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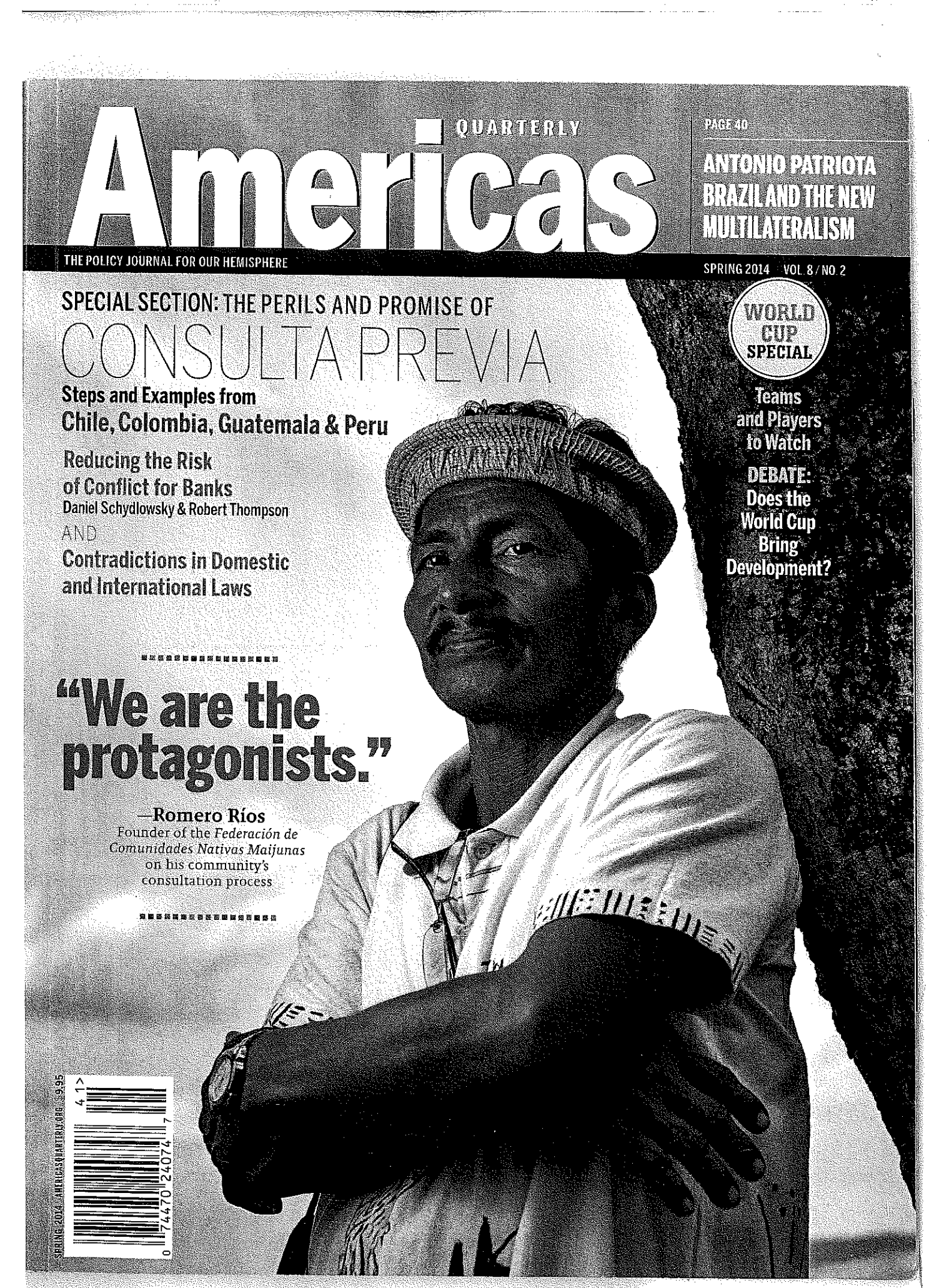

"We are the protagonists."

—**Romero Ríos**
Founder of the *Federación de Comunidades Nativas Maijunas* on his community's consultation process

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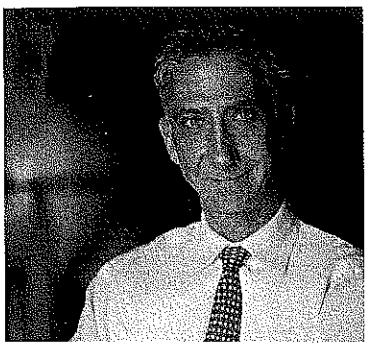
LETTER FROM THE EDITOR



"Portraying the intransigent, sharp opposition of some groups to investment and natural resource extraction is essential to show how vexing this topic is."

One of the challenges of editing a journal dedicated to provoking debate is considering for publication articles that I may not agree with. In the end, if the article is well-written and factual, and represents a valuable contribution to the debate, I have no hesitation in publishing it. And that underlies the principle that has guided *AQ* from the beginning: promoting an honest, intellectual, democratic debate about the region.

This issue is another testament to that principle. In order to thoroughly explore our topic of free, prior and informed consent (*consulta previa*) embodied in International Labour Organization Convention 169 (ILO 169), we have included some articles that—quite frankly—are extreme in their antipathy toward investors. Nevertheless, I believe that portraying the intransigent, sharp opposition of some groups to investment and natural resource extraction is essential to show how vexing this topic is.

For communities and peoples that have been brutalized, repressed, marginalized, and manipulated for centuries—often over the very same resources and lands that are the focus of the new wave of investment today—their positions are understandable.

But my discussions during research trips in the region, and the tone of one article in this issue, reveal that there is a very real risk that some groups—even more than the affected communities—have exploited ILO 169 and the right of community consultation to reject any form of international investment and the global economy. We think it's important to reflect that in these pages.

Do these sharp opinions mean that *consulta previa* is a fool's errand or doomed to fail?

Exactly the opposite. This may seem like heresy coming from a policy journal (though editorially independent) published by organizations with ties to business and investors: *consulta previa* has to succeed.

The 15 governments in Latin America and the Caribbean that signed ILO 169 raised the expectations of long-suffering Indigenous and ethnic communities. But they also guaranteed the rights of investors. You need only look at our Charticle on social conflict on pages 68 and 69 to see the trend lines. There's no going back.

Since the adoption of ILO 169, governments have struggled to define and implement an important but vague—and consequently fraught—right with communities that are aggrieved and often fractured. Meanwhile, frustration among investors—often with the failure of governments to effectively define and enforce the efforts—has mounted, as the Cementos Progreso article on page 93 demonstrates. Ultimately, realizing this difficult but important right will require clear, objective and effective state presence—often in territories where the state has effectively been absent.

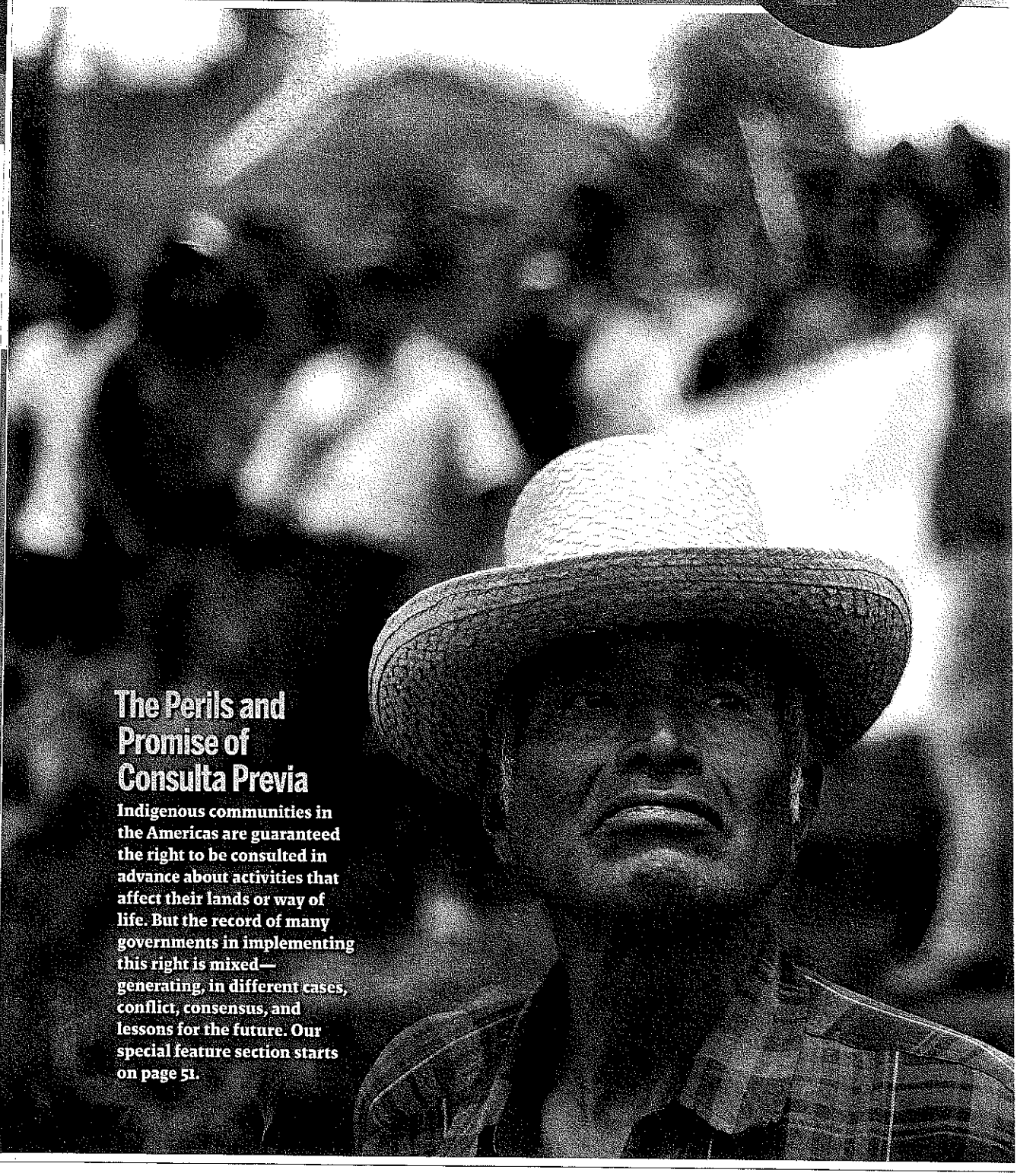
That will not be easy, which is why I believe the issue of *consulta previa* will be among those that define the future of our region.

Interesting note: the countries that have made the greatest advances in *consulta previa* have not been those whose governments have rhetorically trumpeted Indigenous rights (Bolivia, Ecuador and Venezuela). In fact, the "neoliberal" countries (Chile, Colombia and Peru) have demonstrated that rule of law and state efficiency are greater guarantors of human rights and inclusion than populism.

—Christopher Sabatini, Editor-in-Chief

Note: we are proud to announce that in March, *AQ* won the Americas Society of Magazine Editors' (ASME) Best Cover contest in the "Brainiest" category for its Fall 2013 issue, and two merit awards from the Society of Publication Designers' 49th annual editorial design competition.

PHOTOGRAPH BY ROEY YOHAI



The Perils and Promise of Consulta Previa

Indigenous communities in the Americas are guaranteed the right to be consulted in advance about activities that affect their lands or way of life. But the record of many governments in implementing this right is mixed—generating, in different cases, conflict, consensus, and lessons for the future. Our special feature section starts on page 51.

