powers, the actions necessary to compensate or mitigate any effects that may arise from the operation of the project(...)."*[150]

Then, the SCJN granted the amparo and ordered the suspension of the contested act, i.e., the environmental impact authorization issued by the authority, and left it subject to the consultation that was to be carried out on the affected community under the standards provided by the court. This was endorsed by the same court in the clarification requested by the **environmental** authority.

b. Mayan Communities and Monsanto

This case refers to three appeals for protection filed by the Mayan communities of Yucatan and Campeche against the Monsanto company aiming to retrieve the legal authorization for the commercial release of genetically modified soybeans granted to the named company. The Second Chamber of Mexico Supreme Court unanimously resolved to grant the appeals until the Intersecretarial Commission on Biosafety of Genetically Modified Organisms and the National Commission for the Development of Indigenous Peoples undertake the consultation with the indigenous communities to which the person complaining belongs. The complaint of the Mayan communities related to 1) The concern regarding the effect on the biodiversity of the area due to the use of chemical herbicides and the penetration that these would have in the watercourses; 2) the impact that these herbicides would have on the health of the people; and 3) the impact that they would have on the beekeeping activity carried out by these communities.

It is appropriate to cite here the relevance of the concurring vote of Minister José Fernando Franco González Salas and the adoption of the criterion indicated by the IACHR in *Saramaka* about the fact that the significant impact responds to a subjective assessment that should not restrict the rights of the communities.

[149]Supreme Court of Justice Amparo in Review 631/2012 pp. 84 Own translation
[150]*Ibid.* Pp. 87

It should be clarified that, although it is true as stated by the Second Chamber in this decision, the aforementioned term is referred to in the ruling of the Inter-American Court of Human Rights in the Saramaka Vs. Suriname; it is also true that it is not used in the sense intended by the Second Chamber since it is rather used to emphasize that when the impact may be "significant," i.e., important for the indigenous community, it will not be enough to carry out prior consultation but will additionally require their consent to carry out the act in question. Therefore, it is possible to affirm that the Inter-American Court makes an important difference when it mentions that prior consultation must be carried out when measures likely to directly affect them are foreseen; furthermore, when there is a significant impact on communities, obtaining their consent will also be required.[151]

c. Zapotec Communities of San Sebastián Tutla (Oaxaca) with the Chamber of Deputies and Senators of the Congress of the Union

This appeal for protection was promoted by the Zapotec communities who complain of the absolute omission by the Mexican Congress to act. Since 2001, there has been a transitory article that obliges Congress to dictate a law to regulate the prior, free, and informed, culturally adequate, and good faith consultation, but they have failed to do so

"[T]he Plenary Court has concluded that, in terms of the provisions of the first paragraph of articles 1 and 2 of the Federal Constitution, and 6 and 7 of ILO Convention 169, indigenous and Afro-Mexican peoples and communities have the human right to be consulted. Such consultation should take place through culturally appropriate, free, informed, and good-faith procedures to reach an agreement through their representatives whenever legislative measures likely to affect them directly are envisaged."[152]

Thus, the Court exhorts the legislature that while

"[T]he legislatures have a duty to provide for an additional phase in the process of creating the laws to consult the representatives of those sectors of the population when it comes to legislative measures that may directly impact them, having to observe, at least, the phases established by the Plenary of this Court when resolving the Action of Unconstitutionality 81/2018, in a resolution issued on April twentieth of two thousand and twenty, consisting of 1. A pre-consultation phase. 2. An information phase for the delivery of information and dissemination of the consultation process. 3. An internal deliberation phase. 4. A dialogue phase between representatives of the State and representatives of

[151]Concurrent vote made by Minister José Fernando Franco González Salas in the amparo under review 198/2015 p. 3 Own Translation
[152]Amparo in review 1144 /2019 p. 34 Own Translation

indigenous peoples. 5. A decision phase, communication of results, and delivery of the opinion."[153]

What is relevant about this decision is that the SCJN notes, despite the disclaimers issued by the chambers of deputies and senators, the omission by the legislator to issue a regulation for the Consultation.

> *"[T]his Second Chamber considers that the Federal Constitution, although it does not expressly establish the obligation of the Congress of the Union to issue a "law" that regulates the right to consultation of indigenous and Afro-Mexican peoples and communities, the truth is that the imperative to regulate this figure is noted, which may be done through the adaptation to the laws or the issuance of a special law, in its scope of attributions, in order to observe the provisions of the reform to article 2 of the Constitution"* [154]

He concludes this sentence by ordering Congress to issue the legislation and initiate the process in this legislature or, at the latest, in the following legislature.

d. Ejidal Commissariat of Tecoltemi and the Nahua Indigenous Community of Tecoltemi with Chamber of Deputies and Senators of the Congress of the Union, General Director of Mines of the Ministry of Economy, and Minera Gorrión

This appeal for protection, promoted by the Ejidal Commissariat and the Tecoltemi Community, sought, on the one hand, to verify the legislative omission on the part of the Mexican legislature by not adapting the mining law and by including a consultation provision; and, on the other, to cancel the mining concession titles granted to Minera Gorrión for not having complied with the prior consultation established by ILO Convention 169, of which Mexico is a part.

The Supreme Court differed from the judge of first instance who had granted the appeal and declared the challenged regulation unconstitutional. The judge of first instance found that the obligation to legislate on the right to prior consultation and free consent in the Mining Law was not fulfilled.[155]

The Court refers to amparo in review 1144/2019, which determined that the second transitory provision of the constitutional reform of 2001 contained an express mandate to the Congress of the Union and the legislatures of the states to regulate indigenous consultation[156] and revoke the

[153]Ibid. p. 36
[154]Ibid. P. 41
[155]Amparo in Review 134/2021 pp. 15
[156]Ibid.: pp. 19

decision regarding the legislative omission and declaration of unconstitutionality of the contested legal precepts since the absolute legislative omission was not a part of the original complaint.[157]

Regarding the omission of Consultation, the Court makes a first statement, pointing out Article 2 of the Political Constitution of the United Mexican States, as well as Article 6 of ILO Convention 169, which establish the obligation of consultation.

> *This prerogative implies that all authorities, within the scope of their respective competencies, are obliged to consult with these peoples before adopting any action or measure directly related to their rights or interests to establish a dialogue between both parties in order to, if possible, reach a consensus.*[158]

In this sense, the Court makes an abstract analysis of the regulations, concluding that the omission of consultation in mining matters does not represent a legislative omission because the aforementioned legislation is already contemplated at the constitutional level and in international treaties. Thus, given the principles of transversality,[159] the consultation would apply to decisions granting mining concessions on indigenous lands since they are administrative acts of the State that accept the rights of indigenous peoples recognized by the latter; on the other hand, the principle of specialty, under which the Court argues that the paragraphs claimed as unconstitutional, regulates the mining activity itself. Therefore, mining law would not be unconstitutional because it is a general rule and not a specific one, emphasizing that

> *[F]ollowing the aforementioned objective criterion, the Highest Court understood that, although such legislation could contain precepts that could be linked to indigenous peoples, the truth is that the object of regulation of these regulatory instruments is not directly related to their interests and rights.*[160]

Thus, the omission of consultation in the enactment of mining law does not represent any unconstitutionality, which does not negate the possibility that unconstitutional conduct in the specific case can be incurred in the application of the law. Thus,

> *Even when the procedure to grant a mining concession does not expressly provide for the obligation of the applying authorities to carry out such prior consultation, it does not imply that they are not obliged to carry it out in the procedure when the lands linked to the respective title relate to indigenous peoples or communities since that human right*

[157]Ibid.: pp. 26
[158]Ibid.: pp. 41 Own Translation
[159]In this regard, recital 159 of this judicial decision explains it clearly: "This aspect is what is known in law as the principle of transversality, which implies that the prerogative in question, in this case, the right to prior consultation of indigenous peoples permeates or involves other human rights and the entire legal system and, above all, the collective rights of these peoples such as the right to collective property and the use of their natural resources in order to create an analysis approach that allows them to fulfill their objective, which is none other than the real exercise of their rights and the expression of their individual and collective identity to overcome the inequality of opportunities that have traditionally affected them."
[160]Amparo in Revision 134/2021 pp. 51

> *recognized to such a vulnerable group, it reiterates, derives from the constitutional and conventional text previously analyzed, i.e., from regulations of superior hierarchy and that permeate the entire legal system.*[161]

Concerning the concession titles, i.e., to the specific case that refers to the issuance of the mining concession titles in question, the Court declares that the competent authority, i.e., the Secretary of Economy,

> *[S]hould have provided for a consultation procedure with the indigenous community, the complaining party today, that complied with all the requirements set out in ILO Convention 169 since the activities of extracting minerals from the subsoil –the subject of concessional title– are assets that share a dual regime. That is, on the one hand, the domain belongs to the Mexican State, however, the Convention itself recognizes participation in its use, administration, and conservation as part of the rights of indigenous communities."* [162]

In other words, the court notes an omission in the obligation to carry out the consultation, which is established in the Mexican legal system both in the Political Constitution and ILO Convention 169, which was ratified by Mexico. Faced with the manifest omission of the State, the court ordered that the mining concession titles be canceled and reissued considering a consultation procedure, even though this is not regulated in Mexican law.

2. Guatemala

Guatemala ratified the convention in 1997 after the peace agreements that ended the internal war that Guatemala lived through between 1960 and 1996.

Although Guatemala has a consultation procedure in the municipal code, this consultation should not be confused with that referred to in Convention 169.

a. OXEC and the Q'eqchi indigenous community;

The company OXEC seeks to build two dams on the Cahabón River for hydroelectric generation purposes. The complaint filed with the Supreme Court of Justice seeks to have licenses granted by the Ministry of Energy and Mines suspended until communities are consulted. The Supreme Court orders the provisional suspension and that the respondents submit documentation to indicate that the consultation had already taken place, whereupon the suspension was lifted. The Supreme Court ultimately ruled in favor of the Indigenous Community, but the decision was appealed. The case was then sent to the Constitutional Court which ruled in favor of the Q 'eqchi community.

