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# Contesting the Limits of Consultation in the Amazon Region: On Indigenous Peoples' Demands for Free, Prior and Informed Consent in Bolivia and Peru

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## ABSTRACT

*While states have legal rights over more than 60% of the world's forests, around one billion people inhabit and "manage" them often without proper legal recognition. Many countries are moving towards conferring legal rights over forested land to a broad range of private actors such as individuals or communities. However, and perhaps not surprisingly, two thirds of on-going violent conflicts involving rural communities are driven by contested claims over land and resources. In many Latin American countries, statutes and regulations on consultation have recently become strategic issues, even*

## RÉSUMÉ

*Alors que les États détiennent des droits juridiques sur plus de 60 % des forêts du monde, près d'un milliard de personnes habitent et « gèrent » ces ressources sans recevoir une reconnaissance juridique adéquate. Beaucoup de pays commencent à conférer des droits juridiques sur des terres boisées à une panoplie d'acteurs, soit des acteurs individuels privés ou encore à des communautés. Cependant, et peut-être que cela n'est pas étonnant, les deux tiers des conflits violents impliquant des communautés rurales sont fondés sur des prétentions contestées de droits de propriété qui ont pour objet des terrains ainsi*

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*though these laws are suppose to comply with treaties and declarations signed by states some years or even decades before. Is it reasonable to claim that international approaches to indigenous rights, such as the ILO Convention 169 (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (2007) have actually begun to influence domestic regulations in a comprehensive manner? In that sense, what is the concrete impact of these approaches in policy-making processes? Is the recognition of the right to consultation bringing improvement to environmental conditions in the jurisdictions concerned? These questions are hereby addressed by means of two case studies where laws on consultation had parliamentary approval and were promoted by State's agencies, but were contested by indigenous peoples' movements: the framing of the Peruvian National Law on Consultation (Law No. 29785) and the ad hoc Law on Consultation (Law No. 222) over a planned road through the Indigenous Territory and Isiboro-Sécure National Park, regarded as*

*que des ressources naturelles. Dans plusieurs pays d'Amérique latine, les lois et les règlements sur la consultation sont récemment devenus des enjeux stratégiques et cela même si ces lois sont censées se conformer aux traités et aux déclarations signés par les États plusieurs années auparavant. Est-ce raisonnable de prétendre qu'en matière de droits des autochtones, les instruments internationaux telles la Convention de l'OIT 169 (1989) et la Déclaration des Nations Unies sur les droits des autochtones (2007) commencent à influer de manière concrète sur l'élaboration des lois nationales des États? Si oui, quels sont les effets concrets de ces approches en ce qui concerne le processus d'élaboration des lois? Est-ce que la reconnaissance du droit à la consultation sert à améliorer les conditions environnementales dans les États concernés? Ces questions seront examinées par l'entremise de deux études de cas où les lois sur la consultation avaient obtenu l'assentiment du parlement et étaient aussi soutenues par des agences de l'État, mais*

*the basis for the Bolivian Law on Consultation.*

*qui étaient contestées par des mouvements des peuples autochtones : le cadre qu'ont fourni la Loi sur la consultation (Peruvian National Law on Consultation No. 29785), ainsi que la Loi sur la consultation ad hoc (n° 222), pour construire une rue à travers un territoire autochtone (Parc national Isiboro-Sécure), est considéré comme le fondement de la loi bolivienne sur la consultation.*

**Key-words:** *Free prior and informed consent, consultation, Amazon Basin, indigenous peoples' movements, Peru, Bolivia.*

**Mots-clés :** *Principe de consentement préalable donné librement en connaissance de cause, consultation, bassin de l'Amazone, mouvements des peuples autochtones, Pérou, Bolivie.*

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INTRODUCTION

While states have legal rights over more than 60% of the world’s forests, there are around one billion people who inhabit and “manage” them,<sup>1</sup> often without proper legal recognition. Many countries are moving towards conferring legal rights over forested land to a broad range of private actors, being they individuals or communities. From 2002 to 2008, various governments granted rights to indigenous peoples and local communities pertaining to 50 million hectares of forest. By 2012, governments had recognized communities’ ownership or long-term use rights to 31% of the developing world’s forests—which counts for over 490 million hectares.<sup>2</sup>

However, and perhaps not surprisingly, two thirds of on-going violent conflicts involving rural communities are driven by contested claims for land and resources.<sup>3</sup> This tension is particularly vivid in Andean-Amazonian countries where conflicts over development policies and disputed legal reforms have a lengthy history, yet becoming more frequent and harder to conciliate.

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1. UNFAO, *Celebration of the International Year of Forest* (2011) online: FAO <<http://www.fao.org/forestry/iyf2011/en/>> (Note that all online references were accessed 4 June 2013).

2. See Rights and Resources Initiative, *State of Rights and Resources 2012–2013: Landowners or Laborers?* online: <<http://www.rightsandresources.org/pages.php?id=972>>. To establish these proportions, the total forest area of the 27 countries taken into account is 1.66 billion hectares, while the total forest area for developing countries is 2.25 billion hectares (Russia is excluded from these calculations because its coverage of forest area has statistically distorting effects). UNFAO, *FAO Forestry Paper 163: Global Forest Resources Assessment 2010 Main Report* (Rome: FAO, 2010).

3. Liz Alden Wily et al, *The End of Hinterland: Forest, Conflict and Climate Change* (Washington: Rights and Resources Initiative, 2009).

National prior consultation acts are meant to enshrine the right, recognized by international law, of indigenous peoples to be consulted by the State before the adoption of legal and administrative reforms that will affect them, and before the implementation of investment projects where the project's area of influence includes their lands. In many Latin American countries, statutes and regulations on consultation have recently become a strategic issue, even though these laws are supposed to comply with treaties and declarations signed by states, some years (or even decades) before. As the President of Peru stated,<sup>4</sup> several governments in the region consider that consultation mechanisms might help to avoid social conflict in the long run as they "enhance intercultural dialogue with indigenous peoples." Is it reasonable to claim that international approaches to indigenous rights, such as the International Labour Organization's Convention 169 (1989) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007)<sup>5</sup> have actually begun to influence domestic regulations in a comprehensive manner? In that sense, what is the concrete impact of these international approaches to indigenous peoples' rights in domestic practices and policy-making processes? And, is the recognition of the right to consultation bringing improvement to environmental conditions in the jurisdictions concerned?

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4. The President of Peru, Ollanta Humala, in his Address to the Nation of the 28th of July, 2012 stated: "We approved the Prior Consultation Law, the first law in the world of its kind, fully recognizing the rights of indigenous peoples. My government expects that this law will change the context of dialogue in the country, in order to listen to those who were never heard."

5. GA Res 295, UNGA, 61th Sess, UN Doc A/RES/61/295 (2007). The UN Assembly approved this Declaration on 13 September 2007. As written in Article 19, "[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Consultation to indigenous peoples has become a central mechanism by which a range of legal regimes (e.g., ILO and UN human rights instruments, multilateral banks and transnational corporations' codes of conduct, national constitutions, etc.) has sought to manage disputes over indigenous territories.