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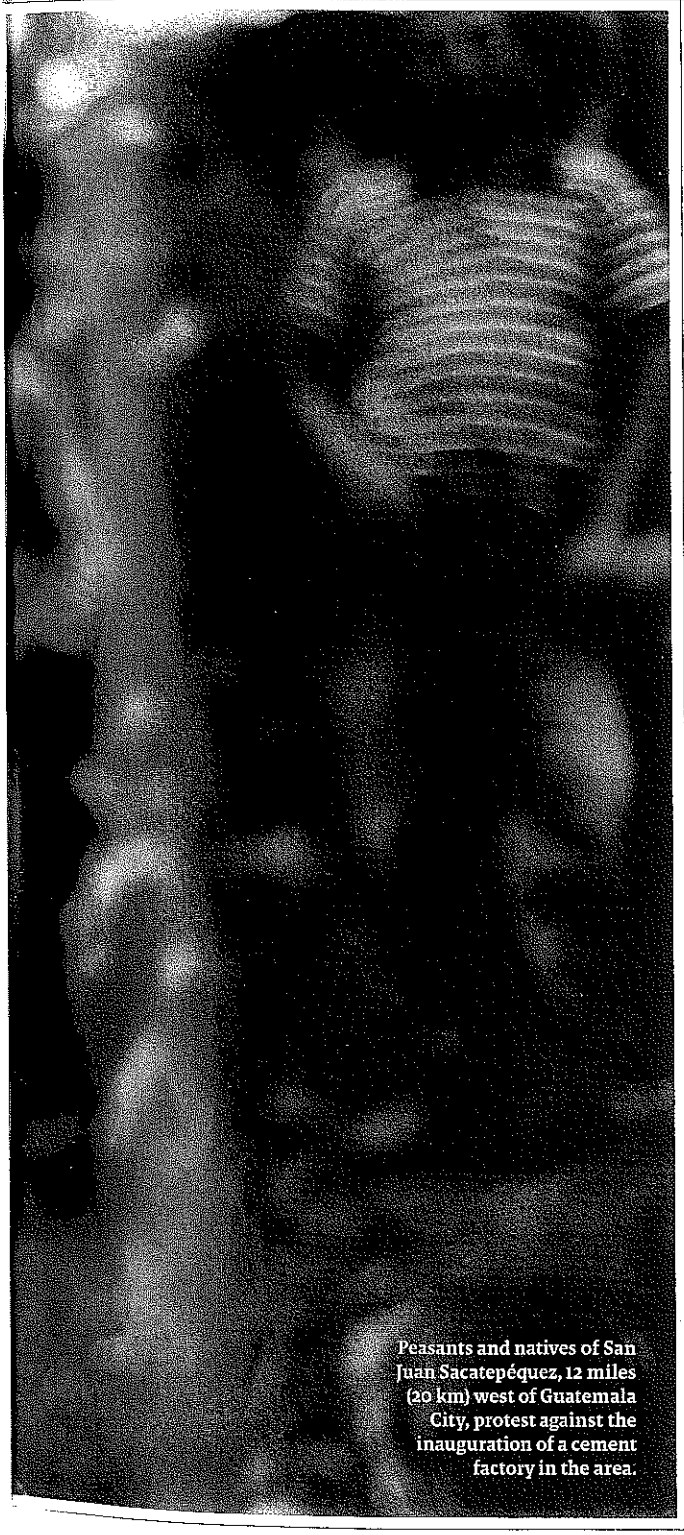


Peasants and natives of San Juan Sacatepéquez, 12 miles (20 km) west of Guatemala City, protest against the inauguration of a cement factory in the area.

JOHAN ORDONEZ/AFP/GETTY

Feature Section: Consulta Previa

COVER PHOTOGRAPH BY NICOLAS VILLAUME

CONSULTA PREVIA: Solution or Nuisance?

How do you implement *consulta previa* to ensure everyone's rights—communities and investors alike?

Our feature section on International Labour Organization Convention 169 (ILO 169) follows from the Spring 2012 issue on social inclusion and the Winter 2013 issue on natural resource extraction. In conducting the research for both, we consistently heard about the importance of ILO 169. In the case of social inclusion, ILO 169 was seen as a step toward the recognition of long-neglected Indigenous and ethnic community rights. In the case of natural resource extraction, it was seen as a means to finally get communities a seat at the table to define their own economic future. And for investors and the private sector, it was seen as a potential risk, but—in the best of cases—a necessary one.

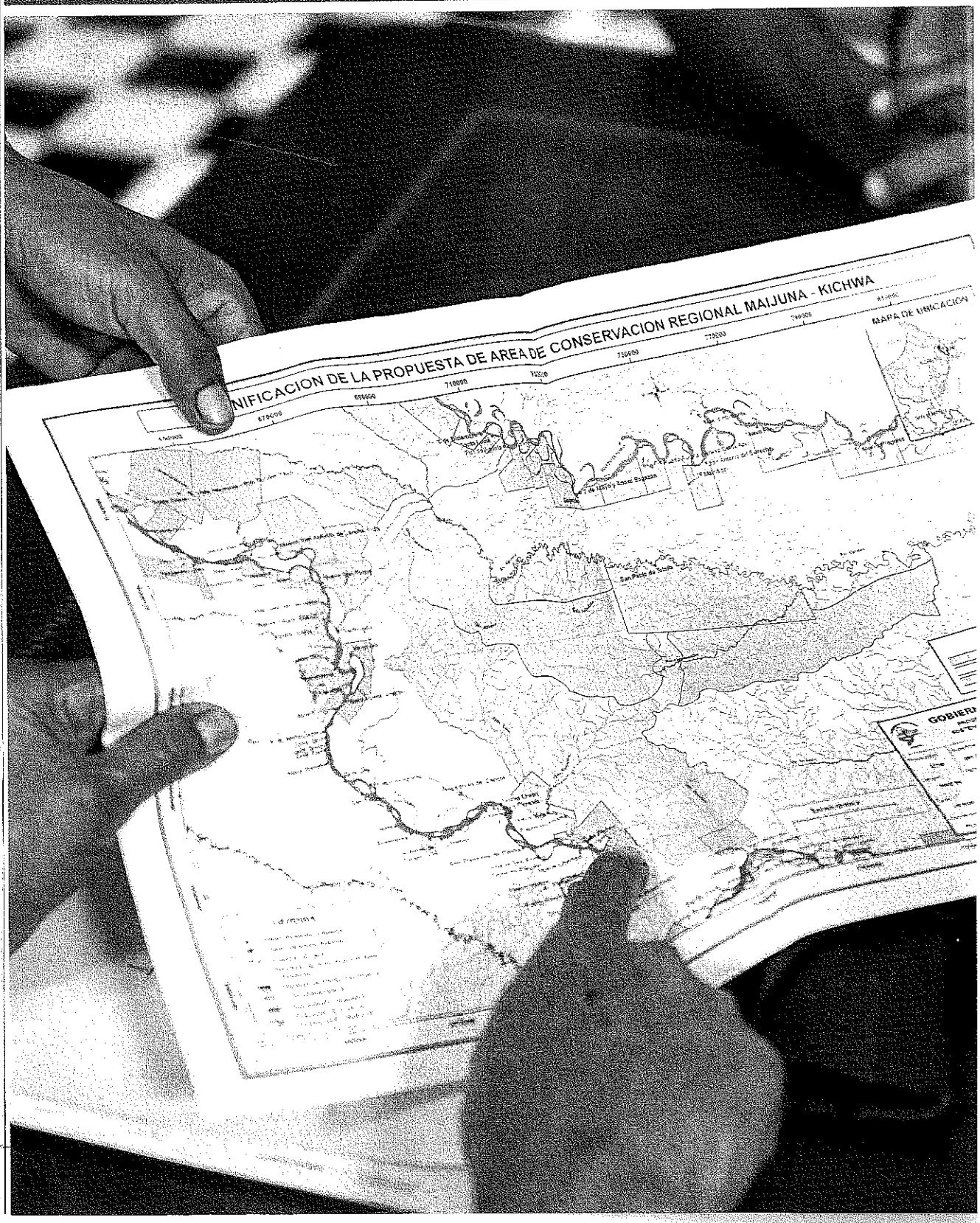
To understand how this new international and domestic right is shaping investors' calculations, reforming government offices and laws, and sparking national and local dialogues, *Americas Quarterly* conducted a four-country research project aimed at examining the responses of governments, communities and companies. Those individual country case studies—Chile, Colombia, Guatemala, and Peru—start on page 52.

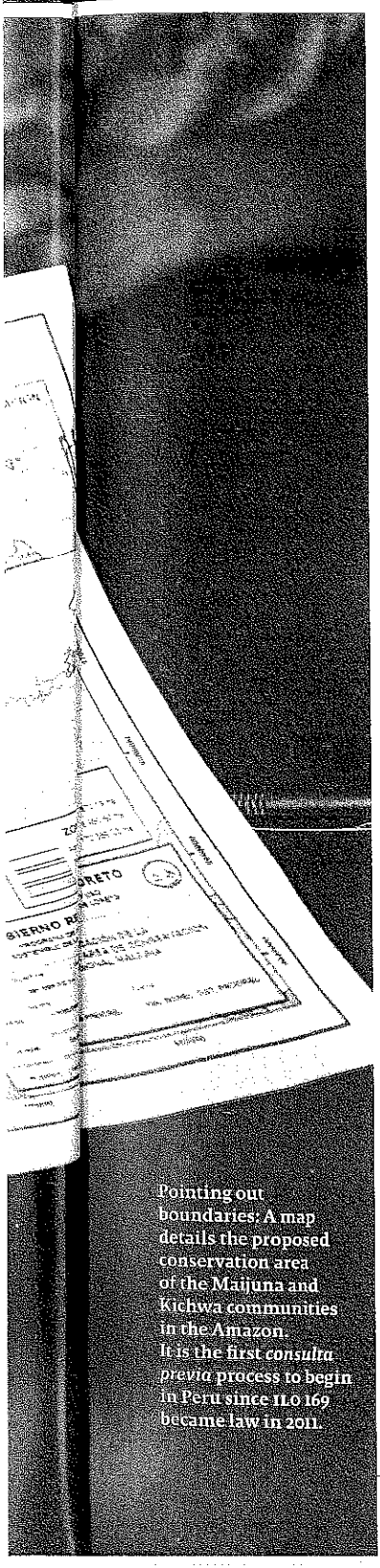
But as we identify in our case studies, part of the difficulty in implementing ILO 169 stems from the vagueness of the original convention. The feature section explores how international and domestic laws define the rights and limits of *consulta previa* (prior consultation), including the most central: do communities have a veto? For differing and contrasting laws and interpretations, see Bunch (p.88), Rodríguez-Franco (p.97) and Baquero (p.106). To see the potential for deadlock in action, we have included two views in Guatemala (p.89). And in our Chartricle (p.68) we track the patterns of social conflict parallel to the adoption and refinement of ILO 169 in Peru and Chile.

AQ always seeks to be constructive, even about such a contested topic. For that reason, we have developed a step-by-step graphic on how to conduct *consulta previa* in Chile, Colombia, Guatemala, and Peru (p.98). It illustrates the differences among those countries, while demonstrating the advances each nation has made.

Last, the right of *consulta previa* depends on more than just governments and communities. Thompson and Schydlowsky (p.82) discuss how the banking supervisory office in Peru is regulating banks to ensure that their investments reduce the potential for conflict by consulting local populations. There also exists today a growing set of NGOs and toolkits to help businesses meet international norms and standards, many highlighted by Muñoz Quick (p.104) and Franks and Arabeláez-Ruiz (p.111).

CONSULTA PREVIA
CASE STUDIES





Pointing out boundaries. A map details the proposed conservation area of the Maijuna and Kichwa communities in the Amazon. It is the first *consulta previa* process to begin in Peru since ILO 169 became law in 2011.

BETWEEN August 2013 and January 2014, an *Americas Quarterly* research team traveled to four countries in Latin America—Chile, Colombia, Guatemala, and Peru—to study the varied implementation of *consulta previa* across the Americas.

The four countries we studied have all ratified International Labour Organization Convention 169 (ILO 169), a binding international treaty that establishes the right of Indigenous and tribal peoples to be consulted when a policy or project affects their culture or heritage. With support from the Ford Foundation and local researchers in the four countries, we spoke to Indigenous and Afrodescendant leaders, company representatives, government officials, lawyers, and NGOs to better understand their experiences, successes and frustrations with *consulta previa*.