[161] Ibid., p. 62
[162] Ibid., p. 86

Regarding the grounds for the consultation, the Court indicates that the progressive development that has been taking place in international human rights law concerning consultation is part of the Guatemalan constitutionality block, and that, consequently

> *"[I]n the case of requests for the authorization of projects, operations or activities related to the use of natural resources, the competent bodies are obliged to comply with the relevant precepts that are contained both in the ordinary laws and regulatory provisions in force as well as in the instruments of international law signed and ratified by the State of Guatemala."*[163]

Therefore, if the project under study involves a direct impact on indigenous communities, the consultation established in Convention 169 must be implemented. Likewise, it emphasizes that the passivity of the legislator cannot mean the nullity or non-existence of such consultation since it would mean guaranteeing that the inaction of the public power empties the fundamental rights of the content.[164]

The Court finds that

> *"for a consultation to be appropriate, two components must concur: on one hand, the framing of certain actions or decisions of the public power as administrative or legislative measures; and on the other hand, the circumstance that it can be reasonably expected that the project, operation or activity whose authorization is requested will cause a direct impact on indigenous populations."*[165]

And it adds that this impact is not limited to the merely patrimonial but encompasses the worldview of indigenous peoples and is aimed at giving them special protection so that the measures of the public authority do not entail a detriment to the life of these communities that for various reasons are more vulnerable.

The court determines that the approval of a hydroelectric plant entails environmental impact and that such impact significantly influences the lives of communities located in the area of influence of the project so that consultation shall proceed in accordance with the legislation in force in Guatemala. The minimum international standards established by the Inter-American Court in the *Saramaka* and *Sarayaku cases are listed.* Likewise, guidelines are established for carrying out the consultation in accordance with said international jurisprudence but, taking into account the circumstances of a project that was already authorized and was even ready to operate, a period of twelve months is granted for conducting the consultation so that, after the term, a report is submitted to the court to determine either a term extension, the termination of the permit or the final operation of the project.

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[163]Cumulative files 90 -2017, 91 -2017 and 92 -2017 CONSTITUTIONAL COURT REPUBLIC OF GUATEMALA, CA P. 49 Own Translation
[164]Ibid. P. 50
[165]Ibid. p. 51

b. Case of the San Rafael Mine

In the Guatemalan case, perhaps the most relevant decision regarding prior consultation is the one issued by the Constitutional Court of Guatemala in the dispute between the Xinca community and the Escobal–San Rafel mining project. It is an extensive ruling, with more than 550 pages, containing valuable reports. The court chose to issue a decision that would make up for the lawmaker's failure to issue the proper regulation for consultation.

> *[I]t has been deemed necessary to issue an atypical ruling with 'nomogenetic' nuances that integrates the legal system and provides guidelines (...). That is why, in the absence of local regulations on the subject, in the following paragraphs, the guidelines will be established that must be observed in the consultations to consider them valid.*[166]

Thus, the Court defines what should be understood by a direct impact on indigenous communities[167] and makes clear that for projects to be developed, the environmental impact study must take into account the opinion of indigenous communities and their special relationship with the territories.[168] The Court points out the conditions that consultation must have in accordance with what the IACHR has established in its jurisprudence. The court lists them as follows.[169]

> *a) Consultation must be carried out prior to assuming the governmental measure that is intended to be implemented.*
>
> *b) Consultation must be free and informed.*
>
> *c) Consultation must be a true dialogue in which good faith, constant communication, transparency, mutual understanding, and respect prevail –it is not exhausted by the information alone.*
>
> *(i) Consultation must not be understood as a mere formality.*
>
> *(ii) Consultation is a process of dialogue between the parties, based on principles of mutual trust and respect.*
>
> *d) The consultation must be aimed at reaching agreements: reaching a consensus as a way to make decisions –it is not intended to legitimize one party imposing itself on the other.*
>
> *(e) Consultation must be conducted through culturally appropriate procedures, in which the customs and traditions of indigenous peoples, especially their representative institutions, are respected.*

[166]File 4785 -2017 CONSTITUTIONAL COURT REPUBLIC OF GUATEMALA, CA p. 55
[167]Ibid. p. 266
[168]Ibid. p. 273, 288, 295
[169]Ibid. P. 301 et seq.

(f) Consultation must be systematic.

One of the arguments put forward by the respondents to reject the appeal was that the inhabitants of the affected sector did not identify themselves as Xinca. The court determined that the fact that the inhabitants of the sector did not identify themselves as indigenous to that community was rather due to the historical circumstance of discrimination against the indigenous population in Guatemala and that for the same reason that historical circumstance of discrimination could not operate against them.[170]

To a greater extent,

> *"In the preceding Recital, this Court, upon analyzing the evidence incorporated into this amparo process, concluded that the indigenous Xinka people live in the municipality of San Rafael Las Flores of the department of Santa Rosa. This conclusion was reached after analyzing the anthropological studies determining that, in the human collective based in that area, both the subjective element and the objective elements that Convention 169 and the International Labor Organization have defined as distinctive of indigenous peoples converge. That affirmation led this Court to ensure that, in this area, there is indeed a people who hold the right to consultation provided for in that international instrument. "These two premises are reiterated in this section and serve as a basis to affirm that, prior to granting the Escobal exploitation license, the State of Guatemala, through the Ministry of Energy and Mines, must consult with the indigenous people residing in the area of influence of this extractive project."*[171]

The Constitutional Court concludes that the State of Guatemala violated the human rights of the Xinca community by not carrying out prior consultation during the environmental impact study and in granting the mining exploration license[172] and, thus, preventing the community from having a say in the formulation, application, and evaluation of the development plans and programs that would be likely to affect them.

It should be noted that the right must not be confused with the similar mechanism established in the municipal code, and that the State of Guatemala is obligated to carry out the consultation process before developing projects for the use of natural resources and to ensure compliance with what is agreed upon as a result of the consultation process.

The court concludes by confirming the ruling of first instance, granting the appeal to the Xinca community, revoking the license granted previously, and ordering a new environmental impact study in which consultation must also be carried out with the community settled in the area of influence.

[170]Ibid.: pp. 373
[171]Ibid P. 452-453
[172]Ibid. p. 469

Photo Credit: Mexican Netowrk of Mining Affected People (REMA) @ https://ecology.iww.org/taxonomy/term/1530

VII. INTERNATIONAL STANDARDS ON THE RIGHTS OF INDIGENOUS PEOPLES TO CONSULTATION AND CONSENT AND CONSIDERATIONS FOR THEIR APPLICATION by Leonardo J Alvarado

1. Introduction

This section will address international standards on indigenous and tribal peoples' rights to consultation and free, prior and informed consent. Included herein are observations by authorities on universal and Inter-American human rights on the bases, content, scope, purpose, and other elements of indigenous consultation and particular considerations that must be taken into account concerning the implementation of the consultation through regulations or other means.

In this sense, this article provides some reflections to be considered in discussions and debates at the regional level in Latin America regarding the elements necessary for the implementation of indigenous consultation. It emphasizes the role of consultation and free, prior and informed consent as a safeguard for indigenous peoples' human rights and the importance that the

mechanisms to consult them also be the product of consultation and consensus. It concludes with final reflections on the mechanisms developed by indigenous peoples themselves as an important option in the discussion on the implementation of these international standards and that this right is understood as an expression of the self-determination of these peoples.

2. Legal Basis of consultation and its safeguarding role

Indigenous consultation is both a right of indigenous peoples and a duty of the States based on various international instruments and jurisprudence. It is not an obligation arising solely from Convention 169 on Indigenous and Tribal Peoples of the International Labour Organization (ILO).[173] Since the adoption of ILO Convention 169 in 1989, significant progress has been made in international standards relating to indigenous peoples that must be taken into account. Convention 169 itself specifies in article 35 that its application "shall not impair the rights and advantages guaranteed to the peoples concerned under other conventions… international instruments, treaties [...]"

Therefore, other international legal sources must be taken into account and incorporated, in particular, the 2007 United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration"),[174] the jurisprudence of the Inter-American Commission and Court of Human Rights, and the general comments and recommendations of the United Nations (UN) treaty monitoring bodies. The legal analyses and recommendations of the UN Special Rapporteur on Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples[175] have also provided guidance for the interpretation and application of international standards relating to indigenous consultation.

Indigenous consultation should not be understood as a simple procedure or formality that must be fulfilled for the achievement of measures, projects, or activities in indigenous lands or territories, nor as an isolated or independent right. The indigenous consultation has a human rights protection function. The Inter-American Court has established that indigenous consultation constitutes a safeguard against measures or activities proposed by the State that could restrict the rights of indigenous peoples, such as collective property and their cultural identity.[176] Consultation and the related principle of free, prior and informed consent "should be understood as essential safeguards that complement and assist in the realization of the substantive human rights of indigenous peoples."[177]

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[173]International Labour Organization, Convention No. 169 on indigenous and tribal peoples in independent countries, Adopted by the International Labour Conference on June 27, 1989.
[174]United Nations, United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by General Assembly 61/295 of September 13, 2007.
[175]*See* Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed Consent: A Human Rights-Based Approach*, A/HRC/39/62 (August 10, 2018).
[176]*See*, Inter-American Court of Human Rights ("I/A Court"), *Saramaka v. Suriname*, Decision of November 28, 2007 ("Saramaka Case"), paragraphs 129, 130; and I/A Court H.R., *Kichwa Indigenous People of Sarayaku v. Ecuador*, Decision of June 27, 2012 ("Sarayaku Case"), paragraphs 212-220.
[177]UN Special Rapporteur on the rights of indigenous peoples, "Consultation and consent: principles, experiences and challenges," Presentation for the International Colloquium on Free, Prior and Informed Consultation: International

In the decision of the Inter-American Court in the case of the *Kichwa People of Sarayaku*, the Court recognized "the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous communities and peoples are about to be affected," in addition to constituting a treaty-based provision, it also constitutes a general principle of international law.[178] The Court found that Ecuador violated Sarayaku's rights to consultation, communal property, and cultural identity according to its interpretation of Article 21 of the American Convention on Human Rights. Among the reparations ordered by the Court, Ecuador "must adopt, within a reasonable time, any legislative, administrative or other type of measure that may be necessary to effectively implement the right to prior consultation of the indigenous and tribal peoples and communities, and amend those measures that prevent its full and free exercise and, to this end, the State must ensure the participation of the communities themselves."[179]

3. Nature, Object, and Purpose of Indigenous Consultation

A first fundamental point is that indigenous consultation constitutes a differentiated process that goes beyond other processes of citizen participation available to the national population. Consultation processes with indigenous peoples respond to different realities and needs. By way of example, the Rapporteurship on Indigenous Peoples has explained that, in the case of measures or activities that could affect indigenous peoples, special and differentiated procedures for consultation are required "that derive from the distinct nature of indigenous peoples cultural patterns and histories *and because current democratic and representative processes are usually not sufficient to address the particular concerns of indigenous peoples,* who are generally marginalized in the political sphere. The duty of States to consult with indigenous peoples… [is] based on the widespread recognition… of the distinctive characteristics of indigenous peoples and the need for special measures to correct their disadvantaged conditions.[180]

Given the role of consultation as a safeguard of internationally recognized human rights, any regulations or mechanisms developed to implement indigenous consultation should not diminish the guarantees established in the international standards. This is a serious risk when considering the regional debate on the purpose of the consultation and whether it is binding or not or, in other words, whether consultation and consent give indigenous peoples veto power. The UN Rapporteurship on Indigenous Peoples has analyzed this issue by emphasizing that reducing the principles of consultation and consent to a debate on the existence of a veto loses sight of the spirit and character of these international principles. The principles of consultation and consent seek to create a good-faith dialogue between States and indigenous peoples so that, through consensus and agreements that guarantee the human rights of indigenous peoples, historical patterns in which

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and Regional Standards and Experiences - Mexico, November 8, 2016) ["Special Rapporteur Tauli-Corpuz, Colloquium - Mexico (2016) "], p. 4; U.N. Special Rapporteur on the rights of indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/21/47 (July 6, 2012), ["Report Special Rapporteur Anaya (2012)"] para. 49.