These questions are hereby addressed by means of two case studies where laws on consultation had parliamentary approval and were promoted by government agencies, but were contested by indigenous peoples' movements: the framing of the Peruvian National Law on Consultation (Law No. 29785)<sup>6</sup> together with the secondary legislation required to put it into practice; and the *ad hoc* law on consultation (Law No. 222)<sup>7</sup> over a planned road through the Indigenous Territory and National Park Isiboro-Sécure, which is regarded as the basis for the Bolivian National Law on Consultation, being drafted.<sup>8</sup>

As has been demonstrated extensively by social science and legal literature,<sup>9</sup> international regulation on consultation is the outcome of long-standing transnational activism and the subsequent reform of international policy.<sup>10</sup> The main aim of this paper is to examine the shaping of national consultation

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6. State of Peru, Congreso de la República. "Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (31 August 2011)."

7. Plurinational State of Bolivia, *Ley de Consulta a los Pueblos Indígenas del Territorio Indígena Y Parque Nacional Isiboro-Sécure—TIPNIS* Ley 222 (10 February 2012), online: <<http://bolivia.infoleyes.com/shownorm.php?id=3617>>.

8. Plurinational State of Bolivia, *Bill of the Framework Law on Free, Prior and Informed Consultation to the Nations and Indigenous Peoples and Afro-Bolivian Communities; of enforceable compliance by Plurinational State of Bolivia*.

9. Irène Bellier & Martin Préaud, "Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples" (2012) 16:3 *Int'l JHR* 474; Ravi De Costa et al, eds, *Indigenous Peoples and Autonomy: Insights for a Global Age* (Vancouver: UBC, 2010); Chidi Oguamanam, "Indigenous Peoples and International Law: The Making of a Regime" (2004) 30:1 *Queen's LJ* 348; Alice Feldman, "Transforming Peoples and Subverting States: Developing a Pedagogical Approach to the Study of Indigenous Peoples and Ethnocultural Movement" (2001) 1:2 *Ethnicities* 147; Françoise Morin, "L'ONU comme creuset de l'autochtonie" (2005) 5 *Parcours anthropologiques* 35; Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Los Angeles: University of California Press, 2003).

10. César Rodríguez-Garavito & Luis Carlos Arenas, "Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'wa People in Colombia" in Boaventura de Sousa Santos & César Rodríguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 241; Natacha Gagné & Marie Salaün, "De la difficulté à traiter les faits sociaux comme des 'choses': l'anthropologie et la question autochtone" (2009) 2:1 *Monde commun* 68.

"*dispositifs*"<sup>11</sup> (defined below), and the possibilities of action they open up for the parties engaged in the advocacy of indigenous peoples' collective rights and a healthy environment. The actual influence of international legal frameworks in Bolivia and Peru will be clarified here by highlighting features that were contested at the national level.

The paper is arranged as follows. First, there is an overview of the regional context and the reasons for comparing the Bolivian and Peruvian cases. Then, building on developments made by political ecology, legal studies and French critical social theory, a conceptual framework is sketched that may be of use in understanding common trends in both countries. As many scholars and practitioners assert, consultation mechanisms might lead to a disproportionate attention on procedural matters related to the consultation in itself<sup>12</sup> displacing debates and political action for the improvement of living standards and respect for substantial indigenous rights. We will show in a second part how these processes have not circumvented the emergence of fundamental debates in the public square, though they have been set up in a different manner. The main points of contention in the Bolivian and Peruvian cases are analysed, so as to better understand the intervention of consultation and its impact on the agency of the political actors. In conclusion, lessons from both case studies are drawn, by returning to the questions first asked.

Fieldwork done by the author in Bolivia and Peru between 2010 and 2012 has served as base for the analysis that this article presents. Evidence on the issues discussed was obtained using a combination of techniques in qualitative research, including semi-structured interviews with key actors in the consultation processes (such as indigenous leaders, state officials and human rights and environmental lawyers), extensive

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11. Michel Foucault, *Surveiller et punir. Naissance de la prison* (Paris: Gallimard, 1975) and *Dits et écrits II. 1976-1988* (Paris: Gallimard, 2001) [Foucault, *Dits et écrits II*].

12. César Rodríguez-Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" (2011) 18:1 *Ind J Global Legal Stud* 263.

participatory observation and a review of legal regulation and doctrines on consultation to indigenous peoples.<sup>13</sup>

## I. INDIGENOUS RIGHTS REGIMES AND LATIN AMERICAN POST-NEOLIBERAL ECONOMIC GROWTH

Latin America has gone through political and economic structural changes related to democratisation and neo-liberalisation. This process has led, in one hand, to unparalleled difficulties for indigenous peoples in order to maintain their lifestyles and access to livelihoods but in other hand it renewed political openings for cultural social movements.<sup>14</sup> By the end of the 1980s, political representation of social demands had changed and, while syndicalism started to decline a wider political space opened for the recognition of the rights of indigenous peoples and for the participation of indigenous peoples' organizations.<sup>15</sup> Scholars have paid significant attention to the political economy of neoliberal reform and the way in which it has circumscribed citizenship, democracy and natural resource extraction. Social and political scientists have studied extensively how indigenous movements in particular have mobilized to face these changes.<sup>16</sup> The focus of this paper is on the aftermath of that period. As

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13. As part of a sociological research on indigenous social movements the author has sojourned in territories in conflict over road development projects in the Upper Amazon. In Bolivia the fieldwork was done during 3 periods (from 2010 to 2012) in the Indigenous territory and National Park Isiboro-Sécure also known as TIPNIS. In Peru fieldwork was completed during 2012 in the Purus Province of Ucayali and the surroundings of the recently paved IIRSA road in Madre de Dios. She held participant observation and more than a 100 interviews with indigenous leaders, elders as well as young parents that are mobilized to constraint the construction of both roads. She had several meetings with state agencies civil servants, international organizations working in the field as well as specialist on indigenous rights and environmental right in these countries.

14. For further elaboration on new social movements and cultural social movements, see Michel Wieviorka, *Neuf leçons de sociologie* (Paris: Éditions Robert Laffont, 2008).

15. For further description, see José Bengoa, *La Emergencia Indígena en América Latina* (Mexico: Fondo de Cultura Económica, 2007); Deborah J Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005).

16. See Yvon Le Bot, *La grande révolte indienne* (Paris: Éditions Robert Laffont, 2009); Luis Enrique López & Pablo Regalsky, eds, *Movimientos Indígenas y Estado en Bolivia* (La Paz: PROEIB Andes/Cenda/Plural Editores, 2005).