We discovered that in the adoption, implementation and enforcement of this important right the results have been mixed. Five variables explain many of the differences and difficulties:

1. Clarity of the laws and regulations governing the process;
2. Consultation with communities in the development of the laws and regulations;
3. Interpretation of laws and regulations by the judiciary and the government (including who is entitled to the right of *consulta previa*);
4. Administrative capacity of the state office or offices charged with implementing and enforcing the processes (including budget, authority, cadre of trained officials, and clearly delineated roles and rules);
5. Legacy of violence and relations among the communities, the private sector and the state.

For example, Peru, the first country in our study to pass a law to regulate *consulta previa*, in 2011, still faces the challenge of determining who qualifies for consultations (many Andean groups and Afro-Peruvians say that they are being left out). That issue has become a sticking point for many of the Aymara and Quechua communities in the mountains, where the bulk of the country's mining occurs. At the same time, however, Peru has also made the greatest strides in clarifying the process, even developing a website detailing all the steps (http://consultaprevia.cultura.gob.pe/quipu/), and vesting state offices to manage the *consulta previa* process (Vice Ministry for Intercultural Affairs) and address growing social conflict (*Oficina Nacional de Diálogo y Sostenibilidad* and the *Defensoría del Pueblo*).

In Colombia, due to a lack of successful legislation, the Constitutional Court has largely set the standards on how to carry out *consulta previa*. Given Colombia's strong legalistic tradition, this would seem to be a good stop-gap measure, but a series of conflicts over infrastructure and mining investments—some of the upheaval linked to long-standing local armed conflicts—have raised fears that communities may tie up projects under the constitutional appeal process, *tutela*, claiming that consultations fail to meet an as-yet-undefined process.

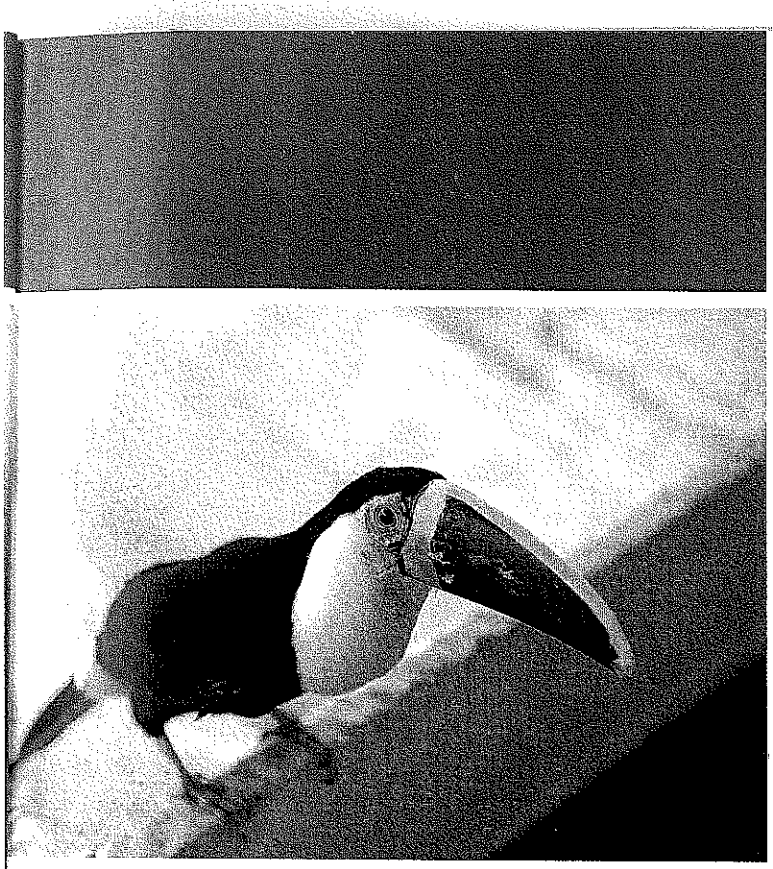
The Chilean government's attempts to legislate regulations to govern its 2008 ratification of ILO 169 were rejected—first by communities and then by the Ministry of Social Development in 2014—for its failure to consult the affected communities in the regulations' development. Meanwhile, in the absence of a clear process or a designated office to conduct the process much of the responsibilities have fallen under environmental licensing, while forward-looking companies have sought to develop their own dialogue with local communities.

And in Guatemala, the government has failed to pass a law to regulate consultation at the national level. In a country deeply scarred by decades of civil war and distrust, communities have carried out their own popular consultations, whose legal standing is a source of debate and conflict, and many are skeptical of any national regulation.

PHOTOGRAPH BY NICOLAS VILLAUME

CASE STUDY:

PERU



Legally and institutionally, Peru has made the greatest advances in the region. But turning a right into reality is easier said than done.

Defending our land: Walter López Gordillo (left) **and Reninger Tamayo Ushiñahua (right) wear special garments identifying them as Maijuna from the "*Familia Tucana*"** (opposite). **A toucan in Iquitos, Peru** (above).

By Cynthia A. Sanborn and Alvaro Paredes

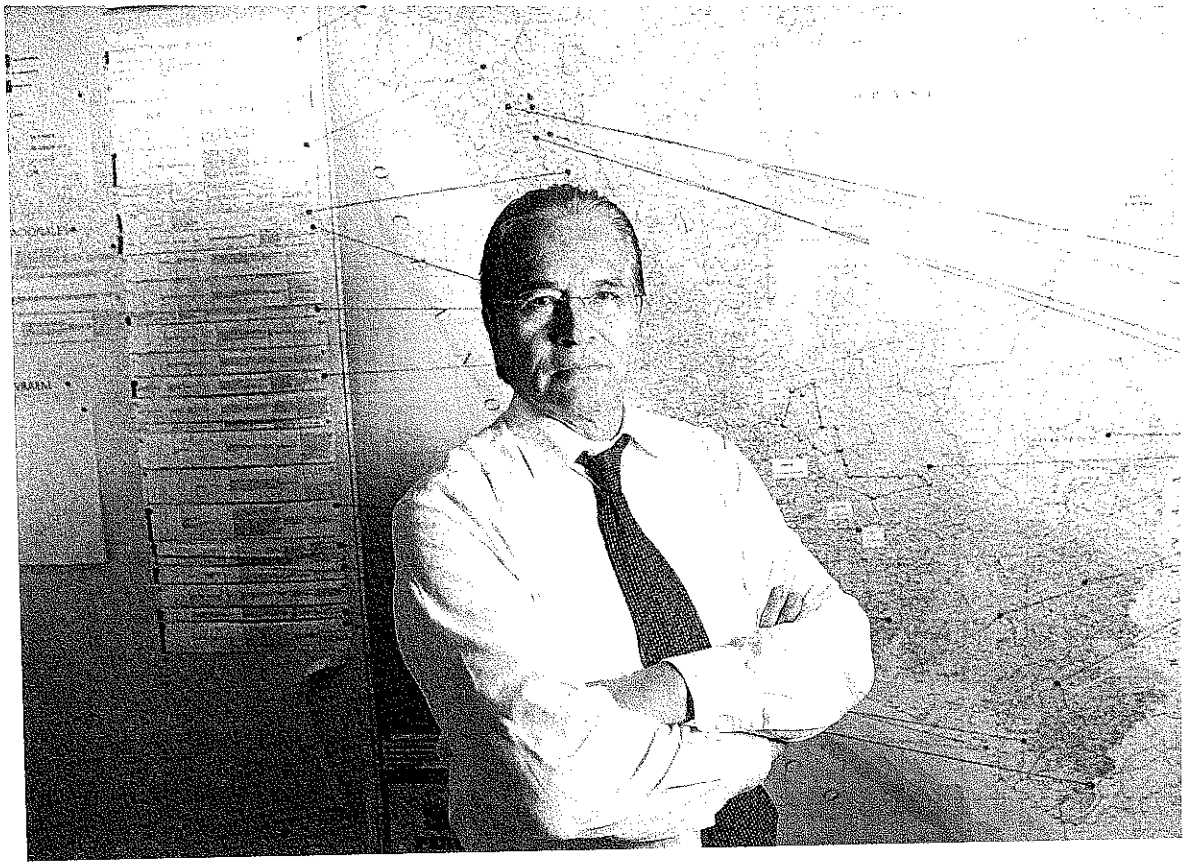
DURING HIS 2011 presidential campaign, Peruvian President Ollanta Humala promised a new relationship between the Peruvian state and Indigenous peoples, in which the rights of the latter would be guaranteed and their participation in government would be treated as fundamental.[1]

One of Humala's first acts as head of state was to sign into effect the *Ley del derecho a la consulta previa a los pueblos indígenas u originarios* (Law of the Right to Prior Consultation for Indigenous and Native Peoples), making Peru the first country in Latin America to incorporate International Labour Organization Convention 169 (ILO 169) into national legislation. In 2013, Peruvian authorities carried out the first formal process of prior consultation within that framework with the Maijuna and Kichwa peoples of the Amazonian province of Loreto, to create a conservation area on their ancestral lands. At least 14 other processes of consultation are now under way.

Behind the scenes, however, relations between government officials and Indigenous organizations in Peru are marked by profound tension and distrust.

An initial challenge involves deciding who should be considered Indigenous for the purposes of granting the right to consultation. Peru has one of the largest Indigenous populations in South America. Yet while millions of Peruvians can claim an Indigenous ancestor, many Andean peoples do not identify with the term "Indigenous," preferring more localized or territorial forms of identity. The national census has not included ethnic variables since 1961, and the leftist military regime of the 1970s attempted to redefine—legally and in popular conceptions—Indigenous peoples in the Andes into

PHOTOGRAPHS BY NICOLAS VILLAUME



class-based "peasant communities."[2]

Meanwhile, the stated objective of ILO 169, now enshrined in the Peruvian Constitution—to protect the distinct cultural heritage and rights of vulnerable Indigenous peoples—clashes with more pressing economic and political concerns.

Peru's powerful Ministry of Energy and Mines has been especially reluctant to recognize consultations—and to date, the government has not recognized the right of any community in which mining interests are at stake to be consulted about concessions to private operators.

Mineral exports are the backbone of the Peruvian national economy, and as many as 40 mining projects in Peru today are located in territories owned or occupied by Indigenous peoples.[3] Most of the country's important hydrocarbon concessions are also located in lands owned or used by native Amazonian groups. Concerns about the impact of these activities have been a leading cause of violent social conflict.

ADOPTION AND LATER IMPLEMENTATION IN THE WAKE OF PROTEST

The Constitutional Congress of 1993, installed under authoritarian President Alberto Fujimori, first proposed on February 2, 1994 that Peru ratify ILO 169. One year later, on February 2, 1995, *consulta previa* became a constitutional right of Peru's native and Indigenous peoples. Yet more than 15 years would pass before this right would be put into practice.

The second administration of President Alan García (2006–2011) approved—in the context of negotiating a free trade agreement with the United States—measures to promote citizen participation in mining and hydrocarbon projects.[4] These norms, which were not aimed exclusively at Indigenous peoples, required private firms to inform people about activities that had already been approved by the state. Indigenous rights advocates argued that this did not respect the ILO principle of *consulta previa*, nor did it involve active efforts to seek agreement and consent, as the Convention mandates. By 2008, demand for full implementation of the Convention went as far as Peru's highest court, the Constitutional Tribunal, which urged Congress to legislate to this effect.

The catalyst for further action, however, was the violent confrontation between local populations and security forces in June 2009 in the Amazonian town of Bagua, which left 23 police officers and 10 civilian protesters dead and over 200 wounded. This conflict was provoked by the central government's failure to consult with native and Indigenous communities before passing a series of decrees aimed at promoting and regulating extractive activities in the Amazon. Opponents criticized these measures for proposing changes in land tenure and use that could accelerate deforestation and open up protected areas for monoculture production.[5] After months of strikes and protests, García's administration de

clared a state of emergency and sent in an unprepared police force to break up a local roadblock, which led to the tragic events.