[178]Sarayaku case, paras. 164-5.

[179]Ibid., paragraphs 301, 341.2, 341.4.

[180]Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, *Technical Note on Consultation and Free, prior and informed Consent of Indigenous Peoples in Mexico* (February 2019) ["Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019)"], p. 6.

decisions have been imposed on indigenous peoples that have threatened their physical and cultural survival can be put to an end.[181] Consultation and consent should therefore not be understood as the imposition of a veto but as mechanisms through which States could ensure that the decisions they took complied with their international obligations regarding the rights of indigenous peoples.

The various universal and regional normative sources of human rights specify that the purpose of indigenous consultation processes is to obtain the free, prior and informed consent of the indigenous peoples concerned. This is reflected in the Declaration which states that the purpose of consultations is to obtain the free, prior and informed consent of indigenous peoples prior to the adoption of legislative or administrative measures affecting them and prior to the approval of development projects affecting their lands, territories, and other resources (articles 19, 32). According to the Inter-American Court, "regarding large-scale development or investment projects that would have a major impact within [an indigenous territory], the State has a duty not only to consult [indigenous peoples] but also to obtain their free, prior and informed consent according to their customs and traditions."[182] In its analysis of international norms and jurisprudence, the Office of the Special Rapporteur has stated that the consent of the indigenous party would be required when a measure, plan, or program could result in significant impacts on the lands, territories, natural resources, cultural and other substantive rights of indigenous peoples.[183]

Bearing in mind this understanding of consultation and consent, the content and application of a law or regulation on indigenous consultation should not focus on the subject of a veto, but rather ensure that as part of a good faith consultation process, indigenous peoples can participate in a free and informed manner in order to enable them to make informed decisions about any measure or activity that might result in a restriction or limitation of their internationally recognized human rights. The will and self-determination of the indigenous people consulted should be respected by State authorities, always taking into account their international obligations to the human rights of indigenous peoples.

In that regard, a normative instrument or other mechanism to implement indigenous consultation should advocate for a mechanism whereby prior to decision-making regarding the approval of projects for the exploitation of natural resources or similar projects affecting indigenous peoples, consultations with indigenous peoples meet their objective of helping to safeguard their human rights in order to obtain the free, prior and informed consent of the indigenous peoples concerned. To that end, indigenous peoples should be provided with the necessary information to decide on measures or activities that might affect them through culturally appropriate mechanisms that

[181] Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz, Additional observations of the Special Rapporteur on the rights of indigenous peoples on the process of regulating prior consultation in Honduras, 9 June 2017, p. 10; Special Rapporteur on the rights of indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/12/34 (15 July 2009) ["Special Rapporteur's Report Anaya (2009)"], paras. 48, 49

[182] Saramaka case, para. 134

[183] Special Rapporteur's Report Anaya (2012), para. 65; Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, *Comments of the United Nations Special Rapporteur on the rights of indigenous peoples on the Preliminary Draft Framework Law on Free, prior and informed consultation of Indigenous and Afro-Honduran Peoples (Honduras) (22 December 2016)* ["Special Rapporteur, Comments on Preliminary Draft Law on Consultation – Honduras"], p. 19; Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019)," p. 7.

respect the representative structures, times, and forms of decision-making of indigenous peoples. There should be no pressure on indigenous peoples to be able to analyze all the necessary information and make a decision within the framework of the consultation processes, as this would undermine the "free" nature of the consultations.

4. The timing and scope of the indigenous consultation

As the UN Special Rapporteur on Indigenous Peoples has pointed out, "[t]he prior nature of consultations requires that consultations take place prior to the adoption of a measure, the granting of authorizations and permits, and the signing of contracts or other types of commitments by the State related to activities or projects that may affect indigenous peoples."[184] The Inter-American Court clearly explains that "consultation should take place, in accordance with the inherent traditions of the indigenous peoples, during the first stages of the development or investment plan and not only when it is necessary to obtain the community's approval, if appropriate, because prior notice allows sufficient time for an internal discussion within the community to provide an appropriate answer to the State."[185]

The consultation must be carried out before the approval and start of any stage related to, for example, mining, oil, hydroelectric or other projects, including the exploratory stages of such types of projects since they constitute activities with possible impacts on an indigenous or tribal people. In the case of the *Garifuna Community of Punta Piedra vs. Honduras*, the Court declared that there was a violation of human rights because there was no prior consultation regarding a mining project on community lands and because the Honduran mining regulation made the consultation processes on mining projects subject to the pre-exploitation phase. The Court ordered the State of Honduras to "adopt sufficient and necessary measures so that its regulatory provisions on mining would not undermine the right to consultation, in the sense that it must be carried out even prior to the authorization of prospecting or exploration programs."[186]

An important point is that "indigenous consultation processes are not a single specific act but must be carried out in all phases of planning and implementation of the measure or activity in question, which implies constant communication between the State, as guarantor of the consultations, and the indigenous party."[187] This is particularly important when subsequent modifications of an ongoing project could generate new impacts not covered in a consultation process, so further consultations would be necessary.

From a business point of view, consultation could be difficult before the prospecting and exploration stages take place since it is not yet known whether there is a deposit of commercial value, its location, or the mode of extraction that would be carried out. However, the adoption of decisions on the realization of such stages and related contracts and the presence of outsiders carrying out these stages, without the knowledge of the peoples affected, are situations that, in

[184]Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019), p. 6.
[185]Sarayaku case, para. 180.
[186]I/A Court H.R., *Case of the Garifuna Community of Punta Piedra and its members v. Honduras*, Decision of October 8, 2015, paras. 224, 345.
[187]Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019), p. 6.

themselves, generate great discomfort and conflict for the indigenous peoples whose ancestral lands would be affected. This situation perpetuates the exclusion of indigenous peoples from decisions that affect their rights and demonstrates why there is a need for a continuous process of prior consultation in all stages of a proposed activity and the impacts that each would generate.

5. The subjects of the consultation and indigenous representativeness

Bearing in mind that the identification of indigenous peoples to be consulted and their corresponding representative structures are particularly problematic issues in many countries of the Latin American region, measures must be taken to ensure the due recognition and identification of the subjects of the consultation, taking into account the criterion of self-identification in accordance with international standards on indigenous peoples. It is important to remember that it is indigenous peoples themselves who must identify their representative institutions and decision-making mechanisms. Situations should be avoided in which a consultation regulation limits indigenous participation only to representatives or organizations that have some type of recognition or accreditation from state entities.[188]

On the other hand, actions that result in the creation of divisions and parallel structures of representation in indigenous consultation processes must be avoided. Likewise, in prior consultation processes, it should be taken into account that "indigenous peoples and their representative structures require the necessary time to prepare and build the capacity to participate effectively in consultation processes and to have access to independent advice and technical assistance."[189] Therefore, a consultation law or regulation that imposes a very short time limit could generate conflicts rather than reduce them.

6. Elements necessary for the implementation of indigenous consultation processes

Indigenous consultation "should not be understood as a simple process of socialization on decisions previously taken by the State, but as a process of horizontal dialogue in order to reach an agreement or obtain consent regarding the measure, taking into account the rights of indigenous peoples that could be affected."[190] It should be recalled that consultations do not constitute a single moment or specific act and must be carried out in good faith and through culturally appropriate procedures. In addition, they must provide the time and space necessary for indigenous peoples to have full knowledge about the scope and impacts of the proposed measure prior to its approval and to be able to impact and influence decision-making that affects their rights, as well as put forward their own proposals.[191]

As noted by the previous Special Rapporteur on indigenous peoples, "another essential element is the carrying out of social, cultural, environmental and human rights impact studies before the

[188]Special Rapporteur, Comments on the Preliminary Draft Consultation Law – Honduras, p. 14.
[189]Special Rapporteur Tauli-Corpuz, Colloquium – Mexico (2016), p. 11.
[190]Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019), p. 6.
[191]Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019), p. 6.

adoption of the measure or project in question."[192] According to the Inter-American Court, States must ensure that they will not issue concessions within an indigenous territory unless and until independent and technically capable entities, under the supervision of the State, carry out a prior study of social and environmental impact.[193] In the Sarayaku case, the Court specifies that these studies "must be made in conformity with the relevant international standards and best practices; respect the indigenous peoples' traditions and culture, and be completed before the concession is granted since one of the objectives of requiring such studies is to guarantee the right of the indigenous people to be informed about all proposed projects in their territory."[194]

7. Methodology of Consultation of the norm and other issues

Any normative instrument to implement prior consultation must be the product of adequate consultation with indigenous peoples. To ensure a climate of trust and mutual respect between a State and indigenous peoples on a prior consultation regulation "the consultation procedure itself must be the result of consensus."[195] Similarly, this type of consensus would also be necessary for project-related consultations in specific cases.

In projects, or other specific cases, or in the development of a consultation norm or regulation, the former Special Rapporteur on the rights of indigenous peoples noted that international standards point to a process of "consultation about the consultation" that should consist "of an open and exhaustive dialogue between the parties on the various aspects of the consultation procedure to be established, including the definition of the various stages of consultation, the corresponding deadlines and the specific modalities of participation, among others. This dialogue must not be initiated with predetermined positions on these aspects."[196] It is also "necessary that state actors have patience so the indigenous parties can define their modalities of representation, as well as adequately prepare themselves before initiating the dialogue."[197]

Regarding legislative proposals on prior consultation, the UN Special Rapporteur on Indigenous Peoples has recommended that they be the product of a broad consultation process that has an adequate representation of indigenous peoples, according to their own models of representation, to define the consultation process and the content of a consultation norm or regulation.[198]

[192]Special Rapporteur Tauli-Corpuz, Technical Note – Mexico (2019), p. 7.
[193]Sarayaku case, para. 205, citing Saramaka Case, para. 130.
[194]Sarayaku case, para. 206.
[195]Special Rapporteur's Report Anaya (2009), para. 51.
[196]United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, *The situation of indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica* (30 May 2011), para. 32.
[197]Ibid., para. 33.
[198]*See* in general, Special Rapporteur, Comments on Preliminary Draft Consultation Law – Honduras; and Additional Remarks by the Special Rapporteur on the Rights of Indigenous Peoples on the Prior Consultation Regulatory Process in Honduras, 9 June 2017, p. 12.