Håvard Haarstad claims, the current juncture provides an opportunity to analyse development models that are springing from mobilization against neoliberal orders; how the characteristics of post-neoliberal models (if such things exist) are constructed and negotiated; enduring constraints on equitable policy; the complexities of integration in international markets and territorial-political conflicts between states and local sovereignties.<sup>17</sup>

The last decade has witnessed sustained growth in most of the region's economies. While foreign investments are falling overall for developed countries, foreign direct investment inflows in Latin America rose by 40% from 2009 to 2010. China, its third largest foreign investor, places almost all of its assets (90%) in natural resources.<sup>18</sup> About half of Brazilian multinational enterprises (MNEs) focus on Latin America. Natural-resource firms are primarily responsible for the impressive growth of Brazilian MNEs and account for about two thirds of the total foreign assets of the top twenty Brazilian multinationals in the market.<sup>19</sup>

Accompanying this trend, since the turn of the century most of the Andean-Amazonian countries have executed a well-documented "shift to the left". The election of Evo Morales in Bolivia (2005), Rafael Correa in Ecuador (2006), Ollanta Humala in Peru (2011) and the formation of the ALBA coalition through the initiative of the Venezuelan government (2005) are some of the signposts of this political turn. Concerning the way natural resources are managed, the distinction between the old "right-wing" governments and the new "left-wing" ones, though significant, is not precisely all what the narrative of these governments might suggest. However, along with the strengthening of state enterprises in

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17. Håvard Haarstad, ed, *New Political Spaces in Latin American Natural Resource Governance* (London: Palgrave Macmillan, 2012).

18. Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean*, 2010 (Santiago de Chile: United Nations, 2011).

19. Paulo Resende, Andrea Almeida & Jase Ramsey, "The Transnationalization of Brazilian Companies: Lessons from the Top Twenty Multinational Enterprises" in Karl P Sauvart, Wolfgang A Maschek & Geraldine McAllister, eds, *Foreign Direct Investments from Emerging Markets: The Challenges Ahead* (New York: Palgrave Macmillan, 2010) 97.

certain countries, the political changes have brought about some reforms in governance. New models and practices have been proposed, where there is opportunity to negotiate different distributions of risks and benefits in civil society, and where indigenous peoples are being called to “participate.”

#### A. TRACING CONSULTATION TO INDIGENOUS PEOPLES IN THE LATIN AMERICAN CONTEXT

Indigenous issues in national law, and specifically on the autonomy of autochthonous peoples, are not new matters of deliberation in the region. However, the current evolution of the debate around consultation mechanisms is exceptionally dynamic. At the regional level, it can be traced back to 1940, when the First Inter-American Indian Congress was held in Pátzcuaro, Mexico. This gathering of diplomats and prominent thinkers of the time charted new guidelines for the treatment of indigenous peoples by American states.<sup>20</sup> Another landmark was the adoption of the ILO Convention 107 on Indigenous and Tribal Peoples in Independent Countries (1957).<sup>21</sup> The Convention recognized that cultures should be respected and their development initiatives should be taken into account. The latter principle would be the basis of a new doctrine on indigenous peoples' affairs: the objective continued to be their *integration* into national societies, but thereafter, looking to establish means of *cooperation*. The emphasis passed from a “compulsory integration” model to a “directed but voluntary” integration.<sup>22</sup> According to Betancur, this was the origin of what would become the right to prior consultation, 30 years later, with the ILO Convention 169 of 1989.<sup>23</sup> At the same time, we should keep in mind the role

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20. Laura Giraudo & Juan Martín Sánchez, eds, *La Ambivalente Historia del Indigenismo: Campo Interamericano y Trayectorias Nacionales, 1940-1970* (Lima: IEP, 2011).

21. *Ibid.*

22. Rodolfo Stavenhagen, “Los Derechos de los Pueblos Indígenas: Esperanzas, Logros y Reclamos” in Mikel Berraondo, ed, *Pueblos Indígenas y Derechos Humanos*, Instituto de Derechos Humanos (Bilbao: Universidad de Deusto, 2006) 21.

23. Ana Cecilia Betancur, “La Consulta Previa a los Pueblos Indígenas: De la Participación Democrática a la Expropiación de Territorios” (Oral presentation delivered at the VIIIth Congress of the RELAJU, Sucre, Bolivia, 25 October 2012) [unpublished].

played by the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), adopted by the UN in 1966. Based on Common Article 1, which recognizes the right to self-determination of peoples, *Indians* began to advocate their status as peoples. This was recognized in the ILO Convention 169. However, this binding treaty does not grant self-determination, but considers the right of peoples to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy in the framework of national states.<sup>24</sup> The main mechanism called to make this autonomy effective was prior consultation.

By now, according to Rodríguez-Garavito<sup>25</sup> the consultation approach has become the most likely candidate to replace the integrationist approach that prevailed in international law and domestic legal frameworks throughout the 20th century and purported to resolve the “indigenous problem” by assimilating aboriginal peoples into the rest of society. He considers that this trend was inscribed in domestic law with the “multicultural constitutionalism,” inaugurated by the Guatemalan Constitution of 1985, which was joined by Nicaragua (1987), Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Bolivia (1994), Argentina (1994), Mexico (1994), Venezuela (1998), and, especially, Ecuador (2008) and Bolivia (2009). Each country recognizes the right to autonomy and self-determination to a different extent.

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24. Article 7.1 of the Declaration asserts that:

the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.

25. *Supra* note 12.

## B. WHY COMPARE CONSULTATION PROCESSES IN BOLIVIA AND PERU?

Peru and Bolivia can be seen as placed in two different poles of the region's political economy. While Bolivia has oriented its international relations to an alliance with Venezuela and Brazil, Peru maintains a closer affiliation to the United States through a free trade agreement. Bolivia is the only country to withdraw (in November 2007) from the International Centre for Settlement of Investment Disputes (ICSID), although, as several of Bolivia's Bilateral Investment Treaties offering ICSID arbitration remain in force, legal questions arise over whether claims can still be made against the Bolivian State.

Bolivia, in common with Ecuador, has adopted a constitution that has set a "plurinational" approach to indigenous issues. Its 2009 Constitution redefined the "uni-national" project, as indigenous peoples not only have internal autonomy, but also are recognized on an equal footing with other sectors within the country. According to Yrigoyen Fajardo,<sup>26</sup> this approach is fully linked to the right to self-determination of indigenous peoples as described in the United Nations Declaration of 2007. In Bolivia, this necessitated deep reforms in the structure of the State, accompanied by a new political map for the country, which incorporates "indigenous territories" in a more established manner. The strong political support of indigenous social movements to these reforms, as well as to other political changes that the Morales administration performed in its first term, were essential.