As a consequence of the Bagua tragedy, Peru's *Defensoría del Pueblo* (ombudsman) proposed national legislation to implement the right to *consulta previa*, which the Constitutional Tribunal reaffirmed as a constitutional right in 2010 in Sentence STC 0022-2009-PI/TC. That same year, Congress approved a first draft law to establish official stages and procedures for *consulta previa*, but García refused to support it. Finally, on September 6, 2011, the above-mentioned *Ley de Consulta Previa*[6] was passed by Congress and promulgated by President Humala in an emotional public ceremony in Bagua. Seven months later, regulations to implement the law were approved.[7]

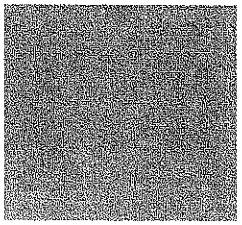
The new law aims to promote agreement between the state and Peru's native populations regarding any administrative or legislative measures that could significantly and directly affect them. Although investment projects are not specifically mentioned, all mineral and hydrocarbon investments in Peru involve concessions to private operators, so the law would require authorities to consult any Indigenous group potentially affected by a concession.

The Peruvian law also establishes that the government agency that plans to issue the measure in question is the one that should carry out the consultation process. (So, if the measure touches on education, the Ministry of Education; if it touches on hydrocarbon concessions, the responsibility belongs to PERUPETRO S.A.)

However, the law also establishes that the Ministry of Culture—and within that, the Vice Ministry for Interculturalism—must coordinate all public policies related to the implementation of the right to *consulta previa*. The Vice Ministry is expected to provide technical assistance and training to other state agencies, as well as to Indigenous peoples and organizations, and to address the questions that emerge. Yet it does not have power to sanction other agencies if they do not respect this right.

The final decision regarding approval or disapproval of any administrative or legislative measures lies in the hands of the Peruvian state. If an agreement is reached in the consultation process, the law establishes that it is mandatory for both

The final decision regarding approval or disapproval of any administrative or legislative measures lies in the hands of the Peruvian state.



Tarcila Rivera, executive director of the *Centro de Culturas Indígenas del Perú* (Center for Indigenous Peoples' Cultures of Peru—CHIRAPAQ) (foreground) and Rocío Ávila of Oxfam America (left).

Opposite, above: High Commissioner of the *Oficina de Diálogo y Sostenibilidad* (Office of Dialogue and Sustainability) Vladimiro Huaroc poses in front of a map of social conflicts in Peru.

parties. If agreement is not reached, the government authority must still make all possible efforts to secure Indigenous peoples' collective rights. So far, there has been no case in which an Indigenous group participating in the consultation process has failed to agree to a proposed policy.

NOT A UNANIMOUSLY WARM RECEPTION

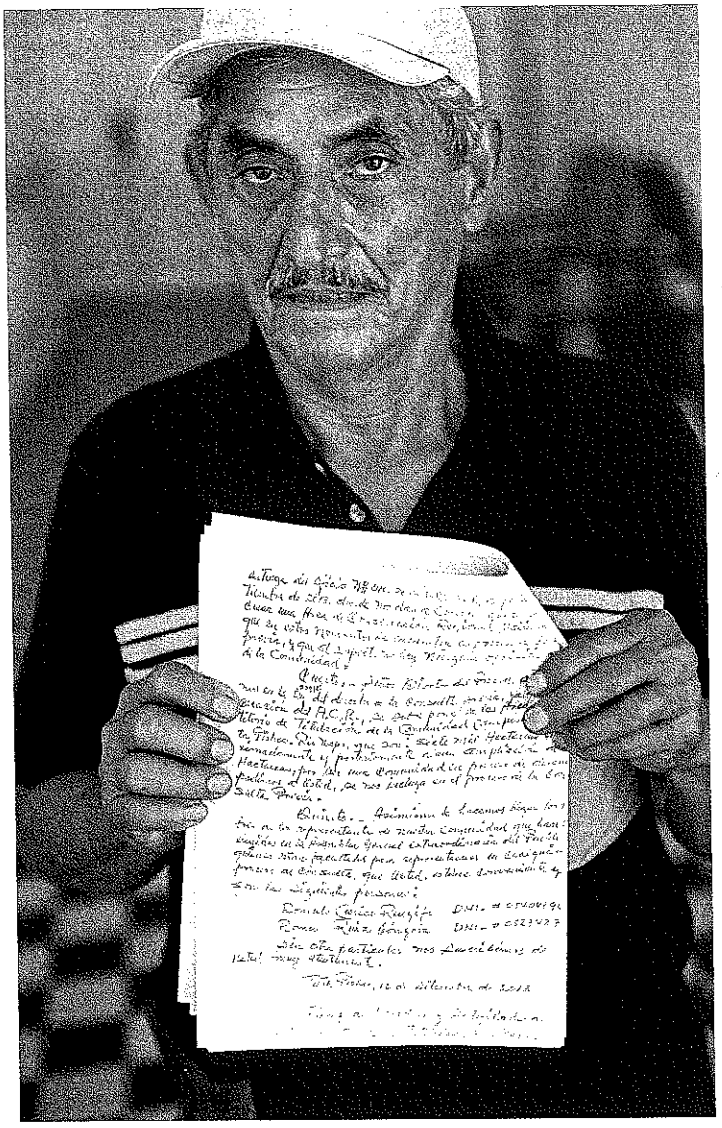
Implementation of the new law in Peru has faced numerous obstacles. Leading business groups fear that the law will threaten investment in urgently needed infrastructure, export agriculture and other sectors,[8] although there is little concrete evidence of this to date. In the mining sector, for example, economic factors, infrastructure limitations and various bureaucratic obstacles bear more weight in delaying new production.

In response to these concerns, however, in April 2013 then-Prime Minister Juan Federico Jiménez Mayor spoke of the need to *"destrabar"* (release) mining projects from the consultation process, and President Humala himself later claimed that the right to consultation was meant only for certain Amazon tribes.[9]

One exception to this position has been PERUPETRO, which has actively promoted consultation processes related to the concession of lots for oil and gas exploration in the Amazon. Beatriz Merino, former head of Peru's *Defensoría del Pueblo* and current president of the newly formed *Sociedad Peruana de Hidrocarburos* (Peruvian Hydrocarbon Society), an industry group, has also expressed support for consultation.[10] Yet strong conflicts have arisen in these cases, as government officials are anxious to move ahead with new oil concessions.

Meanwhile, Peru's leading national Indigenous organizations have also not supported the new law. The *Pacto de Unidad de Organizaciones Indígenas* (Unity Pact of Indigenous Organizations), formed in late 2011 by five major Indigenous and peasant organizations, argues the law should have a broader definition of who is Indigenous, and that it should apply to decisions made since ILO 169 was ratified in 1994. This would mean reopening the approval processes for some of the most important mining and hydrocarbon projects in the country. They also propose that the law involve the right to prior consent and not just consultation.[11]

Internal conflicts among Indigenous organizations and strategic differences among their NGO supporters have hindered their negotiating capacities. One issue that divides the NGOs is whether to focus on using national courts to advance the right to *consulta previa* for specific communities, or to shift to the international level.



MORE PEACE? INVESTMENT STABILITY?

Recent experience has shown that virtually no major investment projects, however legal, can thrive if they are not accepted by the communities directly affected by them. Savvy investors realize that investing time and effort in communication with local stakeholders is the smartest move they can make.

However, Peru's nascent Indige-

nous consultation processes demonstrate that even a genuine effort to consult of Indigenous communities will not prevent conflict. Some of the most challenging cases in Peru involve the development of oil and gas reserves in the Amazon.

PERUPETRO has promoted consultation with Amazonian native groups regarding the creation of lots for hydrocarbon exploration and exploitation and the granting of licensing agreements to private investors. In 2013, the agency announced that 26 lots would be subject to consultation, and in January 2014 it claimed to have successfully completed one such process, in the Ucayali region, called Lot 169.[12]

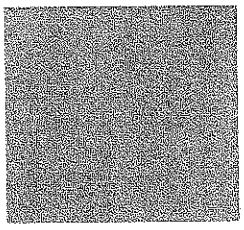
However, few details about this consultation have been made public, and some analysts felt the agency was not fully prepared for this procedure and that mistakes could have occurred. Recently, Indigenous organizations involved have charged that they were not well informed about what was being consulted and do not consider the matter settled.

Other cases have been more controversial. One of the most important cases involves Lot 192, located in Loreto, where 12 percent of all crude oil in Peru is produced.[13] The current contract for concession of this lot, held by Pluspetrol, expires in 2015. Although PERUPETRO announced a consultation process for the new concession in August 2012, it has yet to take place. Leaders of the communities involved have posed demands to the government as preconditions to entering the process, including remediation and indemnification for years of environmental and social damage produced by prior operators.[14]

The most conflict-plagued case to date, however, has involved Lot 88, also operated by Pluspetrol as part of the huge Camisea gas project in Cuzco. While this operation has been widely recognized as incorporating global best practices for protecting biodiversity, its human and social impact has been hotly debated. Roughly two-thirds of Lot 88 lies within a reservation established to protect the Machiguenga, Nahua, Nanti and other native peoples, some living in voluntary isolation.

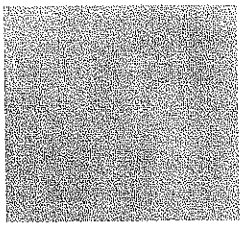
Since late 2011, Pluspetrol's requests for government authorization to expand exploitation have generated internal conflicts with other agencies, including the *Defensoría del Pueblo* and the Vice Ministry for Interculturalism. Indeed, Vice Minister Paulo Vilca resigned after other members of the executive refused to heed his concerns.

This case underlined the continuing instability and resistance within the Peruvian government to efforts that are seen to harm investment prospects. Last December, James Anaya, then-UN special rapporteur on the rights of Indigenous peoples, visited Cuzco and recommended that the government conduct a more comprehensive study of the Lot 88 case, and grant the right of *consulta previa* to the relevant contacted tribes.[15] The following month, however, the new vice minister of interculturalism, Patricia Balbuena, gave the project a green light.[16]



Opposite, above: Romeo Ruíz Góngora holds a petition signed by members of the Kichwa community asking to be consulted about the *Área de Conservación Regional* (Regional Conservation Area) in Loreto.

Vice Minister of Intercultural Affairs Patricia Balbuena in her office at the Ministry of Culture (left).



Romero Ríos, former president and founder of the *Federación de Comunidades Nativas Maijuna* (Federation of Native Maijuna Communities) in a January 2014 interview.

The law has given Indigenous Peruvians an opportunity to be heard by authorities in their own language.

WHAT NEXT?

Rolando Luque of the ombudsman's office has said that the 2011 *Ley del derecho a la consulta previa* is the most important effort made by Peru to include Indigenous peoples in public decision making since the inclusion of universal suffrage in the Constitution of 1979.[17] The law has given Indigenous Peruvians an opportunity to be heard by authorities, in their own language, and to challenge traditionally powerful political and economic elites.

In the short term, this process will not necessarily lead to a reduction of social conflict. When powerful interests are challenged, resistance and struggle are more likely outcomes. Indigenous peoples in Peru have longstanding demands to present to the state, which in many cases will need to be addressed before entering into consultation about new policy measures and investment projects.

Nonetheless, because the implementation of Peru's new law represents an evolving effort to institutionalize intercultural dialogue, it could develop into a more effective mechanism to address the underlying roots of conflict. Recent examples of this are the *mesas de diálogo* (dialogue roundtables) and *mesas de desarrollo* (development roundtables) established by regional authorities and by the *Oficina Nacional de Diálogo y Sostenibilidad* (National Office of Dialogue and Sustainability—ONDS) to address longstanding demands before new *consultas* occur. While no one should imagine that social conflict will disappear in a country with such a long history of racism and exclusion, it is realistic to hope the violence will be reduced as new institutional channels are created.