8. Conclusion

The implementation of indigenous consultation at the regional level has been a challenge given the economic interests that, in many cases, are at stake and the divergent interpretations among indigenous peoples, States, and business sectors regarding the bases, scope, content, and purpose of prior consultation. As reflected in this article, the international human rights bodies and mechanisms of the United Nations and the Inter-American System have established important guidelines to understand the elements necessary for the implementation of consultation.

Despite these guidelines, the implementation of these standards in practice has been disappointing for indigenous peoples. The regulatory initiatives and laws adopted by States have been regarded as detrimental to their rights and contrary to the spirit of the international instruments and jurisprudence on indigenous peoples referred to in this article. Similarly, consultations in specific cases have not complied with essential elements such as their prior nature, or that they are carried out in good faith with the truly representative authorities of a people or community, among others.

An important factor has been that consultation has been dissociated from its role of safeguarding human rights, which States and private actors must respect at all times, including in relation to the planning of economic development activities and policies. The consultation standard has also been dissociated from the right of indigenous peoples to self-determination. As the previous Special Rapporteur on indigenous peoples explained, "[c]onsultation and free, prior and informed consent must also be understood as an extension of the right of indigenous peoples to self-determination. Therefore, they should be able to decide their own social, cultural, economic and political destinies and ultimately safeguard their rights recognized under the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights sources."[199] As the Inter-American Commission on Human Rights (IACHR) has recently pointed out, for indigenous and tribal peoples, the right to self-determination is an inherent, pre-existing and aboriginal right from the standpoint of their own worldviews, histories, and laws. Therefore, States must implement consultation and consent from an approach based on the right to self-determination, respecting their own protocols or other mechanisms adopted by these peoples for its implementation, and respecting and recognizing "the decisions adopted by the peoples concerned regarding the granting or denial of their consent with respect to measures or activities that may affect their human rights.[200]

Due to the aforementioned problems, several indigenous peoples in Latin America have developed their own autonomous protocols for consultation or relations with third parties as a mechanism to establish the rules that States or other actors must follow concerning measures or activities proposed in their territories. These consultation protocols have been important mechanisms

[199]Special Rapporteur on the rights of indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz to the Human Rights Council, 18 June 2020, A/HRC/45/34, para. 71.
[200]Inter-American Commission on Human Rights (IACHR). (2021): Indigenous and Tribal Peoples' Right to Self-Determination. OEA/Ser.L/V/II. December 28, 2021, paras. 55, 365.12.

through which indigenous peoples seek to strengthen their processes of autonomy, governance, and self-determination.[201]

The proposals developed by the indigenous peoples themselves to implement prior consultation constitute an important alternative to the models of laws, regulations, and other instruments that have so far been adopted in different countries of the region. This allows each people or community to define the procedures, authorities that would participate, and decision-making methods in consultation processes, rather than being imposed upon by a single model of consultation through a law that might not be suitable for all indigenous peoples in a country. Through the development of these protocols, many of the problems identified in this article regarding the definition of representative authorities, the modalities of information exchange (including the results of social, cultural, and environmental impacts studies), aspects of timing and determining the final results in terms of consent or non-consent to a measure, and the monitoring of agreements reached could be overcome.

These types of initiatives require support from national or international institutions, which requires time and resources. One option that can be considered is to develop a legal framework that establishes basic principles of indigenous consultation, including the necessary elements of its prior nature, good faith, and respect for free, prior and informed consent. As for consultation procedures in specific situations, these would be subject to the consultation protocols developed by the peoples in question.

In conclusion, the implementation of consultation requires a space for dialogue and consensus between indigenous peoples and States that starts from the basis of the internationally recognized human rights of these peoples and which are part of the obligations of the vast majority of countries in the Latin American region. It is clear that, in order to fulfill the safeguarding purpose of consultation, indigenous peoples must also enjoy full recognition and guarantee of their rights over their ancestral territories, natural resources, cultures, self-determination, and other fundamental rights. The implementation of consultation, whether through specific laws or regulations, the recognition of indigenous consultation protocols, or a combination of these mechanisms, should itself be the subject of consultation processes and agreement with indigenous peoples.

[201]For more information on the development of consultation protocols in Brazil, Colombia and Peru, *see*, Doyle, C., Whitmore, A and Tugendhat, H. (2019) (eds.): *Protocols of free, prior and informed consent as instruments of autonomy: laying the foundations for rights-based interactions*; and Millaleo Hernández, Salvador, (2020) (ed.): *Autonomous Protocols of Indigenous Prior Consultation in Latin America: Case studies in Bolivia, Brazil, Chile, Colombia, Honduras, Mexico and Peru*, Copenhagen: IWGIA, October 2020.

Darío José Mejía Montalvo, Chair of UN Permanent Forum on Indigenous issues and Leader of the National Indigenous Organization of Colombia, (right) speaks from New York. Left, National Chief of the Assembly of First Nations RoseAnne Archibald.

Credit: Tristan Ahtone / Grist, available at https://www.hcn.org/articles/indigenous-affairs-social-justice-free-prior-and-informed-consent-is-the-gold-standard-of-indigenous-rights-why-isnt-it-followed, April 2022

VIII. CONSULTATION PROCESSES WITH INDIGENOUS COMMUNITIES AND GROUPS FROM THE MINING INVESTOR'S POINT OF VIEW by Andres Rodriguez

1. The usefulness of consultation processes and a social license to operate

Over recent decades, the extractive mining sector has strengthened its awareness and actions regarding the importance of its social environment and respect for the collective rights of the people where it operates. More and more successful examples of these approaches and joint work for the development of the community and recognition of human rights can be seen between the mining company and ethnic minorities.

It is important to emphasize that the responsible mining company understands the importance of developing its natural resource projects' environmental, social, and governance aspects. One of the essential aspects is obtaining a social license to operate. Projects that achieve this are an invaluable asset in attracting investors to the progress of the extractive project. Nowadays, investors involved

in the financing of mining projects are cautious about the processes carried out by governments to consult with Latin American communities. In several cases, the consultation process and mechanism have yet to be agreed upon in advance with indigenous peoples and communities. Citizen participation in these consultations has been unilaterally encouraged by anti-mining organizations without tangible community development objectives.

A controversial example of community consultation took place in Colombia and was aimed at the La Colosa gold project, managed by Anglo Gold Ashanti ("AGA") in Cajamarca, department of Tolima. In 2015, the Colombian congress recognized the mechanism to convene popular consultations of citizen origin. Thus, collecting signatures to conduct the consultation in Cajamarca was carried out by a collective of citizens motivated against mining. After collecting a minimum of signatures, the local government approved the consultation process, and the registry carried out the process by vote in 2017. A participation of 37% was obtained that minimally exceeded the threshold of citizen participation required (33%). The consultation asked: "Do you agree, yes or no, with the implementation of mining projects and activities in Cajamarca?" this resulted in 99% of the vote in favor of banning mining in the municipality. At this point, AGA had already invested about US$370 million in the development of La Colosa. To this day, several entities continue to question the degree of validity of this consultation and whether or not it was binding. This case evidenced a high legal uncertainty in Colombian mining and generated suspicion about whether it would be possible to proceed with large mining projects in that country; in 2017, the multinational company said that it did not rule out a lawsuit against the Colombian nation on account of this case. The company has been developing another copper and gold project called Quebradona in Antioquia, Colombia. Although Quebradona is still feasible, the project has generated community resistance. However, since the beginning of the project, AGA has done a tremendous job in integrating social and environmental components at this stage of the project, as well as ongoing dialogue and support to the communities.

Today's responsible mining sector is highly self-critical and has learned several lessons after many cases in which it did not listen to the needs of the neighboring communities of a specific mining project, or the project's area of influence did not receive a tangible benefit from the mining operation.

Two contrasting examples of the importance of the license to operate can be seen with the Navajo Nation in Arizona and New Mexico, USA. In the 1950s and 1960s, the Kerr-McGee company operated uranium mines with deplorable environmental practices and left piles of radioactive waste exposed in areas of cultural sensitivity for the Navajo Nation. This waste caused irreversible damage to the health of the community. After nearly six decades, the Navajo nation obtained the compensation agreement for cleaning up the contaminated sites, including US$5.15 billion to be paid by Anadarko, the successor company to Kerr-McGee. The Navajo community has shown the commitment that it will scrutinize the development of uranium mining on their lands or allow access to companies dedicated to this activity. One of the companies that failed to understand the history of this community and in obtaining its social license to operate within its territories was

Uranium Resources Inc., which had been proposing a uranium extraction project since 2012 that required a capital investment of US$35 million. In July 2014, the Navajo Nation decided to quash any discussion on land access and use by this extractive project. Although most of the mineral resource area was not within the Navajo reserve (see Figure 1), it was required to travel through 100 meters of road within the indigenous reservation to access the area. The Navajo community vetoed the passage of this route, so the project has not materially advanced since 2012.