Despite salient differences, these two countries have many structural features in common. From an international perspective, both countries had the political will to play an active role in the recognition of the rights of indigenous peoples. Both ratified ILO 169 in the early 1990s; and while Peruvian diplomacy championed the UN Declaration on Indigenous Rights at its early beginnings, Bolivia was the

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26. Raquel Yrigoyen Fajardo, "A los 20 años del Convenio 169 de la OIT: Balance y Retos de la Implementación de los Derechos de los Pueblos Indígenas en Latinoamérica", online: AADI <<http://derechosindigenas.org.ar/index.php/component/search/raquel%20yrigoyen?ordering=&searchphrase=all>>.

first country to fully integrate it into its Constitution in 2009. The right to a healthy environment was also recognized in both countries more than a decade ago (and it is now valid following the Peruvian Constitution Art 2.22; and the Bolivian Constitution Chap 5 Sect 1; and particularly for Indigenous Peoples in Art 30.10).<sup>27</sup>

At the same time, the importance of extractive industries in Bolivian and Peruvian economies is rather central. The major economic activity (in GDP terms) in both countries is mining. The expansion of this industry in the last 20 years is affecting new ecosystems. More than 50% of each country's territory forms a part of the Amazon Basin biome and infrastructure projects in this areas currently favour both extractive and agribusiness industries. As investment on these activities accelerates, indigenous peoples' lands and territories as well as Protected Areas are increasingly overlaid with concessions granted to others, for mining and hydrocarbons mainly, but also for forestry and tourism.

Political and institutional regimes affect the extent, nature and distribution of development opportunities and risks catalysed by the growth of extractive industries. These structural features set up the context for "free, prior and informed consent" (FPIC) processes in both countries. As we have seen, although constitutional and political orders are dissimilar, basic rights are equally recognized, which enhance the exercise of comparison.

## II. CONCEPTUAL FRAMEWORK: WHEN CONSULTATION BECOMES A NATIONAL "*DISPOSITIF*"

Consultation should be considered as a social process that goes beyond legal frameworks. It implies a complex series of engagements and institutional arrangements that state agencies, indigenous peoples and other stakeholders have to construct and perform inside and outside current institutional set-ups.

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27. The right to a healthy environment was recognized in the 2004 Constitution.

The complexities of this process can be better understood by using the concept of “*dispositif*”, first proposed by the French philosopher Michel Foucault in 1975, to analyse technologies of power and technologies of punishment. In an interview in 1977, Foucault gives a first definition of the concept as:

a resolutely heterogeneous set that includes discourses, institutions, architectural designs, legal decisions, laws, administrative measures, scientific statements, as well as philosophical, moral and philanthropic propositions. The *dispositif* itself is the network that can be established between these elements.<sup>28</sup>

Foucault was a pioneer in raising material and technical devices to the rank of objects worthy of analysis by philosophy and the social sciences. The heterogeneous quality of *dispositifs* (which include material and non-material objects such as discourses), and the role they play in association with the author’s conception of power might help us in the analysis of consultation and its contestation.

For Foucault, power is “a set of actions upon actions”: it operates on the “fields of possibility” where the behaviour of acting subjects is inscribed.<sup>29</sup> Power does not reduce the people on whom it is exerted to passivity:

A relationship of power is based on two elements that are essential to its being truly a relationship of power: that the “other” (the one on whom the power is exerted) is properly recognized and maintained throughout the end as a subject of action; and that it opens for him—in front of the relationship of power—a whole field of responses, reactions, effects, possible inventions . . .<sup>30</sup>

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28. Foucault, *Dits et Écrits II*, *supra* note 11 at 299 [translated by author].

29. The complete definition of power given by the author in original language is:

un ensemble d’actions sur des actions possibles: il opère sur le champ de possibilité où vient s’inscrire le comportement des sujets agissants: il incite, il induit, il détourne, il facilite ou rend plus difficile, il élargit ou il limite, il rend plus ou moins probable; à la limite, il contraint ou empêche absolument; mais il est bien toujours une manière d’agir sur un ou sur des sujet agissants, et ce tant qu’ils agissent ou qu’ils sont susceptibles d’agir. Une action sur des actions. *Ibid* at 1054.

30. *Ibid* at 1055 [translated by author].

Power is the action over the champ of possible *actions* a subject will come up with and perform; the “other” is not reduced to the incapability to act.

Building on Foucault’s definition of *dispositif*, Silva-Castañeda highlights the dynamic dimension of this concept. *Dispositifs* are places of “strategic filling” as the emergence of a *dispositif* generates expected and unexpected effects and spaces that will be reinvested by new players, where new strategies will be used as well.<sup>31</sup> According to this perspective, it is therefore central to analyse a *dispositif* “by the movement it creates, the *magnet effect* it provokes, the attempts, reinterpretations, and detours it raises.”<sup>32</sup>

As we will show in later sections, indigenous organizations intervene in the consultation process in ways that were not expected by the original set-up of the *dispositif*. On the other hand, governments, as well as other new and old actors present in the territories, operate significant changes on what was proposed or expected by international law and jurisprudence on the matter. The shape contestation takes in this process speaks both on the dispositive and on how the sense of the action of indigenous peoples movements is being deployed in this new context.

To elaborate further on the spatiality that this concept implies, this paper draws on recent work by political geographers employing the analytical framework of emerging “political spaces” in Latin America proposed by Haarstad.<sup>33</sup> As this author defines it, “[p]olitical space has both metaphorical and geographical elements, in that it alludes to the enabling and constraining factors in opportunity structures, and to the socio-spatial changes in relations between localities, states,

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31. Laura Silva-Castañeda, *Les dispositifs de certification à l'épreuve des conflits fonciers: le cas de la table ronde sur l'huile de palme durable* (Thesis, Louvain-la-Neuve, Université catholique de Louvain, École des sciences politiques et sociales, 2012) [unpublished].

32. Marc Mormont, quoted by Silva-Castañeda, *ibid.*

33. John-Andrew McNeish, “More than Beads and Feathers: Resource Extraction and the Indigenous Challenge in Latin America” in Haarstad, *supra* note 17, 39; Denise Humphreys-Bebington & Anthony Bebbington, “Post-What? Extractive Industries, Narratives of Development, and Socio-Environmental Disputes across the (Ostensibly Changing) Andean Region” in Haarstad, *ibid.*, 17.

and the various processes associated with globalization.”<sup>34</sup> This framework posits that the region is undergoing broad structural changes in political institutions, political discourses, and economic relations, which reshape the opportunity structures of various actors. In the following sections, consultation is considered as a *dispositif* that has opened up certain spaces for contestation in the sense that Haarstad indicates: in mutually dependent socio-spatial dimensions and political structures.

Many times, the territories where indigenous peoples live and struggle for permanence are highly risky, characterised by the volatile social relations of hybrid economies situated at the crossroads of legality, illegality, and informality. As a “legal artefact,” consultation generates an “illusion of order” in an unruly and risky context. The intrinsic procedural nature of law—accentuated by the governing paradigm of neoliberal multiculturalism—permits, as it intervenes in these contexts, some provisional and mediated communication between different actors in tension. It offers a “point of contact,” and a space of coordination of action, between agents that might defend different, or even antagonistic, positions.<sup>35</sup>

### III. CONTESTING PREVALENT APPROACHES AND RECLAIMING CHANGE: THE PERUVIAN CASE

The Peruvian law on consultation was one of the first substantive measures agreed during the government of Ollanta Humala (in power since August 2011) in order to enable arbitration concerning the social impacts of increasing investment in rural areas. After violent confrontations between indigenous groups and the Peruvian police in the Peruvian state of Amazonas, an intense debate began on García’s administration (2006–2011) approach to indigenous and peasant communities. The “Bagua uprising” in the north

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34. Håvard Haarstad, “Extracting Justice? Critical Themes and Challenges in Latin American Natural Resource Governance” in Haarstad, *ibid* at 4.