It is also reasonable to conclude that private investment and *consulta previa* are not irreconcilable; they can and will coexist. The Peruvian case shows that the cost of not making the effort to consult, listen and seek consensus is even higher.

Cynthia Sanborn *is a political scientist and director of the* Centro de Investigación de la Universidad del Pacífico *(CIUP) in Lima, Peru.* **Álvaro Paredes** *is a researcher at the CIUP.*

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INDIGENOUS OR NOT? By Alana Tummino

A lot depends on how the government determines who is Indigenous. It's not an easy task.

Peru was the first country in the region to pass a law implementing International Labour Organization Convention 169 (ILO 169). The 2011 law established regulations that set out how Indigenous and tribal communities must be consulted by the government on any legislative or administrative measure or project that could affect them.

But a difficult question remains: who is legally Indigenous?

In Peru, determining who has the right to be consulted under ILO 169 has become one of the government's most controversial challenges. While 15.9 percent of Peru's population speaks an Indigenous mother tongue, according to the most recent census—and roughly 40 percent of Peruvians claim some degree of Andean or Amazonian ancestry—many do not self-identify as Indigenous.[1]

In 2010, the Vice Ministry of Intercultural Affairs was created within Peru's Ministry of Culture to ensure that the rights of Indigenous people are protected. The Vice Ministry was also charged with determining who is Indigenous for the purpose of implementing ILO 169.

To fulfill this task, the Vice Ministry released a much-debated *Base de Datos de Pueblos Indígenas u Originarios* (Database of Indigenous or Native Peoples)[2] in October 2013. The database lists 52 unique Indigenous groups, including 48 Amazonian peoples and four Andean ones: Quechua, Aymara, Uro and Jaqaru. But it is still a work in progress.

The Vice Ministry used both objective and subjective criteria to identify Peru's Indigenous groups.[3] Objective criteria include speaking an Indigenous or native language and living on communal lands recognized by state agencies—factors that aim to reflect "historical continuity," meaning that one's ancestors lived in national territory before the establishment of the state. Subjective criteria include identifying oneself as native or Indigenous.

And this is where it becomes tricky.

Peru's national census has not included questions related to racial and ethnic factors (other than language) since 1940, although the country plans to include questions on ethnic self-identification in its 2017 census. The struggle to accurately represent race and ethnicity is not unique to Peru. Nations like Australia, Kenya and the United States are addressing similar questions in their censuses.

The complexity of ethnic self-identification in Peru is evident in a variety of public opinion surveys taken over the past decade. Such surveys may show that Peru has a self-identified Indigenous population ranging anywhere from 7 to 75 percent, depending on what questions are asked and how they are asked.

Comparing public opinion surveys taken between 2005 and 2009, *Pontificia Universidad Católica del Perú* sociologist David Sulmont points out that there are stark differences. For example, in the World Values Survey of 2006, 29.3 percent of respondents identified as Quechua, Aymara or "from the Amazon" when asked about their ancestry and customs. But in the 2008 Americas Barometer Latin American Public Opinion Project (LAPOP) survey, respondents were only given the option to identify as "Indigenous," and just 7 percent identified as such, while 75.9 percent identified as "*mestizo*" ("mixed race").[4]

According to *Universidad del Pacífico* professor Cynthia Sanborn, the survey results find that the question "Are you Indigenous?" will receive the lowest number of positive responses, while questions about identification with a specific group, such as Quechua or Aymara, receive a higher number of positive responses. Indigenous self-identification increases as you include questions about place of origin, native language, parents' native tongue, and customs practiced at home. Some studies also suggest that Indigenous self-identification may decline with rural-urban migration and higher levels of formal education.

Unfortunately, the Peruvian national census can use only one or two questions on self-identification, and not a range of questions that might capture more information. Each added question requires time, investment and training of census takers. A working group involving scholars and ethnic activists meets about once a month with the staff at the *Instituto Nacional de Estadística e Informática* (National Institute of Statistics and Informatics—INEI), which conducts all census surveys, household surveys and other public-sector data gathering.

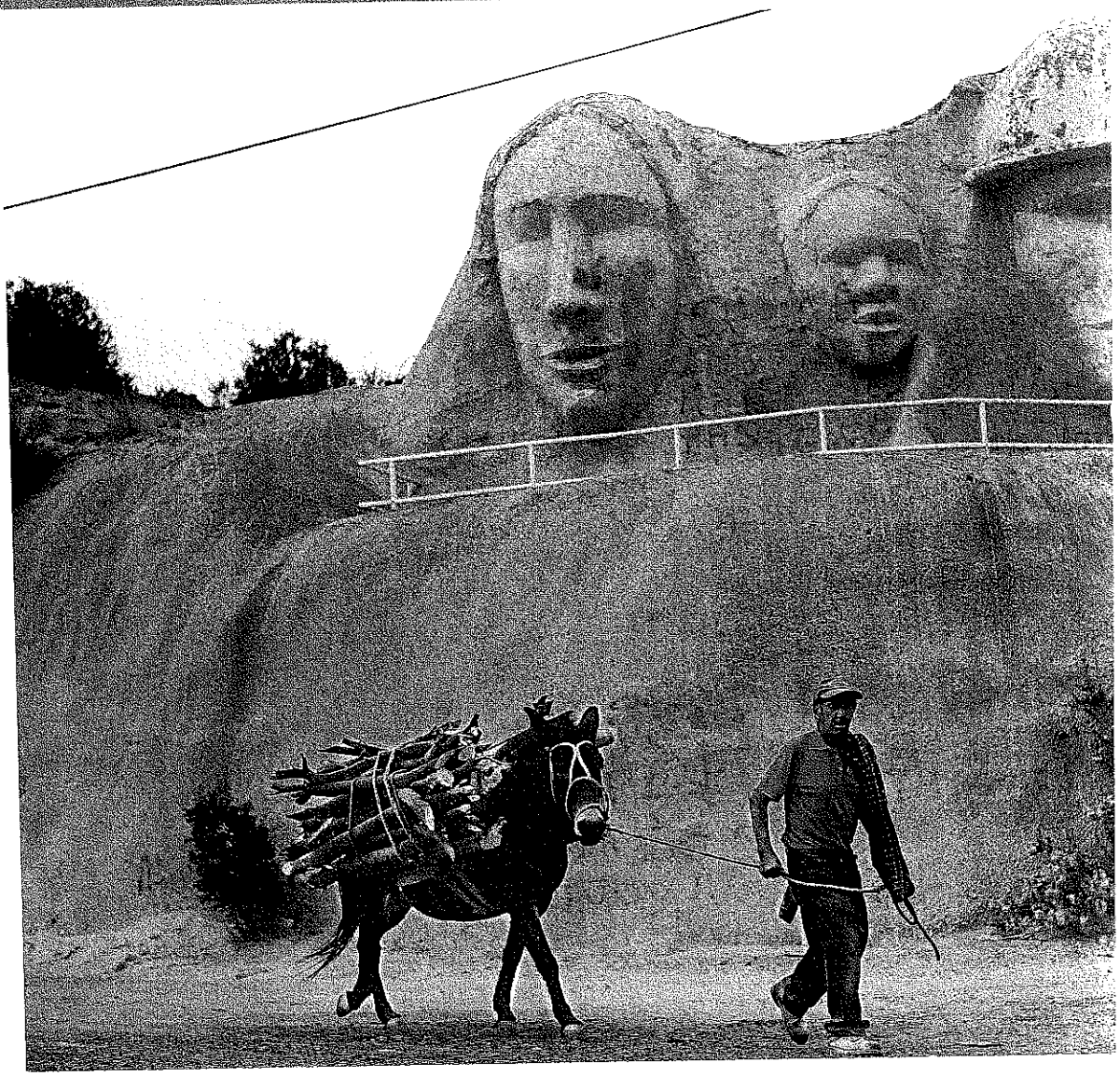
Mitigating social conflict: A *"mesa de diálogo"* between the local authorities of Challhuahuacho and the National Office of Dialogue and Sustainability in Peru.

FOR SOURCE CITATIONS VISIT: WWW.AMERICASQUARTERLY.ORG/TUMMINO-INDIGENOUS

PHOTOGRAPH BY NICOLAS VILLAUME

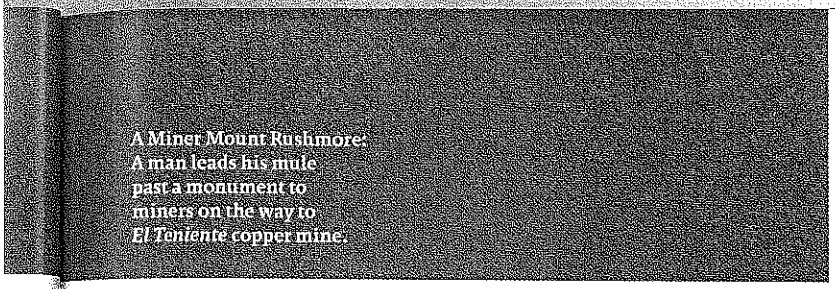
CASE STUDY:

CHILE

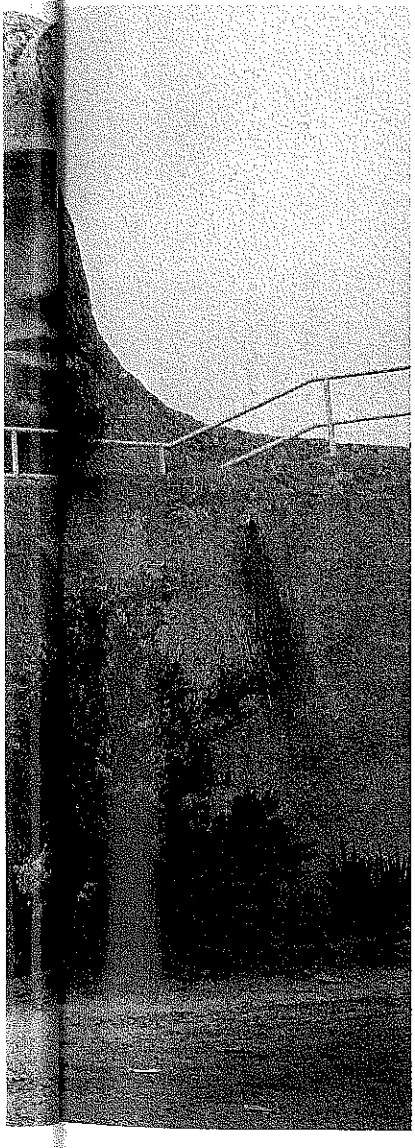


WHILE CHILE has recognized and supported Indigenous rights through a variety of constitutional, legal and statutory norms, one of the most central—especially given the country's extractive industry—is one of the least settled.

Officially International Labour Organization Convention 169 (ILO 169) has been in effect in Chile since September 15, 2009. But on September 4, 2009, just days before it was to take effect, the Ministry of Planning (today renamed the Ministry of Social Development) issued regulations intended to govern the norms and processes of consultation with Chilean Indigenous communities. Indigenou



A Miner Mount Rushmore: A man leads his mule past a monument to miners on the way to *El Teniente* copper mine.



IVAN ALVARADO/REUTERS

The lack of a regularized and institutionalized process and precedent has meant that what was intended to be an Indigenous right has—for now—assumed a more environmental orientation.

By Jerónimo Carcelén Pacheco and Valentina Mir Bennett

groups immediately rejected the regulations because the Chilean government had failed to consult them, calling it a law developed without "consultation about consultation." The regulations were officially overturned in March 2014.

To fill the gap left by the rejection of the 2009 decree, since March 2011 Chile's Ministry of Social Development has conducted a consultation process to create a more consensus-based regulatory framework for the implementation of ILO 169.