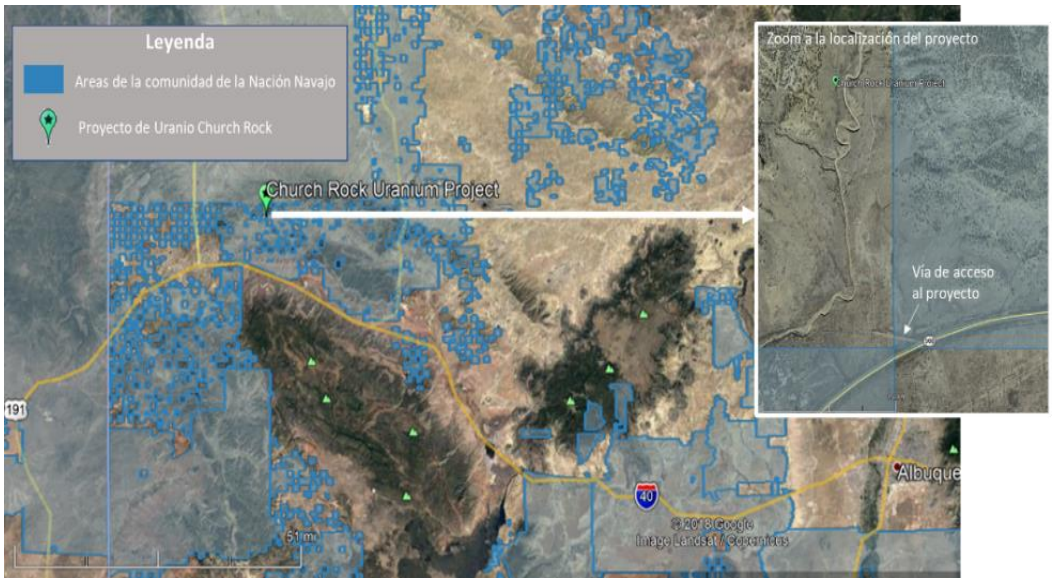

Figure 1 – Location Map of the Uranium Church Rock Project in New Mexico, USA

However, we have another successful example of a social license to operate with the Navajo community. For more than 30 years, BHP Billiton operated the Navajo coal mine in New Mexico. Its standards of operation and collaboration with the community were high, respect for the environment prevailed, and it managed to employ 80% of its staff from the indigenous community. In 2013, BHP Billiton sold the mine to the community and coal mining continued with high-quality standards handed over to the community by the Australian multinational. Today the mine operators are 100% Navajo and strive to operate with respect for the tribal and non-tribal communities of their area of influence.

2. Points to consider for free, prior and informed consultation processes in Latin America

In general terms, the initiatives to propose consultation processes for mining concessions in Latin America to indigenous nations, indigenous communities, Afro-American towns, and recognized mestizo communities is a process that, when well implemented, could help the objectives of approach and cooperation of private enterprise to communities throughout the American continent.

However, it should be noted that this is a delicate process, and that the implementation of these processes should consider the following:

Ongoing review

The methodology of the consultation process must have constant review and feedback that includes what is learned in the application of the consultation mechanisms of each case that has been executed and the time elapsed for each process.

Governments must reflect initiatives in their consultation that the time elapsed from the initial exploration to the exploitation phase of a mining project can take decades and the feasibility conditions of the project fluctuate with the markets, the liquidity of the mining owner, technical feasibility, and access to infrastructure. During this period, the community expectations and the of interest of the mining company will change significantly. Therefore, consideration should be given to whether a periodic review or update of the consultation process can support the timing of the application. This could serve as an instrument to monitor the interest and understanding of the consulted communities towards the mining project. It is feasible for the communities to modify their opinions and arguments when the mining right is granted and when the exploitation phase begins. In many cases, it is necessary to establish contingency agreements to clarify situations or changes that may affect what was, in principle, the subject of consultation.

Certification

It must be effectively demonstrated to the private enterprise that the communities agree with the methodology of the process. Concerning this issue, the relevant agreements must be verified and obtained. The agreement guarantees, as a support for the investor, that both the government and the communities, peoples, indigenous nations, and Afro-American peoples have reached an agreement or not as a result of prior consultation. Therefore, there are clear documents that articulate the mechanisms to mitigate, correct, or restore the effects that mining development activities cause or may generate to the detriment of the community or its members.

The Need for an Accurate Social Diagnosis

Guarantees must be recognized where there is an accurate identification through the recent census of the communities and where representatives of these communities are duly accredited.

A case where the identification of communities was deficient occurred in July 2017 in Guatemala. The company Tahoe Resources (“Tahoe”) was forced to suspend production of the polymetallic

mine known as El Escobal. The suspension of operations was in compliance with the order of the constitutional court of that country after the Center for Environmental and Social Legal Action of Guatemala filed an appeal for protection, arguing that the community consultations were not carried out with the indigenous Xinca people before authorizing the licenses for the operation of El Escobal. In a communication from Tahoe to its investors on July 5, 2017, it is stated that the company believed that all the requirements of the prior consultation were carried out by the Ministry of Energy and Mines of Guatemala in 2013 and that the census indicated that there was no Xinca presence in the area of influence of the project. The inconvenience may have resulted from the fact that the last census carried out in the area of impact was dated in 2002, and several deficiencies in the ethnic categorization of the territory were recognized.

Tahoe's case is highlighted as it is a mine that began operations in 2014 after a significant $500M in capital investment, generating sales in 2017 for US$356 million and royalties to Guatemala for US$18.7 million. That announcement caused the company to immediately lose 42% of its $1.13 trillion market cap. As of the date of writing this, the revenues to the Guatemalan Treasury on behalf of the El Escobal mine are at zero, and the mining attractiveness index published by the Fraser Institute in 2019 ranked Guatemala as the third worst mining investment destination (after Venezuela and Neuquén, Argentina). A position that in 2015 was better and placed the country at 97 out of 109 in investment attractiveness.

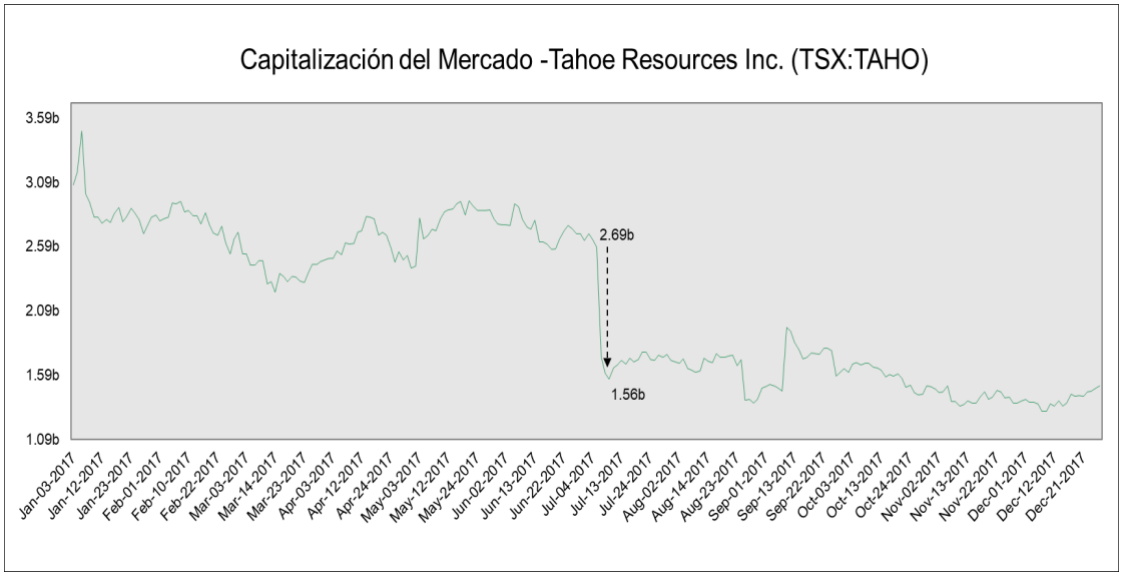

Figure 2 – Market capitalization in 2017 for Tahoe Resources Inc.

The reference case in Guatemala also indicates how the timelines for the delimitation of mineral concession zones and delineation of these areas could generate social unrest. The footprint of mining development projects can change at every stage. A community may be silent during the exploratory and technical study phases, and may not be interested in participating in the early

stages of consultation. However, when starting stages of exploitation, their spirits could become heated when they physically see the project's scope.

There have been cases like the Amulsar gold project in Armenia, which obtained US$425M in financing from several investment funds. This project was planned to be completed in October 2018, but in June 2018, it was blocked by the community of the village of Jermuk, located 15 kilometers from the mine. The community argued that previous governments did not fully include it during the consultation processes between 2009 and 2016. This community stopped the project entirely by illegally blocking access roads. In December 2019, Lydian was forced into a restructuring process due to the inability to meet obligations to its creditors. This example highlights the need to allow more time for neighboring communities to enter the process and generate proactive approaches for encouraging these communities to join the consultation process early. Today's mining investors cannot quantitatively estimate the risk to which they are exposed with communities that remain silent on the project's margins and during exploration stages.

In Amulsar's case, Lydian International lost close to $150 million in market capitalization from community blockades and being delisted from the Toronto Stock Exchange in December 2020. The position of its two largest owners, with a 46.6% (June 2018) share of ownership, declined significantly, and the company's value possibly reached an almost unrecoverable point. At Lydian International, its two significant investors had already invested more than $300 million in advancing the construction of this gold project.

Figure 3 – Market Capitalization between Jun 2018 and Dec 2020 for Lydian International Limited.

Inclusion of a thematic agenda

The responsible private mining company creates relationships with its neighboring communities. It recognizes that its development and management plans can generally be harmonized with the surrounding communities and the environment. The consultation process must incorporate a

component in its agenda that investigates and aggregates the development vision of the consulted community and works synergistically with the mining company so that this vision is developed.

We can cite here again the case of the Amulsar project. This project may have ignored the development plans of the Jermuk community, which had an economic future based on tourism. The vision of this community was never harmonized with the development plan of the mining project within the consultation plans carried out in the project. Therefore, this suggests that, although the community may not be physically affected today, the vision of future development could have substantial discrepancies that must be harmonized and discussed.

Integration of mining royalties into community economic development

For private companies and investors in the sector, it is essential to highlight and discuss methods of oversight and transparency to ensure that mining royalties reach the communities. Suppose that a portion of the royalties is to be directly managed by communities. In that case, working on competency initiatives in job training and education in managing community projects is also recommended. Private enterprise has seen the need to strengthen these competencies. For example, in the Cerrejón coal mine in Colombia, after several decades of operation, it was evident that the Wayú indigenous community needed training in project management and administration. In 2016, Cerrejón LLC contracted educational seminars with leaders of these communities. With better eyes, the responsible private mining company sees the creation of alliances with communities to empower them and provide them with the necessary tools for quality governance and a level of prosperity.

The mining sector must value the agreements reached for the distribution of royalties in prior consultation processes but to receive the proper community interest and awareness, it should ensure that royalties from the mining activity are distributed to projects beyond satisfying basic community needs. It is also vital for the community to know that the responsible mining company strengthens the productive chains existing in its area of influence. Agreements can be formalized between the company and the community to generate parallel and culturally acceptable economic development during the project's operation. We recommend that the creation of a thematic agenda for consultation processes addresses the generation of opportunities for entrepreneurship and the establishment of economic clusters in the area of influence of the mining project.

Another point that must be contemplated in the agenda concerns "appropriate procedures and adequate cultural methodology" aimed at how the mining company must guarantee respect for conserving the cultural component in its area of influence. For example, in British Columbia, Canada, the Teck mining company works with Aboriginal communities to understand ancestral traditions and research methods to strengthen their intercultural communication. Similarly, Rio Tinto on the Cape York Peninsula, Australia, handles community agreements that protect cultural heritage, employment, training, and support for local businesses operated by indigenous people.