35. Rodríguez-Garavito, *supra* note 12. Conflicts over resource extraction can be generally understood as manifestations of different types of overlapping contradictions where actors are not necessarily opposed by markedly different positions. The article of Humphreys-Bebbington & Bebbington (*supra* note 33) offers an interesting typology of those.



of the country was the high tide of an Amazonian-wide movement protesting against non-consultative, legislative measures. These measures were perceived as opening the door for massive foreign investment and the increased extraction of natural resources in provinces with important forest cover, which are used by indigenous peoples<sup>36</sup> and conceived as their territory,<sup>37</sup> but for which in many cases they are still awaiting proper legal rights. The asymmetry between the actors involved in the confrontation and its violence had no precedent, other than the sad chapters of Peru's previous history of terrorism. More than 30 people, police and protestors died, and many others injured.<sup>38</sup> The acceptance in political circles of the need for legal change and for channels for the participation of indigenous peoples was precipitated by a sudden and violent event.

The Law on Consultation and its secondary legislation were drawn up in a short period of time (August 2011 to March 2012). After a troubled drafting process, all peasant and indigenous national organizations that participated of this process presented their objections and reservations on

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36. Over one hundred decrees were issued within a six-month period to implement legislation for implementation of the Free Trade Agreement signed with the United States in 2006. Over ten of them were perceived as weakening communal forms of property, or fomenting private investment in areas historically occupied and claimed by peasant and indigenous peoples without any prevision regarding their presence in those areas.

37. There is a point to be made about the notion of territory for indigenous peoples. The Ibero-American Institute of Human Rights described territory as "a geographical area in which the dynamics of indigenous societies is deployed, and to which is linked with culture, history and identity of a particular group." This living space has been claimed as a collective right, essential for the survival and continuity as distinctive peoples. ILO Convention 169 is very emphatic in this regard. In its article 13.1, related to land issues: "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship", *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169)* (Geneva: ILO, 2003) 29. It stresses the application of the provisions of the Convention to the territories of indigenous peoples, noting that "The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use." *Ibid* at 96.

38. For an account of the facts and context, as well as further analysis, see Shane Greene, "Making Old Histories New in the Peruvian Amazon" (2009) 1:3 *Anthropology Now* 52; Humphreys-Bebbington & Bebbington, *supra* note 33.

both the statute and its regulations. What was contested in the Peruvian case? There were concerns about the way the process was conducted and about the content of the officially accepted legal provisions.

Indigenous peoples and their allied organizations identified the following pitfalls in the process: a low participation by national organizations representing indigenous peoples, hastily organized; a desire by government agencies to accelerate the process affected the principles of flexibility and reasonable time; imbalances in the development of the consultation were not effectively mitigated; various agreements reached in the dialogue stage about the legal content were later disregarded; the introduction of new clauses in the regulations (some 15 provisions) that were not included in the consultation process.<sup>39</sup>

The text was adopted with the agreement of only two of the six organizations that participated in the consultation; the biggest four left the process before its conclusion. The two remaining organizations stated that the resulting legal text did not respect five agreements that had been reached in the consultation process.<sup>40</sup>

#### A. MAIN CONTENTIOUS ISSUES

The way the law sets up the dialogue between the State and indigenous people is key to further deployments of the *dispositif*. One key aspect of it is who is considered as having the right of being consulted. The law gives the right of consultation only to “those whose collective rights might be affected in a direct manner by a legislative or administrative measure” (Art 5). The recognised legal representatives are those with a title to the land and for the Peruvian law that is the native or peasant community. Hence, it is not clear what would be the role of sub-national, representative organizations of indigenous peoples that associate them. The law

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39. For further details, see Vladimir Pinto & Ramon Rivero, *La Consulta Previa en el Perú: Contexto y Debates Actuales* (Lima: Idea, 2013).

40. See Servicios en Comunicación Intercultural Servindi, “Perú: Lista Versión Final de Reglamento de Ley de Consulta” (1 March 2012), online: Servindi <<http://servindi.org/actualidad/60278>>.

might their leverage of subnational organizations in specific negotiations as it is not clearly established what they may legitimately contribute to the process (or either if this organizational structures will be explicitly engaged). The law stipulates that non-governmental organizations might participate as “advisers.” Would this also be the case for indigenous peoples’ organizations?

The new law is somewhat rigorous about the necessity of identifying cultural markers pertaining to pre-colonial cultures (Art 7 of the Law).<sup>41</sup> In the Andean context, these visible cultural and linguistic qualities are, in several cases, hardly present. It is to be expected that the proposed development of an official database of indigenous peoples and their representative organizations (Art 19 point f of the Law) will result in a controversial process.

As a new and comprehensive law comes into force, indigenous peoples’ organizations argue that a wide-ranging review of all actions already taken should be required. They recognize that although new legislation does not normally nullify existing contracts and agreements, in some cases compensation might conceivably be due.

The long-term social and physiological consequences of the environmental impact of extractive industries are evident in several regions where new concessions are to be granted (and therefore, consultations held), as is the case in the oil block 1AB: one of the oldest hydrocarbon operations in the Peruvian Amazon. Indigenous communities have deep concerns as to whether state and corporate actors will respect new agreements as they observe that changes to institutional arrangements over time have not strengthened compliance to past pledges. There is significant frustration with governmental and corporate avoidance of laws and regulations relating to social and environmental impact studies and to

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41. The Article 7 of the *Peruvian National Law on Consultation (Law No. 29785)* disposes that: “To identify indigenous or native peoples as collective subjects, are taken into account objective and subjective criteria. The objective criteria are: Direct descendants of the indigenous populations of national territory. Lifestyle and spiritual and historical links with the territory traditionally use or occupy. Social institutions and customs. Cultural patterns and lifestyles different from other sectors of the national population.” The Article 20 asks for the preparation of an “Official data base of indigenous peoples.”

prior consultation. This frustration appears in review to be one of the principal factors explaining why interactions with local populations develop a more confrontational character.<sup>42</sup>

There is yet no clear determination of the institutional responsibilities of the competent agency. Neither is there information on or how the results of the consultation should be taken forward. It seems this is still to be defined in practice, on a case-by-case or sectorial approach.

When should the consultation take place? The new regulations stipulate that the state agency responsible for promoting the consultation must develop a “consultation plan” and ensure that indigenous organizations are well aware of the existence of the process, but that, beyond this, no other deadlines should be made public. As Yrigoyen Fajardo argues, the State will not consult before granting concessions, but only before the phases of exploration and exploitation.<sup>43</sup> The law places any consultation *after* the granting of investment concessions and gives the State the final call on the approval of the project.