This process has involved organizing workshops, providing technical and logistical support for Indigenous groups' internal meetings, providing independent counsel and experts selected by the Indigenous people themselves, and financing these and other activities. According to the government, this initiative has been mostly successful, and it is in line with the recommendations of then-UN special rapporteur on the rights of Indigenous peoples, James Anaya, adhering to the principles and standards of the convention, such as good faith and the intention to reach an agreement.

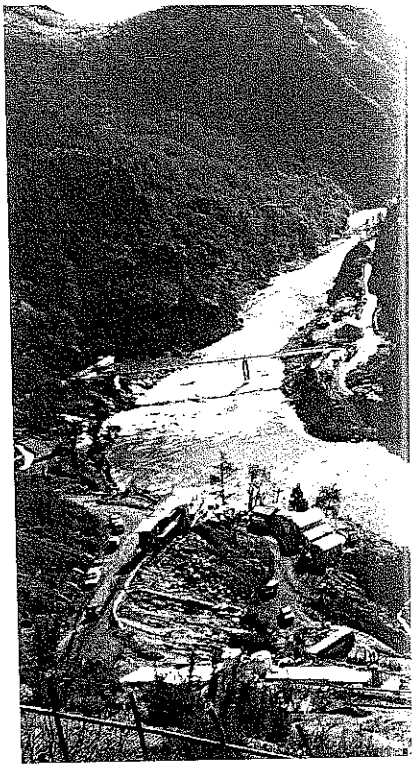
That dialogue process concluded in August 2013, and on November 13, 2013, the Ministry of Social Development finally issued a new decree—Supreme Decree No. 66—replacing the ill-fated Supreme Decree No. 124.

Though this is an important step for Chile, there is still no consensus on three essential aspects of *consulta previa*: how to determine whether Indigenous communities are "affected" by a legislative or administrative measure; the types of measures that should be subject to *consulta previa*; and the types of investment projects that must be subject to *consulta previa*.

As a result, in its 2014 annual report, the ILO Committee of Experts on the Application of Conventions and Recommendations requested that the Chilean government explain in detail how it will carry out effective consultations.

WHO'S RESPONSIBLE FOR THIS THING?

According to the law, two public entities in Chile are involved in the implementation of Indigenous consultations: the *Corporación Nacional de Desarrollo Indígena* (National Corporation of Indigenous Development—CONADI) and the *Servicio de Evaluación Ambiental* (Environmental Evaluation Service—SEA). CONADI is the body in charge of promoting the development of Indigenous communities and providing them with technical assistance. The SEA is tasked with promoting and facilitating citizen participation to evaluate development



projects that may have an environmental impact. Vesting the responsibility in both organizations, though, has created a division of policy.

The SEA has the authority to carry out citizen participation and Indigenous prior consultation processes, in compliance with the principles, criteria and standards of ILO 169. According to the Convention, consultations must, among other things, be carried out in good faith, aim to achieve an agreement or consent about the project, and be representative.

Although there is no definition of good faith in the Convention, according to Anaya's criteria, it implies that governments must recognize the authority of Indigenous representative organizations, attempt to reach agreements, and comply with them. Anaya also says that institutional decisions must be the product of Indigenous peoples' internal deliberations, according to their own customs and traditions.

However, these requirements do not imply that it is necessary to reach an agreement. Nor do they imply that communities have a right to veto administrative measures or investment projects, or that communities' agreement or consent can be coerced.

When it was adopted, ILO 169 rested on two existing laws that helped set the standards for the process of *consulta previa* in Chile. The first is Law No. 19.253—the so-called "Indigenous Law"—issued on September 28, 1993, which sets standards for Indigenous protection, promotion and development, and which created CONADI to execute public policies for Indigenous community development and represent Indigenous interests. The law also requires state agencies to consult with Indigenous peoples regarding matters that affect them, but it does not specify how to do so.

The second law is Law No. 19.300, the *Ley Sobre Bases Generales del Medio Ambiente* (General Environmental Law—LBGMA), issued on March 1, 1994. An amendment to the LBGMA was approved on January 12, 2010, and recognizes the obligation of state agencies with environmental responsibilities to contribute to Indigenous development in accordance with ILO 169.

The LBGMA set forth two ways to submit a project for environmental qualification: an *estudio de impacto ambiental* (environmental impact study—EIA), required when a project may have a special impact regulated under law, such as relocation of a community; and *declaración de impacto ambiental* (environmental impact declaration—DIA), required when there are no special impacts anticipated. After determining a project's environmental impact, either favorable or unfavorable, the government issues a *resolución de calificación ambiental* (environmental qualification resolution—RCA).

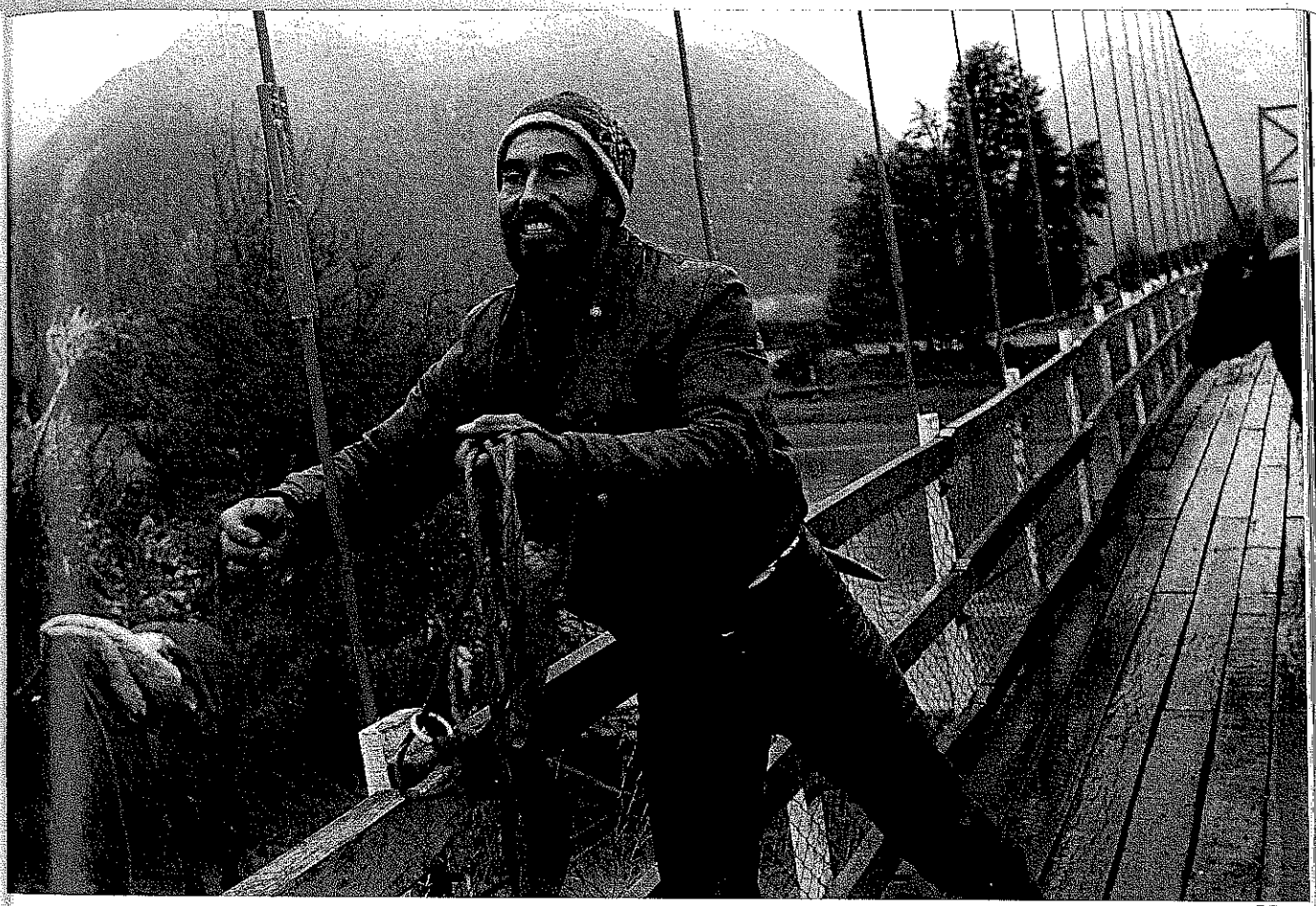
Within this regulatory framework, the Chilean state has developed and expanded the details for implementing consultations through four legal instruments:

1. Supreme Decree No. 124 (issued in September 2009 which—as described above—was later overturned);
2. Supreme Decree No. 40, issued on October 30, 2012 by the Ministry of the Environment, which establishes a special consultation process for Chile's native peoples through the *Reglamento del Sistema de Evaluación de Impacto Ambiental* (Regulation of the Environmental Impact Assessment System—SEIA). According to the regulation, a company must request information from the SEA about the presence of Indigenous people in the area and other relevant facts, and the SEA will explain the legal or technical requirements that must be complied with;
3. Ordinance No. 140143, issued in January 2014 by the Executive Director of the SEA, to regulate the *"Análisis de ingreso por susceptibilidad de afectación directa a grupos humanos pertenecientes a pueblos indígenas"* ("Preliminary analysis of Indigenous groups' susceptibility to direct affectation"); and
4. Supreme Decree No. 66 of 2014, mentioned above, which regulates the implementation of ILO 169.

Meanwhile, Chilean courts have issued a series of rulings on *consulta previa* that have failed to establish a single, consistent standard for enacting Indigenous consultations.

In fact, the Chilean Supreme Court has taken two different positions on Indigenous consultation. In 2010, the Supreme Court maintained that if an investment project had been submitted to the Ministry of the Environment in the form of an EIA, and a citizen participation process (*"participación ciudadana"*) had been carried out by the SEA, this would sufficiently satisfy the criteria for consultation established in ILO 169.[1]

Later, overruling its previous position, the Court decided that a special consultation process for Indigenous peoples must be carried out by the SEA—independent of the general citizen participation process already required for EIAs. These consultation processes must be tailored to the spe-



JORGE UZON/AP

ment of Chilean President Michelle Bachelet has outlined a series of steps intended to address the institutional and regulatory shortcomings of *consulta previa*. The first step is to constitutionally recognize the rights of Indigenous peoples.

In recognition of the institutional and political shortcomings of CONADI, Bachelet has announced a plan to create a Ministry of Indigenous Affairs and an autonomous Council of Indigenous Peoples—rather than a separate office—that would represent the diverse Indigenous groups in Chile.

Correcting the procedural wrongs of the recent past, Bachelet has also proposed a process to review and modify Supreme Decrees No. 40 and No. 66, in consultation with Indigenous communities. The goal would be to fully consult and air, in a transparent and participatory manner, the regulations to fully and effectively comply with the standards of ILO 169. Last, none of this can be done if the state lacks the financial capacity to monitor and implement any of these commitments. To that end, the Bachelet government has promised to evaluate a financing mechanism for consultation processes to ensure that they are sufficent.

Should these promises be met, they will go a long way toward applying and upholding the criteria and standards of ILO 169, beyond the more narrow definition of environment. More, such an effort will confer legal certainty on investments in Chile that respect and protect the rights of Indigenous peoples.

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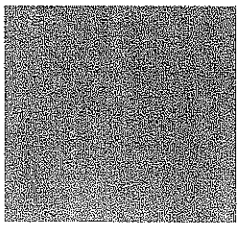


Rozendo Sánchez ties a cow to a bridge over the Nadis River while herding cattle to a market in Los Nadis, Aysén region, near the proposed HidroAysén project.

AQ CHARTICLE

SOCIAL CONFLICT & ILO 169

Across the Andes, land- and natural resource-related conflict has been increasing in the past 10 years, with only minor fluctuations from year to year. In the past six years, those conflicts have occurred against a backdrop of discussion, adoption and refinement of International Labour Organization Convention 169 (ILO 169) and *consulta previa* regulations to govern it. While not necessarily related, the long-term trends in conflict and the adoption of *consulta previa* raise important questions. Can *consulta previa* address or contain long pent-up frustrations and conflicts? Or will the rising expectations they bring to communities, if the laws are imperfectly or subjectively implemented, lead to even more conflict? The Charticle here shows the risks of the latter.