Creation of consultation process councils following the governing laws

It will always be necessary to evaluate the resolutions and laws that the governments of Latin America may issue and that expressly authorize the appointment of councils or committees for consultation as a mechanism for citizen participation in the decision-making of local mining policies. This must be done in ways consistent with respect for the traditional authorities and decision-making processes in indigenous communities. Without disregarding the rights of these minorities, these councils can foresee and shape the needs and plans for mining development in each region. These councils must have a high level of independence concerning the positions taken towards the mining project and a good knowledge of the socio-economic conditions of the communities. It is also prudent to evaluate the possibility of certification of these councils by international mechanisms in their areas of expertise, such as communities, environmental aspects, and their knowledge of extractive responsibility in natural resources.

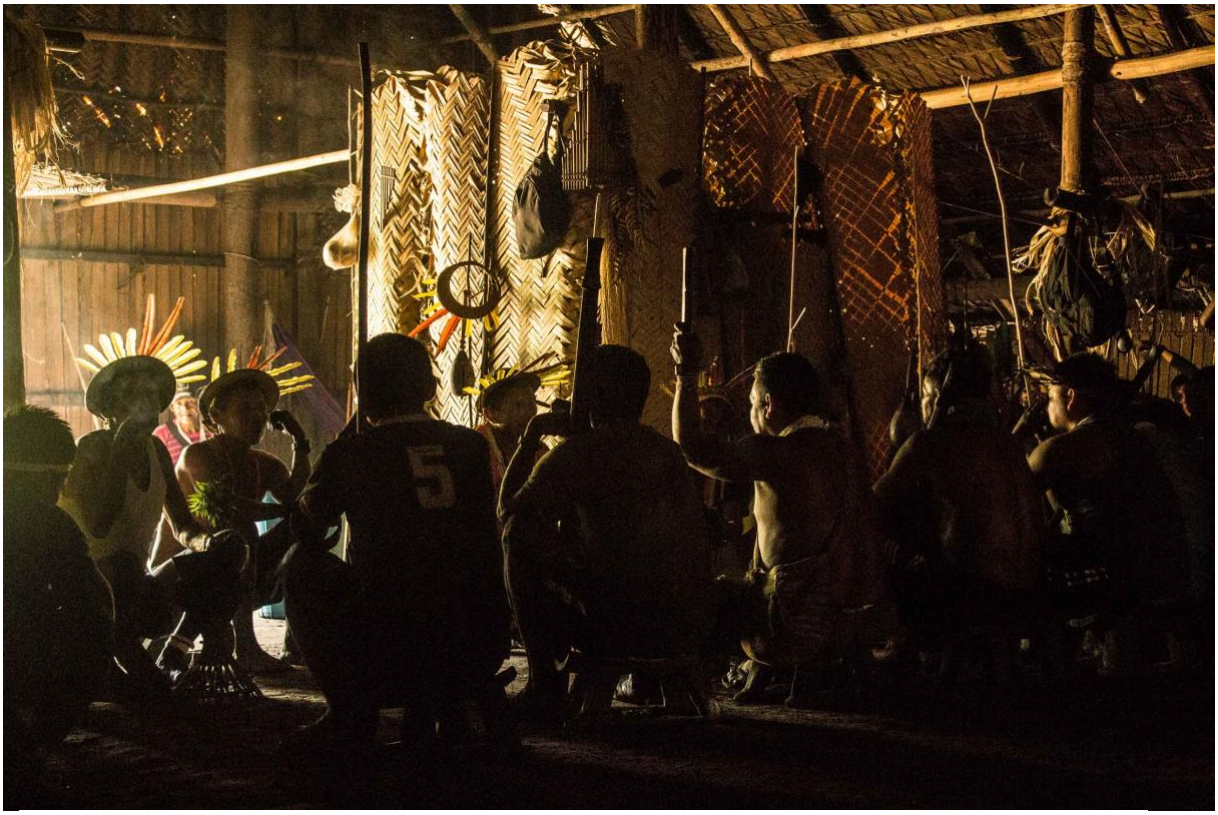

Photo Credit: https://www.gaiaamazonas.org/en/noticias/2019-07-25_what-is-ilo-convention-169-and-why-it-is-important

IX. CONCLUSIONS

We are at a time of many changes in the relationship between our governments and our indigenous and traditional neighbors. This presents us with many challenges but also with great opportunities to improve on a regrettable past.

We have gone from the era of forced assimilation of minority communities to a vision of multicultural republics in which**,** despite our differences and histories, we can imagine a future of equitable, shared, and sustainable development. Solving the problem of shared decision-making is necessary for this future to become a reality. Having all the decision-making power in the hands of a non-indigenous majority is inconsistent with this vision of a peaceful and productive partnership.

There are a number of important sources of international law that bind governments and give rights to indigenous people whether governments have ratified ILO Convention 169 or not. But the fact that courts in countries that have ratified the convention and are applying it as part of their domestic law is encouraging.

The obligations outlined in ILO Convention 169 and related instruments are obligations of the States which have ratified the Convention. This indicates that the nature of consultation should not, at least in its fundamental elements, depend on which ministry is in charge of a given project.

But this, unfortunately, is the case in the majority of countries we have studied. In the absence of national laws or regulations applied across government, outlines, guidelines, and regulations for consultation have been adopted by specific government bodies for activities within their competencies, but do not apply to the entire government. Procedures vary markedly from one ministry to the next.

It may be that the experience of the various ministries or other government agencies can illuminate the needs of an acceptable process. However, the objective must be a law or a regulation of general application to all government activities, and any regulations or mechanisms developed by individual ministries to implement indigenous consultation should not reduce the guarantees established in international standards.

As the previous Special Rapporteur on indigenous peoples explained, "[c]onsultation and free, prior and informed consent must also be understood as an extension of the right of indigenous peoples to self-determination. Therefore, they should be able to decide their own social, cultural, economic and political destinies and ultimately safeguard their rights recognized under the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights sources."[202]

[202] United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples* par.71; 18 June 2020, A/HRC/45/34 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/151/15/PDF/G2015115.pdf?OpenElement.

Flexibility

The need for uniformity across government does not indicate that consultation requirements must always be exactly the same.

A law or regulation can recognize the differences among projects depending on their size and the impacts that they can generate either in the ecosystems or in the communities themselves. Highways, dams and wind farms are in fact different, and these differences can and should be recognized. Specialized subject matter expertise in different ministries can and should be brought to bear.

These provisions should also be adapted to the great variation in characteristics of communities. Indigenous consultation should, subject to a uniform general framework, be a differentiated process that goes beyond and is separate from other processes of citizen participation available to the national population.

If the consultation takes place through culturally appropriate mechanisms that respect the representative structures, times, and forms of decision-making of the indigenous peoples involved, there must be some flexibility in a regulation or a law. It should consider the uses and customs of indigenous and native communities for decision-making and the type of measure it proposes to adopt.

This may require, as exists in certain countries, that a law outlines a preliminary stage in which the community is approached to determine its needs and to define the consultation process together with government. That is to say, there should be a preparatory stage in which the promoting agency may hold meetings with the representative organizations and inform them about the proposal and seek agreement on a consultation plan. This preparatory stage could be very useful for defining common rules and a methodology that allows a true intercultural dialogue and avoiding many potential problems.

The Constitutional Court of Peru has taught us that:

"The exact timing of the prior consultation could not be determined as a standard that applies interchangeably to every community. …The timing of the prior consultation should consider the uses and customs of indigenous and native communities for decision-making and the type of measure it intends to approve… (IDLADS Peru Case, Findings 41, 42, and 43).

"**Consultation about the consultation**" **for a national law**

It seems to us that Article 6 of the Convention requires that a law or regulation seeking to define the guidelines of consultations for all government activities has to itself be consulted. The prior development of a consultation process on the regulation of indigenous consultation, also called "consultation about the consultation," apart from being an obligation, is critical for the regulation to enjoy social legitimacy and therefore meet the objective.

As Professor Donoso has said:

"A first lesson learned is the importance of reaching a consensus with indigenous peoples on the methodology for *consultation about the consultation*, or at least clearly informing them of such methodology if a consensus on the latter is not possible in whole or in part. This is a complex issue considering that a *process of consultation about the consultation* is usually carried out without a regulatory parameter at the domestic level regarding the methodology to be observed since this process seeks precisely that. Thus, the methodology of *consultation about the consultation* is important not only because it must guarantee the exercise of the right to consultation itself but also because the lack of agreement on this point could significantly affect the legitimacy of the process."

This presents us with some fundamental questions. In this national consultation, there are difficulties in deciding how indigenous participants are identified. Some indigenous or traditional communities are large. Others are small. Some may have more financial resources than others, have a better command of the national language, or have better access to experts or lawyers. In certain countries, there are congresses or other indigenous bodies with some degree of acceptance and legitimacy as representatives of the interests of all indigenous peoples, but, in other countries, these bodies may be at best regional, or nonexistent.

It is common for indigenous peoples to challenge or criticize consultation processes on the grounds that indigenous participants have not been validated as representing them or do not adequately embody the plurality of visions that exist among them.

Dialogue on consultation requires a certain level of trust and the willingness of all parties to accept an eventual agreement and translate it into public policy. As Benito Juarez, President of Mexico, said, "Respect for the rights of others is peace."

This is not to say that all problems of representativeness are on the side of traditional and indigenous peoples. In several governments, there are serious internal conflicts over who has the floor in pronouncing the positions of the government. The mining ministry does not feel represented by the national indigenous agency. And neither of these two wants to be represented by energy, or by transportation.

Resolving these internal conflicts requires some leadership by the top government executive, who has to decide how the various interests within the government can be represented in a dialogue on how to regulate consultation. In the absence of clear leadership from the top, progress is very difficult.

When does consultation take place?

One idea that has come up repeatedly is that consultation over a given project should occur at one point in time, and occur once. Many of the supporters of this view are also in favor of a very brief period of time for consultation and a provision that, if there is no agreement within this time, the government should be free to make unilateral decisions with no further duty to consult. This is a way of saying that the process is so unpleasant that it should be done as quickly as possible, after which, communication should be cut off and everyone should go back to decision-making processes that don't include the affected communities.

This devalues what the wisest entrepreneurs understand to be of enormous value: good relations, cooperation, and common interests among neighbors, sometimes called the "social license to operate." If we are able to achieve good communication, why end it? If we do not have good communication, we need to keep trying.

As Andrés Rodriguez has written:

"One of the essential aspects in mineral resource development is obtaining a social license to operate. Projects that achieve this hold an invaluable asset capable of attracting investors to the progress of the mining project."