Finally, should the process merely “aim at consent” or should consensus be its required outcome? This is a core issue that has again become central to the debate. Again, in this procedural form, the question over the actual extent of indigenous peoples’ right to determine the development of their territories has re-emerged. When designing the regulative framework, the Peruvian authorities insisted that consultation under the law does not imply the need for consent. Consent is to be limited to certain cases (forced displacement, toxic materials and military interventions) and to the overall “right” to the territory.

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42. Tami Okamoto, “Consultation with Indigenous Peoples: Just another Formal Dispositif? The Case of Oil Block 192 (1AB) in the Peruvian Amazon” (Paper delivered at the AAG Annual Meeting, Los Angeles, California, 11 April 2013) [unpublished].

43. See her analysis for Servicios en Comunicación Intercultural Servindi, “Perú: Observaciones a Ley de Consulta pueden plantear un quiebre en el Estado de Derecho” (23 June 2010), online: Servindi <<http://servindi.org/actualidad/27352>>.

## B. LESSONS FROM THE PERUVIAN CASE

One of the key characteristics exposed by the Peruvian process is the tendency of national procedures for the realization of recognized rights effectively to restrict them.<sup>44</sup> Although virtually all the actors consider as a “common ground” the ILO Convention 169 and recognize the *advancements* done by UNDRIP,<sup>45</sup> they opt for restricting interpretations as sectorial interests gain sufficient room in an asymmetrical discussion process, that enable them to shape decisively what is later going to be negotiated in particular consultation processes. The intervention of the Ministry of Energy and Mines was decisive in this process and the contravening between agencies of the State finished by the reassignment of the Deputy Minister of Intercultural Issues in April 2013. Despite the fact that the main objective of the drafting process was to give better guidance for legal procedures, difficulties in establishing operational criteria persist. The solution proposed for this impasse was to establish further sector-specific protocols, postponing but also circumscribing contestation (*referencia a la conferencia de Vladimir*).

In some ways, the drafting process of the law led to a strengthening of national indigenous organizations, as they become familiar with new regulations. This opens the way to changes in their organizational strategies for the near future, as new consultation procedures come into place in 2013. Multiple laws that will regulate matters of vital importance for companies and indigenous peoples, such as the use of forests or the exploitation of hydrocarbons, are expected to be discussed throughout 2013. These laws may be decisive in the way consultation processes will be implemented in particular cases.<sup>46</sup>

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44. Pinto & Ribero, *supra* note 39.

45. Personal communications with the Ministry of Culture, agents of international cooperation and AIDESEP leaders.

46. Ivan Lanegra, Vice Minister for Intercultural Affairs for Andina, Press Statements, “2013 Será el Año de la Consulta Previa, Destaca Viceministro Lanegra” (28 December 2012), online: Andina <<http://www.andina.com.pe/Espanol/noticia-2013-sera-ano-de-consulta-previa-destaca-viceministro-lanegra-441371.aspx>>.

#### IV. STANDING AGAINST THE RESCINDING OF POLITICAL GAINS: THE BOLIVIAN CASE

Among all the countries in the region, Bolivia is arguably the one where indigenous peoples' land rights have advanced the farthest: their lands have been recognized as indigenous territories (TCO—*tierra comunitaria de origen*) to which they have legal entitlement. Nevertheless, the continued expansion of development projects, exploitation of hydrocarbons and mining operations will deeply affect the future of indigenous communities. In 2012, the number of zones made available for oil operations increased by 50% on the previous year, sustaining an existing trend. In 2010, there were 56 petroleum concessions; in 2011, it had grown to 96. This expanding industry extends to 22 indigenous territories and 10 protected areas. As Pellegrini and Ribera<sup>47</sup> conclude, despite an original narrative related to a change of development paradigm, and the respect of the rights of "Mother Earth," the government's policy aims are intertwined with a willingness to perpetuate the extractive economic model. In other countries of the region (such as Colombia and Ecuador), consultation processes have, by opening additional paths of resistance, slowed down, but not stopped, the frenetic rhythm of investment. Will this also be the case in Bolivia?

The "Ninth March of the Lowland Indigenous Peoples" in 2012 sought the repeal of Law 222, which had aimed, through consultation, to strike a deal allowing the construction of a highway from Villa Tunari to San Ignacio de Moxos. This long-delayed road project encountered strong opposition from indigenous peoples and from environmental movements across the nation, as it threatened to penetrate the core zone of protection of a National Park and Indigenous Territory known as TIPNIS (*Territorio Indígena y Parque Nacional Isiboro-Secure*). It is expected that the road will have irreversible impacts over forest and watersheds and, therefore, in the lives of the people of that region.

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47. Lorenzo Pellegrini & Marco Octavio Ribera Arismendi, "Consultation, Compensation and Extraction in Bolivia after the 'Left Turn': The Case of Oil Exploration in the North of La Paz Department" (2012) 11:2 JLAG 103.

TIPNIS was the first indigenous territory to be legally recognized in Bolivia. It was designated as such in response to an historic protest march in 1990 under the leadership of the newly formed regional organizations of the Moxeños people.<sup>48</sup> As was publicly stated by indigenous organizations from across the country<sup>49</sup> now fear that the proposed road will compromise the integrity of this highly symbolic indigenous territory, weaken legal protection for their lands, and create a precedent for the despoliation of other TCOs that are coveted for their natural resources.

As was the case in Peru, the political will to formulate national regulations on consultation came only after a strong indigenous peoples' mobilization. A protest march in 2011, which lasted for more than three months, obtained important national attention.<sup>50</sup> It exposed indigenous peoples' claim regarding the violation of their constitutional right to be consulted before any administrative measure or development project directly affecting them. Law 180 of 2011 was introduced through an agreement, which brought the march to an end. Also known as the "*Ley Corta*," or short law, it designates TIPNIS as an "intangible zone," prohibiting the construction of highways across the area.

A counter-march was organized by neighbouring rural inhabitants of the Park (migrant peasants and other indigenous peoples) and found support within the government. It was used as justification for promulgating Law No. 222 on

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48. See Zulema Lehm, *Ardaya Milenarismo y Movimientos Sociales en la Amazonia Boliviana: La Búsqueda de la Loma Santa y la Marcha Indígena por el Territorio y la Dignidad* (Santa Cruz, Bolivia: Oxfam America, 1999); Wilder Molina, *Somos creación de Dios, ¿Acaso no somos todos iguales? Acciones colectivas, discursos y efectos de la Marcha por el Territorio y la Dignidad de los Pueblos Indígenas Amazónicos* (La Paz: PIEB, 2011).

49. TIPNIS Subcentral has emitted several position papers after their meetings on the issue. For more information, see the work of Wilder Molina, particularly: Cynthia Vargas, Wilder Molina & Miguel Molina, "El territorio indígena y Parque Nacional Isiboro-Sécure (TIPNIS) en un escenario con la carretera San Ignacio de Moxos-Villa Tunari, Analisis de los posibles efectos sociales, ambientales y politicos de la carretera en el TIPNIS", Project MAPZA-GTZ, 2003.