2008

PERU
136 LAND CONFLICTS

PERU*
CONFLICT:
June 22
In **Pasco**, 500 community members march against legislative decree 1,015 permitting private investment in rural and native lands in the *sierra* of Peru. Protestors claim that the decree violates their rights under ILO 169. Later, more protests over the law erupt in other places as well, including **Imaza, Amazonas** and **Cuzco**, until August 22 when Congress votes to repeal it.

CHILE
48 LAND CONFLICTS

PERU
CONFLICT:
April 9
More than 1,300 Indigenous communities in the **Amazon** launch a wave of protests requesting the repeal of a series of laws affecting natural resource extraction that they believe violate their right of consultation under ILO 169. On June 5, the protests escalate in **Bagua**, leading to the death of 24 police officers and 10 Indigenous protestors.

2009

PERU*
84 LAND CONFLICTS

CHILE
69 LAND CONFLICTS

ILO 169 PROGRESS

CHILE
ILO 169:
March 6
ILO 169 is ratified by the Senate.

CHILE
CONFLICT:
January 3
In **Temucuicui, Araucanía**, 22-year-old Matías Catrileo Quezada is killed in an internal Mapuche conflict over state efforts to purchase land for the company *Forestal Mininco*.

CHILE
CONFLICT:
December 5
Mapuche organizations in **Temuco, Araucanía**, protest the local government's failure to seek Indigenous participation, in violation of ILO 169, citing "the lack of response despite numerous petitions and requests from each community [Wenteche, Lafkenche and Puehuenche...] to discuss with the local government. [...]"

CHILE
ILO 169:
September 4
Supreme Decree No. 124, issued by the *Ministerio de Planificación* (Planning Ministry), to regulate Article 34 of Law 19.253, which deals with Indigenous consultation and participation (passed in 1993).

CHILE
ILO 169:
September 1
ILO 169 goes in effect in Chile.

In a highly polarized environment, the failure to establish a national law to regulate *consulta previa* has left the process in the hands of local communities' *consultas populares*, with dubious legal authority.

By Silvel Elías and Geisselle Sánchez

ALTHOUGH THEY constitute 40 percent of Guatemala's population, Indigenous Guatemalans face great inequality in terms of access to health, education, housing and—most critically—political representation.[1]

In 1995, the Guatemalan Constitutional Court asked Congress to approve and ratify International Labour Organization Convention 169 (ILO 169). Ratified on June 5, 1996, the Convention was elevated to the category of law, committing the Guatemalan government to adapt national legislation in compliance with it.

The Guatemalan government has since attempted to pass regulation on *consulta previa* numerous times, but has not yet succeeded.[2] In 2011, with the goal of determining how consultations should be carried out, who should participate, and the degree to which the consultations would be binding, the administration of then-President Álvaro Colom proposed a regulation intended to ensure the adoption of the norm—the *Reglamento para el proceso de Consulta del Convenio 169 de la Organización Internacional del Trabajo sobre Pueblos Indígenas y Tribales en Países Independientes* (Regulation for the consultation process of ILO Convention 169 on Indigenous and tribal peoples in independent countries).

But many Indigenous organizations rejected the resolution, claiming they were not adequately consulted while the regulation was being developed and that the regulation gave too much power to government entities. Furthermore, many claimed there should not be regulation for consultations, because ILO 169 already delineates how the process of *consulta previa* should be carried out in a way

PHOTOGRAPHS BY JAMES RODRÍGUEZ

that accommodates local methods of implementation.

After the *Consejo Plurinacional del Pueblo Maya* (Plurinational Council of Maya Peoples—CPO) petitioned the Constitutional Court for an *amparo de inconstitucionalidad* (appeal) to provide emergency protection from the regulation in 2011, its passage was suspended indefinitely.

Communities have meanwhile relied on alternative channels—including *consultas comunitarias de buena fé* ("good faith" consultations), which apply to communities, and *consultas de vecinos* (neighborhood or municipal consultations), which apply to municipalities—to make their opinions heard.[3] Between 2005 and 2012, 74 *consultas comunitarias de buena fé* were carried out by Guatemalan Indigenous communities, who expressed their opposition to natural resource extraction in their territories by margins that exceeded 90 percent.

However, the degree to which such community consultations are considered valid has been widely contested among different stakeholders. The Ministry of Energy and Mines has not considered the results of these consultations when awarding new mining licenses, arguing that popular consultations with Indigenous communities are not within its jurisdiction, and that the ministry is solely responsible for implementing the 1997 Mining Law, which does not require consultations. The Mining Law is currently being reformed, and the status of the consultations is not yet clear.

As a result, Indigenous consultation in Guatemala has been reduced to a simple exercise in citizen dialogue carried out by municipal governments, which, while important for the local communities, is irrelevant to state decisions on awarding licenses to the extraction industry. This has done little to mitigate the high levels of conflict and violence that surround extractive projects in Guatemala.

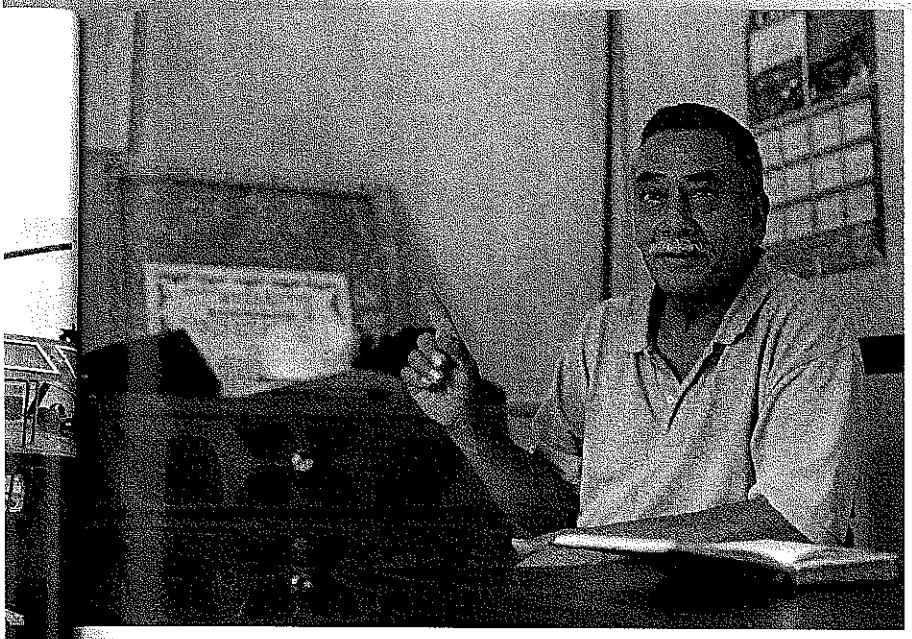
WEAK STATE, NO LAW, WEAK CONSENSUS

The Guatemalan Constitution (1985), ILO 169 (ratified in 1996), the Municipal Code (2002), and the United Nations Declaration on the Rights of Indigenous Peoples (2007) all recognize the rights of Guatemalan citizens to be consulted on important matters that could affect their lives and territories.[4]

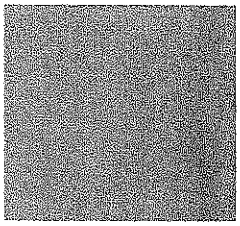
Yet in the absence of any national regulation on *consulta previa*, the primary national legal channel that regulates consultations in Guatemala is the Municipal Code, which, unlike ILO 169—an international legal instrument that provides guidelines for carrying out consultations with Indigenous and tribal peoples—applies to all citizens, both Indigenous and non-Indigenous. However, Indigenous Guatemalans make up 40 percent of the population, according to Guatemala's most recent census—an estimate that most Indigenous groups consider conservative.

Passed in 2002, the current Municipal Code requires local citizens to submit requests for consultation to the Municipal Council (the city government agency comprising the mayor, representatives and council members) by presenting a request signed by at least 10 percent of the municipality's registered residents. For the consultation of Indigenous communities, which is described in Article 65, there are no established minimum percentages for participation. Consultations are to be carried out in a way that is sensitive to the customs and traditions of Indigenous communities.

But Guatemala's Municipal Code suffers from some internal contradictions that have not yet been resolved. Article 64 declares that the result of any municipal consultation is binding if 20 percent of a municipality's registered residents participate in the consultation, but Article 66 says that at least 50 percent of registered residents must participate for the decision to be binding. This explains the systematic opposition the government and the private sector have expressed toward *consultas comunitarias de buena fé*—which critics describe as informal and not serious because there are neither voter registries nor clear mechanisms for carrying out the vote.



A checkpoint between San Rafael Las Flores and Mataquescuintla on May 2, 2013 (far left). Fidel Ortíz Cabrera, president of the Xinca Indigenous Community of Jumaytepeque, in November 2013 (above).



The Guatemalan justice system, meanwhile, has issued contradictory decisions about the legal status of consultations. For example, the Constitutional Court has recognized that Indigenous communities possess a fundamental right to be consulted, affirming in Sentence 3878-2007 that "[...] all recognition, exploration and extraction licenses for mining and hydroelectricity awarded by the Ministry without consultation are illegal and arbitrary for having violated the constitutional right to consultation, and by extension, all the other collective and individual rights recognized in the Political Constitution of the Republic and the international conventions ratified by Guatemala on matters of human rights."

Yet the Constitutional Court has also said that consultations, while valid, are merely informative, rather than legally binding. In 2013, the Court rejected an emergency protection order sought by the CPO against the current Mining Law. The case involved the Ministry of Energy and Mines' approval of a mining license in San Marcos that was granted without carrying out a proper process of prior consultation with Indigenous peoples.

So far, there are no successful examples in which the government has carried out a process of *consulta previa* before awarding extraction licenses. Guatemalan courts do not recognize popular consultations carried out under the Municipal Code as legally binding. Therefore, the unresolved debate about the binding or non-binding nature of the consultations is one of the main obstacles to advancing the application of ILO 169 in Guatemala.

NO CONSENSUS, NO PRECEDENT

One example of the way the validity of popular consultations has been challenged is the case of El Escobal mine in Santa Rosa, an area that contains a mix of non-Indigenous communities and Indigenous groups like the Xinca.

When the Ministry of Energy and Mines awarded an extraction license for El Escobal mine to Minera San Rafael S.A., a subsidiary of Tahoe Resources Inc., the local communities in Santa Rosa Department, including the Xinca, were not consulted. In response, five municipalities near the mine—Mataquescuintla, Jalapa, Casillas, Nueva Santa Rosa and Santa Rosa de Lima—carried out *consultas municipales*. Nine *consultas comunitarias de buena fé* also took place in the communities of San Juan Bosco, Los Planes, Volcancito, La Cuchilla, Barrio Oriental, Aldea Chan, Caserío

So far, there are no successful examples in which the government has carried out a process of *consulta previa* before awarding extraction licenses.

El Renacimiento and Caserío Las Delicias, organized by the *Consejos Comunitarios de Desarrollo* (Community Development Councils—COCODE). In the 14 consultations, an overwhelming majority of community members were opposed to the mining.

Yet when residents requested a consultation in the San Rafael municipality, where El Escobal mine is located, the San Rafael Municipal Council challenged the validity of the signatures that residents submitted to begin the process. Though a *mesa de coordinación* (coordinating roundtable) was eventually formed to carry out a consultation, the Council ultimately annulled the entire process, arguing that the petitioners had not followed correct procedure.

Residents opposed to the mine say the Municipal Council ignored their objections due to the substantial mining royalties the mine has generated, and have launched several legal challenges to the mine, while continuing to carry out consultations in surrounding communities.