The life cycle of a mining project can be decades. All kinds of events can occur, many of them completely unpredictable. They are going to affect nearby communities, the company, and the government. They will present the need to make decisions that affect everyone's interests, and, when this happens, a history of good communication is **i**nvaluable.

- The idea that consultation occurs no more than "once in a lifetime" also has logical conflicts. Few indigenous communities accept the idea that the state grants mining or other concessions in their territories without consulting them. When governments have issued concessions without consultation, many conflicts have been generated**.**
- When it comes to exploration, many communities will not accept the idea that exploration teams enter their territories without consultation. However, at this stage, no one knows if a deposit exists, if it is economically viable, exactly where it is, or what may be the best techniques for its exploitation. That is, when the exploration phase begins, a dialogue about a possible future mine cannot yet be "informed."
- As mineral prices go up and down, technologies change, additional extensions of a deposit are identified, or other factors change the equation, there does not seem to be any productive way forward other than further dialogue and consultation.

As stated by the Constitutional Court of Peru in the IDLADS Peru case,

"It must be a constant dialogue throughout the process of elaboration and implementation of the measure. (Findings 41, 42, and 43).

And Dr. Alvarado says:

An important point is that "indigenous consultation processes are not a single specific act, but must be carried out in all phases of planning and implementation of the measure or activity in question, which implies constant communication between the State, as guarantor of the consultations, and the indigenous party."

In short, the consultation should not be conceived of as if it were a permit that is granted at one point in time and never revisited so long as it remains in force; the consultation should be an ongoing relationship that continues as long as the parties are neighbors.

Participation of private interests

There is no doubt that under the Convention and the *Sarayaku* decision, and the various national rulings, the duty to consult is a duty of the state, which cannot be delegated to a private interest.

At the same time, when there are important economic interests that depend on the results of the consultation, it is difficult to say that investors or individuals who have private interests have no role in the process. They are very uncomfortable not being in the room when it is their money that is at stake.

There are surely things that are forbidden, such as the practices described in *Sarayaku*: reaching out to dissident community members to establish poles of opposition within the community; offering benefits to those expressing pro-project views; funding campaigns by opponents of traditional leaders; and ultimately dividing the community. The government has some responsibility for ensuring that these things do not happen, and a consultation regulation should contain clauses defining proscribed practices.

Beyond this, investors may be in a position to offer things that indigenous or tribal peoples really want. These can be employment and the promotion of small businesses; transportation, like better roads, railroads, or airports; basic services such as electricity, cell towers, drinking water, and sewage treatment; internet access; support for schools; or health care.

In an ideal world, providing many of these things would be the responsibility of the state. However, this is not an ideal world, and many governments have been slow to fulfill these duties, especially in isolated, rural, and poor communities, such as many indigenous communities.

It **is** almost universal in some countries for a company promoting a business investment project to reach an agreement with the community expressing its commitment to these dimensions of the project. See, for example, the *Impact Benefit Agreement Guidebook* by Simon Fraser University,[203] or IIED, *Mapping community development requirements in the mining sector,*[204] *a*nd work by SDSG and the Columbia Center for Sustainable Investment.[205]

In many cases, communities will at least want to know what the company can offer in such a deal. But there is a lot of uncertainty about how this element relates to government consultation.

- Surely this process must be free from the forbidden practices highlighted in *Sarayaku.*
- Surely it must provide a forum for honest dialogue about community development priorities and benefits the project can bring to the community.
- Surely it must begin and give room for due consideration within any time limit that applies to consultation between the community and the government.

[203] See https://rem-main.rem.sfu.ca/planning/IBA/IBA_Guidebook_2-24.pdf
[204] https://www.iied.org/mapping-community-development-requirements-mining-sector
[205] See SDSG, https://www.sdsg.org/archives/cda-library

- Surely it must not serve as an excuse for the government to abandon its role as guarantor of the process.

This is probably the time to provide resources to the community to hire lawyers, engineers, specialists, or others so that the community can negotiate from a more equal position. Some modest support to build community capabilities is likely to pay significant dividends in the form of constructive results. The Chilean system explicitly provides for this, as discussed below.

The regulations we have reviewed do not illuminate this aspect of the process much. For example, in Chile, the private sector role is not explicitly regulated but also not expressly excluded. There is an instruction from August 2016 that recommends - for the dialogue stage - the holding of meetings with the owners of the projects, which have been called "tripartite meetings." This makes sense and is important to the extent that the agreements adopted through indigenous consultation refer to environmental measures and voluntary commitments that the project owner assumes and must execute, and whose compliance is audited by the Superintendency of the Environment.

Resources to Support Communities

In our view, one of the main reasons why some communities are less than enthusiastic about engaging in dialogue is that they are well aware of their position of inequality. The company or the government comes to meetings with teams of lawyers, engineers, biologists, and specialists of all kinds. And in these matters, it is difficult to imagine that a representative of a rural community is not afraid of being deceived, or just overwhelmed.

There have been many suggestions that it is in everyone's interest to provide some resources to communities so they can get the expertise needed to evaluate the specialized information they're receiving. This is, in principle, an opportunity to build trust and generate agreements.

Our colleague Jose Claudio Mozo believes that:

"This problem becomes even more dramatic when we seek to develop projects in areas where communities live that have historically been in a disadvantaged position before the State. Such is the case with indigenous communities."

In Chile, the Environmental Assessment Service has a budget to provide resources to the GHPPIs consulted for this purpose.

Dr. Noejovich has written the following:

"[i]t would be necessary for the communities to have a legal advisor. This would make the processes more cost-efficient and facilitate the monitoring of compliance with the commitments of the consultation agreement."

Coordination with the Environmental Impact Assessment System

It is also important to decide how to relate the environmental assessment process to indigenous consultation. The consultation of indigenous or traditional communities is something specific, based on international agreements and legal provisions. It is separate and distinct from the public consultation that accompanies environmental impact assessment, which belongs to all citizens and is based on the Rio Declaration and national legislation.

For example, on September 8, 2021, the Ecuadorian Constitutional Court ruled that "article 184 of the Organic Code of the Environment does not apply to or replace the right to free, prior and informed consultation of indigenous peoples, communities, and nationalities." This decision, and similar decisions in other countries, are correct.

Indigenous communities have had a very real fear that some will say that, by participating in the public comment process of environmental assessment, they have agreed that this is a consultation that complies with ILO Convention 169. Certainly, there are examples where governments have done so.

At the same time, indigenous consultation has to be "informed," and the environmental impact study is one of the most important sources of information relevant to the concerns of communities. Therefore, it makes little sense, at least in most circumstances, to have a deadline for the indigenous consultation in which the community's decision is expected before the environmental impact study is available, with sufficient time for its proper evaluation.

The "Right of Veto"

What, in our view, has distracted us and hindered the progress of the debate is the repeated question of whether "communities have the right of veto."

As Dr. Alvarado has said:

"The UN Rapporteur on Indigenous Peoples has emphasized that reducing the principles of consultation and consent to a debate on the existence of a veto loses sight of the spirit and nature of these international principles."

The principles of consultation and consent seek to create a good-faith dialogue between States and indigenous peoples so that, through consensus and agreements that guarantee the human rights of indigenous peoples, historical patterns in which decisions have been imposed on indigenous peoples that have threatened their physical and cultural survival can be put to an end.

The ILO Committee of Experts, in its 2011 General Comment on the obligation to consult Convention 169, established the following concerning the purpose of consultations:[206]

[206]CEACR ILO, General Comment 2011 on the obligation to consult.: Indigenous and Tribal Peoples Convention, 1989 (No. 169)169 Report 2011 of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Organization, (2011).

> "Consultations must be formal, full, and conducted in good faith; there must be a genuine dialogue between Governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith, and a sincere desire to reach an agreement;

Consistent with this view is the Inter-American Court's ruling in ***Sarayaku vs. Ecuador,*** as well as several of the national court decisions highlighted in this article.

Consultation and consent should not be understood as the imposition of a veto, but simply as mechanisms through which the State can ensure that the decisions it adopts comply with its international obligations regarding the rights of indigenous peoples.

It should be noted that there are important benchmarks of real relevance. For example, the IFC performance standards (Standard 7), applicable to all its lending and loans from the many private banks that are members of the Equator Principles,[207] already require the "consent" of communities. The loan cannot be granted without consent. So even if the state issues necessary permits over the objections of an indigenous community, many companies will not want to pursue the project, and many lenders will not lend.

These are also the provisions of the United Nations Declaration on the Rights of Indigenous Communities of 2007.

The most widely recognized mine certification program, the Initiative for Responsible Mining Assurance (IRMA for its acronym in English) has an entire chapter (2.2) in its standard that addresses consultation and requires community consent. Whether or not this is the law in a particular country, it clearly seems to be the best practice.

If the goal is to reach an agreement, in Professor Donoso's opinion:

"This discussion is not well-focused and the binding nature of the indigenous consultation must be approached in a different way. Indeed, if the outcome of an indigenous consultation process is an agreement with the peoples consulted, there can be no doubt that such an agreement is binding on the respective government.

On the other hand, if the result of the consultation process is government disagreement with the peoples consulted, it could be asserted that the result of said process is not binding in the sense that it does not imply a right of veto, but it can nevertheless be understood that it is binding insofar as the government must necessarily keep in view and consider the opinion received from the indigenous peoples when issuing any decision.

[207] See https://equator-principles.com/app/uploads/EP4_English.pdf.