50. See the Chapter on Bolivia of: Caecilie Mikkelsen, ed, *The Indigenous World 2013* (Copenhagen: IWGIA, 2013).

consultation, which is currently the focus of strong opposition. Those who oppose it are demanding that the ones who hold legal rights to the territory should effectively influence the decision process and outcome in a legally binding procedure according to international standards. This quarrel is paving the way for a new general law on consultation that is currently being drafted by an interdisciplinary group headed by the Bolivian Ministry of Government.

### A. CONTENTIOUS ISSUES

The whole process has been strongly criticized by indigenous peoples' movements and national civil society (human rights organizations and environmental organizations as well as prominent political actors) for both flagrant indigenous rights violations before and during the consultation process and imminent environmental problems related at the loss of the integrity of the National Park.

Was the consultation conducted sufficiently in advance of any authorization of engineering work? When did the highway project actually commence? The project was brought to consultation long after the planned road was in an advanced design stage and had been designated a policy priority (Law No. 3477 of 22 September 2006). The loan for its construction was already approved by the Brazilian Development Bank and accepted by the Bolivian government (Law No. 0005 of 7 April 2010). Likewise, the road works were inaugurated in July 2010 by President Morales himself.

Indigenous organizations claim that no respect was shown for their organizational structure: state bodies ignored or discredited traditional authorities at the community level, and concentrated on other members of the community who were ready to part company with the position of the territory's organization. The national media has documented how leaders and authorities were co-opted into the project, using contractual relationships and "gifts" with the underlying objective of neutralizing opposition. When I visited several communities, just before the official start of the consultation process, there was a widespread military presence, organizing public transport on the rivers and community sports



events within the territory, giving presents and seeking to influence some of the leaders. New schools, sport centres and other projects were being advanced in communities where this infrastructure should have been present years ago.<sup>51</sup>

Those who hold the collective title to the land, and bear the right in law to be consulted, are designated the “Subcentral TIPNIS.” However, Law No. 222 also recognizes entities that do not exist within this territory. These are called in the text “*Comités Intercomunales*” and defined as supra-community organizations created for specific purposes. The list of communities to be included in consultation procedures was not corroborated by the Subcentral TIPNIS, who maintain that several of the communities on the list have been “invented” or are not part of the territory.<sup>52</sup>

Proceedings were elaborated with the input of the inhabitants of the frontiers of the territory and imposed to communities of the core that, at their time, blocked the brigade’s passage by the territory. Where the representatives of the Ministry of Transport or the Ministry of Environment (promoters of the consultation process) did perform it, from at least six points stipulated in the proceedings in practice the discussion was often organized in three items: Inviolability of the territory (cf. Law 180, § 4),<sup>53</sup> “Development Vision” (limited to petitioning) Presentation of “Ecodesign” of the road. Mitigation measures were not related to evaluating the possibilities of changing the course of the road.

The holders of the collective title to this land have declared several times that the road project should be adjusted in order to preserve the core of the protected area. The will of the communities was already made explicit in

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51. As early as 17th of March 2012 Bolivian Press covered that “the President Evo Morales started to honor its compromises with Conisur (Consejo Indígena del Sur), he donated 12 motors in Oromomo in the Isiboro-Sécure Alto, and promises housing, budget for education and the installation of national telecommunication infrastructure” [translated by author], Paulo Cuiza, “Morales empieza a cumplir la agenda pactada con el Conisur” (17 March 2012) online: La Razón <[http://www.la-razon.com/nacional/Morales-empieza-cumplir-pactada-Conisur\\_0\\_1579042153.html](http://www.la-razon.com/nacional/Morales-empieza-cumplir-pactada-Conisur_0_1579042153.html)>.

52. Marco Chuquimia, “Augmentan Comunidades para Consulta del TIPNIS” (27 July 2012), online: Eldeber <<http://www.eldeber.com.bo/aumentan-comunidades-para-consulta-del-tipnis-/120726234135>>.

53. The highly protected core zone of the park was already recognized as “*inviolable*” where no economic activities were allowed.

several *communiqués* by<sup>54</sup> the Subcentral TIPNIS and published from 2006 onwards. In the words of the traditional authority of the San Miguelito community: “He [President Evo Morales] will not build the road wherever he pleases; instead, we are going to decide where it is going to go.” What was the way of promoting consultation given this context? Was it a suitable process in the first place?

## B. SOME LESSONS FROM THE BOLIVIAN CASE

Whether they want it or not this highway is going to be built and it's going to be delivered by this administration.

Evo Morales, June 29, 2011<sup>55</sup>

This case brings out the complexities of dealing with contested development projects both for the government and for the indigenous communities. Although unevenly, roads are believed to benefit wide sectors of the population, not only a particular set of investors. Different views on the matter may lead to a confrontation between important groups of society. In the TIPNIS case as an important group of migrant “*quechas*” and “*aymaras*” neighbouring the TCO will profit directly from new public investments in the region, but also by occupying forested areas open to colonization (although not legally) by the road. This confrontation has significant ethnic features, confronting different views on ways of living from/out of the forests, making the scenario even more complex.

That being said, the case created an important solidarity from the urban population based on the fact of being the legitimate “owners” of the territory—in the particular way that is recognized as right of indigenous peoples—as well as the “guardians” a common and menaced natural patrimony. This case showed to the Bolivian public opinion that the rights of indigenous peoples entitled to the land cannot only be

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54. “National Organization of Indigenous Peoples of the Lowlands of Bolivia (CIDOB),” (11 June 2013) online: CIDOB <<http://www.cidob-bo.org/images/2013/pronunciamientos/TIPNIS%20PRONUNC%20NACIONAL%20INTERNAL.pdf>>.

55. The original quote in Spanish is: “Quieran o no quieran vamos construir este camino y lo vamos a entregar en esta gestión,” online: Los Tiempos <[http://www.lostiempos.com/diario/actualidad/economia/20110629/evo-quieran-o-no-vamos-a-construir-la-carretera-villa-tunari-san-ignacio\\_131792\\_266957.html](http://www.lostiempos.com/diario/actualidad/economia/20110629/evo-quieran-o-no-vamos-a-construir-la-carretera-villa-tunari-san-ignacio_131792_266957.html)>.

considered as a particular interest yield to a general one, but indigenous peoples' rights can be in themselves of collective interest (that goes in the sense of an ecological collective interest), against which an economic development initiative is presented.