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ANNEX: TABLE OF JURISPRUDENCE

INTER-AMERICAN COURT OF HUMAN RIGHTS			
Case	Court	Year	Available at
Case of the Saramaka People. vs. Suriname		2007	http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_esp.pdf
Kichwa Indigenous People of Sarayaku vs. Ecuador		2012	http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_esp.pdf
CHILE			
Case	Court	Year	Available at
Inalafquen and Inocente Panguilef Indigenous Communities and Futa Koyagtun Coz Coz Mapu Indigenous Association vs. the Environmental Assessment Service	Supreme Court of Justice 3rd Chamber	2014	https://corte-suprema-justicia.vlex.cl/vid/comunidad-inalafken-serv-n-ambiental-rios-526728010?_ga=2.217878294.1068722711.1505931977-240913226.1505931977

Office of Indigenous Affairs of Conadi vs. S.Q.M. Salar S.A	Supreme Court of Justice	2014	http://sentenciasrelevantes.blogspot.com/2014/05/excma-corte-suprema-rol-num-16817-2013.html
Community Organization "The United Indigenous Peoples of la Cuenca de Tarapacá, Quebrada de Aroma, Coscaya, Miñi Miñi" vs. the Environmental Assessment Service	2nd Environmental Court	2015	http://www.tribunalambiental.cl/wp-content/uploads/2014/07/R-54-2014-01-12-2015-Sentencia.pdf
Atacameña de Peine Indigenous Community vs. the General Directorate of Water	Antofagasta Court of Appeals	2020	https://www.diarioconstitucional.cl/wp-content/uploads/2020/11/CA-Antofagasta-5-2020.pdf.
Indigenous Community of *Colla Río Jorquera y Sus Afluentes* vs. the Environmental Assessment Commission of the Atacama Region	Supreme Court of Justice	2021	https://www.pjud.cl/prensa-y-comunicaciones/getRulingNew/9198
COLOMBIA			
Case	Court	Year	Available at
Indigenous Organization of Antioquia and EMBERA-CATIO Indigenous Community of Chajeradó vs. the Corporación Nacional de Desarrollo del Chocó (CODECHOCO) and Compañía de Maderas del Darién (MADARIEN)	Third Review Chamber of the Constitutional Court	1993	http://www.corteconstitucional.gov.co/relatoria/1993/t-380-93.htm
Deputy Prosecutor for Ethnic Affairs vs. the Governor of the Department of Cesar, the National Registrar of Civil Status vs. the Departmental Registrar of Cesar	Seventh Review Chamber of the Constitutional Court	1999	http://www.corteconstitucional.gov.co/relatoria/1999/t-634-99.htm
Julio Alberto Torres Torres and others vs. the Ministry of the Interior and Justice and others	Fourth Review Chamber of the Constitutional Court	2010	http://www.corteconstitucional.gov.co/relatoria/2010/t-547-10.htm

Oscar Carupia Domicó and others, on behalf of the Chidima-Tolo and Pescadito reservations belonging to the Embera-Katío ethnic group vs. the Ministries of Transportation, Environment, Housing and Territorial Development, Interior and Justice, Mines and Energy, Agriculture, Defense, and the Royalties Advisory Council.	Fifth Review Chamber of the Constitutional Court	2011	http://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm
Jovannys Pardo Castro vs. the Maritime Directorate General of the Port of Cartagena (Dimar)	First Review Chamber of the Constitutional Court	2012	http://www.corteconstitucional.gov.co/relatoria/2012/t-376-12.htm
Board of Directors of the Community Council of Mulaló vs. the Ministry of the Environment and Sustainable Development, Ministry of the Interior, Instituto Nacional de Vías (INVIAS), Consorcio D.I.S. S.A- EDL LTDA	First Review Chamber of the Constitutional Court	2013	http://www.corteconstitucional.gov.co/relatoria/2013/t-657-13.htm
Zully Amparo Archibold vs. the Ministry of Commerce, Industry and Tourism, the Coralina Regional Autonomous Corporation and the Municipality of Providencia and Santa Catalina Islands	Fourth Review Chamber of the Constitutional Court	2014	http://www.corteconstitucional.gov.co/relatoria/2014/t-800-14.htm
Jacinto Epinayú, Luis Geronel Quintana and others, identified as indigenous of the Wayúu people vs. the Incoder, with linkage to Agromar SAS	First Review Chamber of the Constitutional Court	2015	http://www.corteconstitucional.gov.co/relatoria/2015/t-661-15.htm
Santacoloma Méndez and Negrete Montes	Constitutional Court	2016	https://www.corteconstitucional.gov.co/relatoria/2016/C-389-16.htm
Awá La Cabaña Indigenous Community vs. Consorcio Colombia Energy	Constitutional Court	2018	https://www.corteconstitucional.gov.co/relatoria/2018/SU123-18.htm

PERU			
Case	Court	Year	Available at
Bustamante vs. Occidental Petrolera del Peru	Constitutional Court of the Republic of Peru	2009	https://tc.gob.pe/jurisprudencia/2009/03343-2007-AA.pdf
INTERETNICA DE DESARROLLO DE LA SELVA PERUANA ASSOCIATION vs. the Ministry of Energy and Mines	Constitutional Court of the Republic of Peru	2010	https://tc.gob.pe/jurisprudencia/2010/05427-2009-AC.pdf
Gonzalo Tuanama Tuanama and more than 5000 Citizens vs. the Presidency of the Council of Ministers	Constitutional Court of the Republic of Peru	2010	http://www.tc.gob.pe/jurisprudencia/2010/00022-2009-AI.html
Ministry of Energy and Mines vs. the Junín Regional Government	Constitutional Court of the Republic of Peru	2012	http://www.tc.gob.pe/jurisprudencia/2013/00005-2012-AI.pdf
Instituto de Defensa Legal vs. the Ministry of Energy and Mines	Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice of the Republic of Peru	2013	https://www.pj.gob.pe/wps/wcm/connect/3281fc0040b6a3268819c9726e1ea793/Sentencia+A.P.N%C2%B0+22322012+LIMA.pdf?MOD=AJPERES&CACHEID=3281fc0040b6a3268819c9726e1ea793
Instituto de Defensa Legal vs. the Ministry of Energy and Mines	Constitutional Court of the Republic of Peru	2014	https://tc.gob.pe/jurisprudencia/2016/02420-2012-AC%20Resolucion.pdf
Instituto de Defensa Legal del Ambiente and Sustainable Development Peru (IDLADS Peru) vs. the Superior Court of Justice Lima	Constitutional Court of the Republic of Peru	2021	https://tc.gob.pe/jurisprudencia/2021/01717-2014-AC.pdf
ASOCACION INTERETNICA DE DESARROLLO DE LA SELVA EPRUANA – AIDESEP	Supreme Court of Justice of the Republic of Peru	2021	https://dar.org.pe/wp-content/uploads/2021/01/Accion-Popular-contra-el-Reglamento-de-la-Ley-de-Consulta-Previa-por-exonerar-de-consulta-previa-los-servicios-publicos.pdf

Chila Chambilla and communities and Chila Pucara vs. Metallurgical Mining Institute (Ingemmet) and the Ministry of Energy and Mines (MEM)	Constitutional Court of the Republic of Peru	2019	https://tc.gob.pe/jurisprudencia/2022/66-2019-AA.pdf
CANADA			
Case	Court	Year	Available at
Delgamuukw vs. British Columbia	Supreme Court of Canada	1997	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do
Haida Nation vs. British Columbia (Ministry of Forests)	Supreme Court of Canada	2004	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do
Taku River Tlingit First Nation vs. British Columbia (Project Assessment Director)	Supreme Court of Canada	2004	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2190/index.do
Rio Tinto Alcan Inc. vs. Carrier Sekani Tribal Council (Supreme Court of Canada) (2010)	Supreme Court of Canada	2010	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7885/index.do
Behn vs. Moulton Contracting Ltd.	Supreme Court of Canada	2013	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13038/index.do
Tsilhqot'in Nation vs. British Columbia	Supreme Court of Canada	2014	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do
GUATEMALA			
OXEC and Q'eqchi Community		2017	https://www.business-humanrights.org/sites/default/files/documents/Oxec_Apelacion%20sentencia%20amparo_CC.pdf
Centre for Legal-Environmental and Social Action of Guatemala (CALAS) vs. Minister of Energy and Mines	Constitutional Court	2017	http://138.94.255.164/Sentencias/840212.4785-2017.pdf

MEXICO			
Case	Court	Year	Available at
Independence Aqueduct and the Yaqui Tribe	Supreme Court of National Justice	2013	https://www.escr-net.org/sites/default/files/Sentencia%20SCJN%20%28Acueducto%20Independencia%29_0.pdf
			https://www.escr-net.org/sites/default/files/Aclaracion%20de%20sentencia%20SCJN_0.pdf
Mayans vs. Monsanto. Concurrent Voting available at	Supreme Court of National Justice	2015	https://franco.scjn.gob.mx/votos/amparo-en-revision-1982015
NORMA ANGÉLICA GARZÓN MARTÍNEZY AND OTHERS VS. CHAMBER OF DEPUTIES AND CHAMBER OF SENATORS OF THE CONGRESS OF THE UNION	Supreme Court of National Justice	2020	https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2020-05/1144.pdf?fbclid=IwAR3eCRzDxCGntFN98D7h63jYY8ZKuWRGvulcuw-SFz5_MfJePGdMHNE_ZgI
Ejidal Commissariat of Tecoltemi and the Nahua Indigenous Community of Tecoltemi vs. Chamber of Deputies and Senators of the Congress of the Union, General Director of Mines of the Ministry of Economy and Gorrión Mining	Supreme Court of National Justice	2022	https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2022-01/AR-134-2021-12012022.pdf
ECUADOR			
Case	Court	Year	Available at
Confederation of Indigenous Nationalities of Ecuador and others against Mining Law	Constitutional Court	2010	http://portal.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=001-10-SIN-CC
Popular consultation of the National Electoral Council	Constitutional Court	2014	http://portal.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=004-14-DCP-CC

Popular Consultation Galo Patricio Mina Espinoza, Luis Amador Mina Espinoza and other residents of the communities settled in the parishes of Lita	Constitutional Court	2019	https://portal.corteconstitucional.gob.ec/FichaCausa.aspx?numcausa=0002-19-CP
Popular Consultation of the Prefect of Azuay	Constitutional Court	2019	https://portal.corteconstitucional.gob.ec/FichaCausa.aspx?numcausa=0009-19-CP
JOSE RIVADENEIRA SERRANO, ECUADORIAN COORDINATOR OF ORGANIZATIONS FOR THE DEFENSE OF NATURE AND THE ENVIRONMENT, CEDENMA, PEDRO BERMEO GUARDERAS, ASOCIACIÓN ANIMALISTA LIBETA ECUADOR, AND ALEXANDRA ALMEIDA ALBUJA, ACCIÓN ECOLOGICA	Constitutional Court	2021	https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=22-18-IN/21
All Metals Mining and others vs. Provincial Court	PROVINCIAL COURT OF JUSTICE OF SUCUMBIOS	2019	https://portal.corteconstitucional.gob.ec/FichaCausa.aspx?numcausa=0920-19-EP
GAD de Santa Ana de Cotacachi vs. ENAMI and others	Constitutional Court	2021	https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21
Arcos Torres and others	Constitutional Court	2022	http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOic3ZmFhMzk0Mi1lYjdmLTQ4YzYtODVjZS02ZmQ1ODkwYjcxZGEucGRmJ30=
ARGENTINA			
Villivar, Silvia Noemí vs. Provincia de Chubut y otros	Corte Suprema de Justicia de la Nacion	2007	http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-villivar-silvana-noemi-provincia-chubut-otros-fa07000219-2007-04-17/123456789-912-0007-0ots-eupmocsollaf