Can a development project be deemed compulsory by government authorities but at the same time be brought to consultation? Both the President and the Vice-President declared publicly in that sense before and during the consultation process, which made dialogue even more difficult. In any case, the right to influence development orientation was at stake, and the way the process was laid out lead to think that "the aim was making of consultation an 'informative' process, in which communities are not able to influence the development of projects inside its own territories."<sup>56</sup>

This case also put us in guard about the limits of law for safeguarding indigenous people's integrity. Although we arrived to a legal framework concerning indigenous rights by social claims regarded as highly legitimate, governments might compromise and minimize them in order to address other priorities. But, when governments do not implement—or go openly against—legal principles, this space becomes (or continues to be) deficient and confrontation continues to be the mean of action with higher impact in public space. We can observe this in the TIPNIS case when the march for the territory was violently repressed in September 2010 (military forces intervene the camping where the marchers were resting, lobbing tear gas into the makeshift camps, dispersing families, beating men and women). All the country expressed solidarity with the indigenous peoples; the march recovered and arrived to the capital city cheered by thousands of people, while the State lost the legitimacy of the use of violence.

Finally, these mechanisms are already affecting day-to-day life of indigenous communities by more subtle and indirect means to the eyes of an external observer. State intervention in the territory had broken social relationships, making resilience to hard environmental conditions weaker, and strategies to face poverty less effective.

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56. Miguel Vargas, Bolivian lawyer (CEJIS), personal communication.

This is particularly patent in the TIPNIS, where solidarity and kinship networks are key for performing customary practices to face extreme climate events (such as strong rains and seasonal inundations).<sup>57</sup> Indigenous peoples' economic strategies have also been strongly affected as productive associations (of cacao and sustainable management of alligators) have gone weaker affected by internal disputes around opinions on how to face State's intervention and consultation. These disputes have even broken relationships within nuclear families that use to work together in several economic initiatives. The resistance to the road is becoming a "life or death" struggle, in Rodríguez-Garavito's<sup>58</sup> terms, particularly for indigenous mothers that often manifest that the reason they are yet fighting the project is to safeguard a future for their children.

## CONCLUSION

As globalization of both extractive capitalism and indigenous rights has increased over the last two decades, conflicts over the exploitation of indigenous territories have multiplied and escalated apace across the world. Indigenous social movements have broken the silence around racial injustice, exacting spaces of accountability, and rewriting narratives of national belonging. They have mobilized in order to communicate their experiences and lobby for their causes on a transnational basis, advancing international law approaches to indigenous issues. After 20 years of existence, the principal of FPIC and consultation procedures have become a central mean by which a range of legal regimes (e.g., ILO and UN human rights instruments, multilateral banks and transnational corporations codes of conduct, national constitutions, etc.) have sought to manage disputes over indigenous territories.

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57. In fact adaptation to environmental conditions has a long history in the region. See Umberto Lombardo et al, "Human—Environment Interactions in Pre-Columbian Amazonia: The Case of the Llanos de Moxos, Bolivia" (2013) *Quaternary International* [forthcoming in 2013], online: <<http://dx.doi.org/10.1016/j.quaint.2013.01.007>>.

58. Rodríguez-Garavito, *supra* note 12.

How strong are indigenous rights approaches in international law (meanly the ILO Convention 169; and the *United Nation Declaration on the Rights of Indigenous Peoples*) operationalized by means of consultation when faced with challenges coming from development goals promoted as of the national interest? In both the Peruvian and Bolivian cases analysed in this paper, consultation has been contested by the indigenous people's organizations, which identify its limits and pitfalls. Giving proper attention to indigenous claims on the limits and risks of this *dispositif* enables us to better understand the nature of the mechanism and its actual effectiveness to allocate "justice" for people engaged in this processes.

Going back to Foucault's notion of *dispositif* we paid attention to the material and procedural *objects* that conform consultation, the link between what is "said" and what is "not said," and particularly the not-prearranged dimension of it. We tried to see it as both a physical and metaphorical place of "strategic filling" that generates expected and unexpected effects; as a space that will be reinvested by new players, where new strategies will be used and contestation raised.

As Rodríguez-Garavito has observed, the official emphasis on the legal process of consultation, either through the exercise of the right itself or through the operation of the courts, has led to growing frustrations among indigenous groups. Mere participation in consultation processes or litigation related to them place the indigenous cause within the logic of procedure, which has costs, as it limits what can be said, demanded, and achieved. In that sense the question over the actual extent of indigenous peoples' right to determine the development of their territories has re-emerged in a procedural form. This becomes clear in the way in which the "objectives of consultation" were questioned during the drafting of the national law in the Peruvian case.

Although indigenous movements are conscious that the emphasis on procedure and complex technicalities dilutes fundamental debates, they cannot avoid its strategic importance. Together with their allies, they are trying to modify the *dispositif* of consultation in order to cope with new challenges and consolidate their position and avoid the rescinding of political gains, as the Bolivian case shows.

Forest areas managed under customary tenure in the Amazon of Peru greatly exceed the area acknowledged by current statutory tenure law. If consultation laws have a restrictive approach to statutory land tenure, communities will lose their chances to keep their ways of life alive.

In the draft of the national law on consultation in Bolivia, a disturbing trend on the diversion of legal gains is noticeable. The population susceptible of being consulted is going to be restrained according to the kind of territory they live in. The bill only considers TIOC (*tierras indigeno originario campesinos*) and does not take into account other kind of territories (such as the collective properties and ancestral territories or "*tierras comunitarias de origen*"), which are the most frequently kind of land tenure found. In the case of indigenous communities that are outside the jurisdiction of a peasant indigenous territory—(TIOC), they will only have right to public consultation. This implies a strong regression vis-à-vis international law and national political gains as it might diminish the consolidation of secure land tenure, management of landscapes and ecosystems that was already starting to happen in several indigenous territories (such as Madidi or the Isiboro-Sécure) as well as putting them in a more vulnerable position vis-à-vis investment promoted by third parties in the territories not recognized as TIOC.

Consultation has also open paths of resistance that shows the centrality of new political spaces and the interaction between physical dimensions and the political opportunities. Resistance in the territories (blocking the process of consultation and causing delays in rushed projects) is a strategy that, although costly, has been used in Bolivia to alleviate historical pressure on the land. At the same time, public attention opened by this mechanism might pave the way to change public opinion regarding "indigenous" and "national" collective interests. In this context, as McNeish<sup>59</sup> points out, creating opportunity for indigenous peoples' real concerns and challenges to come to the fore is a key political stake.

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59. *Supra* note 33.

As states seek compliance with guidelines given in international instances such as ILO 169, the effects of their intervention in indigenous territories is already affecting day-to-day life of communities by more “opaque means” to the eyes of external observers. By “opaque means” I mean that State’s intervention might break social relationships inside the territories, weakening resilience to hard environmental conditions, and lessening the effectiveness of the strategies to reduce poverty that indigenous peoples perform. Facing strong intervention of the State, resistance to consultation can become a “life or death” struggle, particularly for indigenous mothers that often manifest that the reason they are yet fighting environmentally and socially risky projects in particular is to safeguard their children’s future.

To what extent has the recognition of the right of consultation facilitated the improvement of environmental conditions in the concerned jurisdictions? We cannot argue on the right to consultation in isolation. Incorporating consultation to national legal frameworks makes patent that remaining gaps regarding the implementation of other human rights of indigenous peoples, both individual and collective, continue to be extremely disregarded.