In June 2013, the administration of President Otto Pérez Molina decreed a two-year mining license moratorium in an effort to reduce social conflict.

ENTER THE DEMAND FOR NATURAL RESOURCES

In the past 20 years, the increase of natural resource extraction projects in Guatemala has been, perhaps, the greatest source of social conflict in the country. The *Instituto Centroamericano de Estudios Fiscales* (Central American Institute of Fiscal Studies—ICEFI) demonstrated in its 2014 report that mining revenue has not compensated for the high cost of mining-related social conflict in Guatemala.

The government and extraction companies have argued that the Indigenous movement—and especially Indigenous opposition to extractive projects—threatens the business climate and potential investments in Guatemala, exacerbating a weak rule of law, a lack of secure property rights and legal uncertainty.

But the Guatemalan government has been flexible on tax obligations and royalties. It currently requires mining companies to contribute 1 percent of the value of their sales to the state—which is split in half between the central government and the municipality where the project is located. Unfortunately, there are no institutional mechanisms in place to determine the amount that different companies owe and to conduct regular audits of mining companies to ensure compliance with the law, nor to compensate Indigenous peoples for damages or give them a share in revenues.

In January 2012, the Guatemalan government negotiated an agreement with Montana Exploradora, the owner of the Marlin Mine and a subsidiary of Goldcorp, to contribute an additional "voluntary"4 percent royalty to the state and to municipalities near the mine.[6] In April 2013, it reached a similar agreement with Minera San Rafael S.A., owner of El Escobal mine and a subsidiary of Tahoe Resources, and the company made its first royalty payment to seven local communities in January 2014.[5]

The unrest caused by the lack of consultations in the above examples has not prevented either company from operating in Guatemala. Minera San Rafael S.A. was awarded an extraction license in April 2013, after two years of intense conflicts with the local population. In fact, construction began on El Escobal mine before the extraction license was awarded, indicating that the company was confident it would obtain the license.

Shortly thereafter, in June 2013, the administration of President Otto Pérez Molina decreed a two-year mining license moratorium in an effort to reduce social conflict related to mining projects and to reform the country's Mining Law.

But social activists and Indigenous groups remain skeptical, believing that the moratorium represents only

Setting boundaries: A signpost reads, "Main limits of the Xinca Agricultural Community of Jumaytepeque" in Santa Rosa, Guatemala.

a temporary pause in the avalanche of the country's natural resource exploitation.

As of January 2014, the Ministry had awarded 359 licenses for construction and mining (76 for exploration and 283 for exploitation), with another 601 solicitations in process, although no new licenses have been issued since the moratorium was declared.[6]

INVESTMENT, COMMUNITY RIGHTS AT LOGGERHEADS...UNTIL?

Guatemala is facing ever-stronger pressures from businesses interested in exploiting the potential of natural resources through mining, dams and the expansion of mono-crop farming. Most of these investments irretrievably affect the territorial rights of native peoples, which is why *consulta previa* is critical.

At the moment, Guatemala does not possess the institutional capacity or the legal framework necessary to regulate consultations at a national level, and it falls to local municipalities and communities to carry out these processes. There is currently no authority at the national level charged with carrying out consultations, and given Guatemala's historical legacy, Indigenous groups are skeptical of the prospect of increased interaction with the national government. Meanwhile, the government has yet to validate the community consultations that have already occurred.

But even if Guatemala had the institutional and legal framework in place to regulate consultations and an adequate budget to finance them, *consulta previa* requires a climate of trust and mutual respect among the government, companies, social organizations and Indigenous groups to be successful—conditions that do not currently exist in Guatemala.

Nevertheless, different stakeholders agree that prior consultation is an opportunity to establish best practices in the use of natural resources. It must not be the final step, but rather the starting point of a process of dialogue to reduce unrest, improve governance, ensure the protection of rights, and foster development that is socially, culturally and environmentally responsible.

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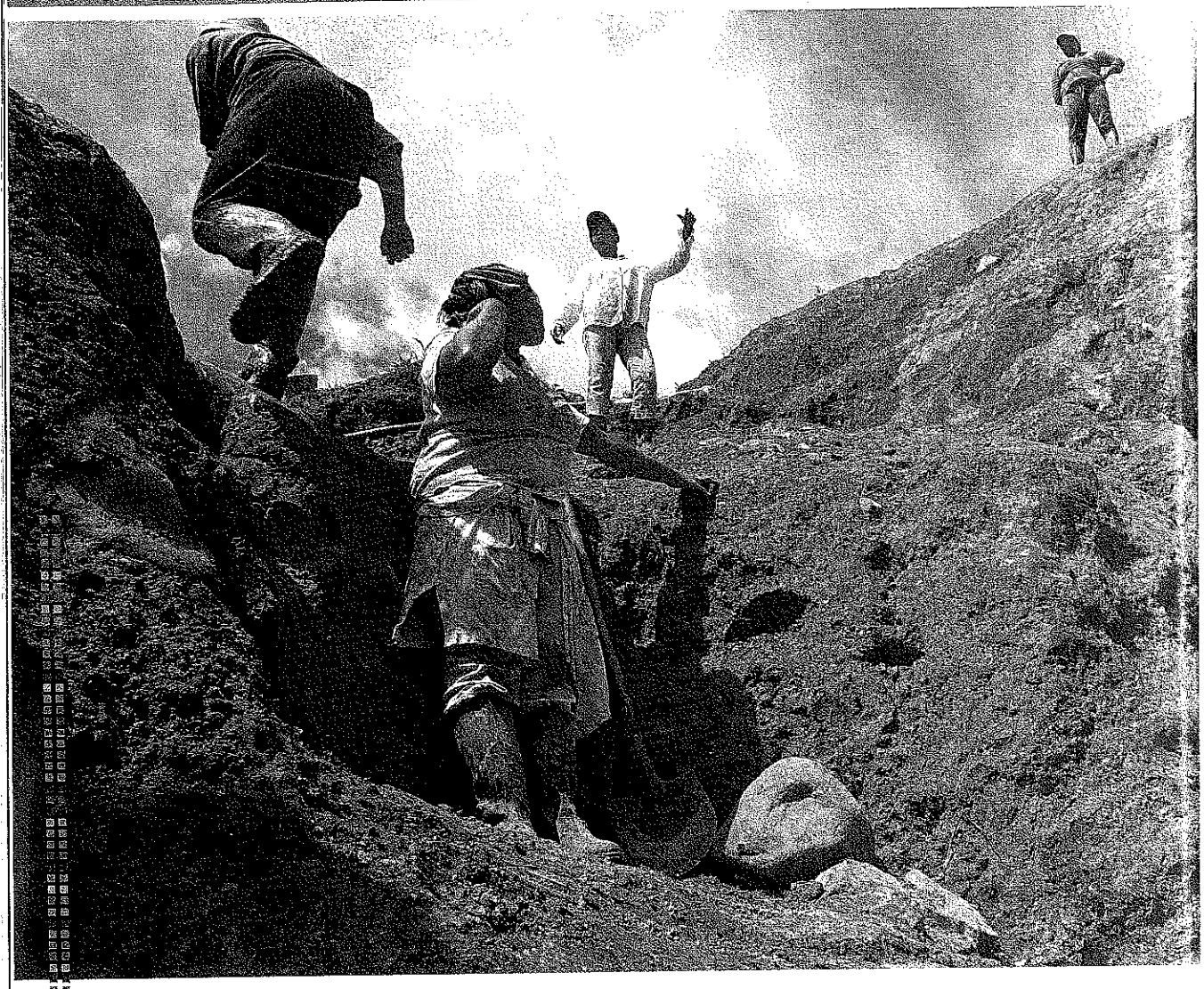
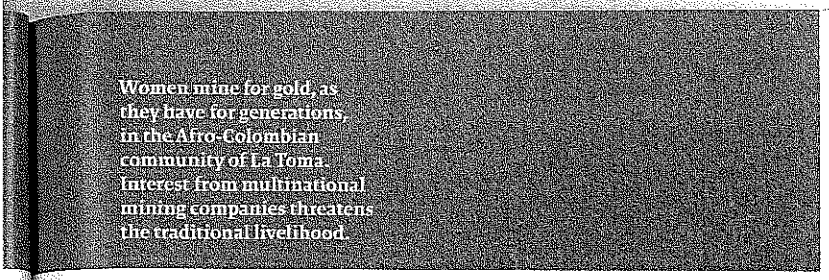
CASE STUDY:

COLOMBIA

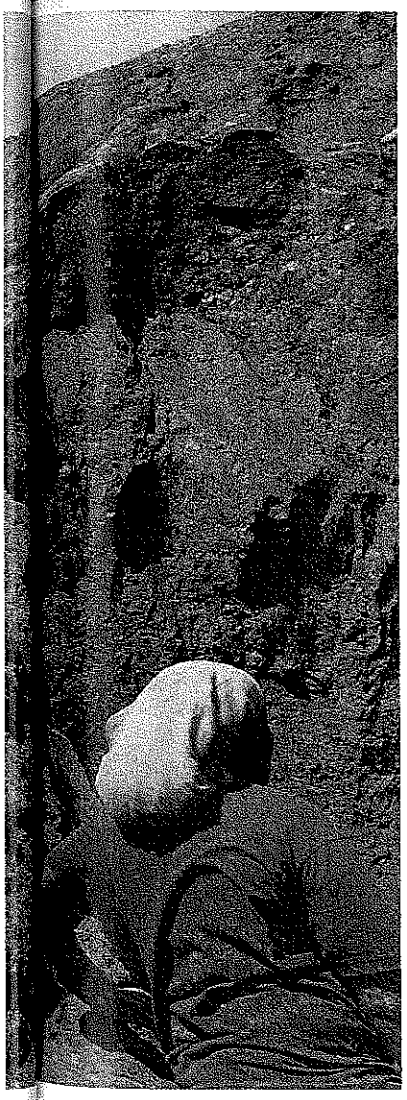


IN COLOMBIA'S 2010–2014 National Development Plan, President Juan Manuel Santos listed the mining sector as one of the five engines of the country's economic growth, alongside infrastructure, housing, agriculture, and innovation. At the same time, the government recognized the need for regulatory, legal and policy instruments to make Colombia a regional powerhouse for mining and infrastructure.

Yet the legal and policy framework that was intended to be adopted in the reform of the 2010 Mining Code was struck down by Colombia's Constitutional Court in early 2011. According to the Court, the 2010 code should have been discussed with Colombia's ethnic minorities (Indigenous peoples, Afrodescendants, *Raizales*, *Palenqueros* and *Rom* communities),[1]



Women mine for gold, as they have for generations, in the Afro-Colombian community of La Toma. Interest from multinational mining companies threatens the traditional livelihood.



Colombia's incomplete regulations governing *consulta previa* have created uncertainty that is hurting investment and community rights.

By Diana María Ocampo and Juan Sebastián Agudelo

in accordance with the 1991 Colombian Constitution and International Labour Organization Convention 169 (ILO 169) ratified in 1991.

In Colombia, according to the latest official population census (2005), 3.4 percent of the population is Indigenous and 10.6 percent is Afrodescendant. Together, these two ethnic groups occupy nearly 30 percent of Colombia's total landmass.

Article 7 of Colombia's 1991 Constitution establishes respect for, and protection of, an ethnically and culturally diverse population as a fundamental principle. Accordingly, the Constitution recognizes Indigenous lands as collective "territorial entities," to be governed by Indigenous communities according to their own customs and by their own representatives. These lands are inalienable, meaning they cannot be taken away from the original owners. Following the same rationale, black ancestral communities were also recognized as entitled to collective property ownership under Law 70 in 1993.

The 1991 Constitution also laid the normative groundwork for *consulta previa* (prior consultation). Article 330 mandates that the exploitation of natural resources on lands recognized as ancestral territories should be conducted without harming ethnic communities' cultural, social and economic integrity. Article 330 also stipulates that the government should guarantee the participation of community representatives in all decisions about any eventual intervention on their land.

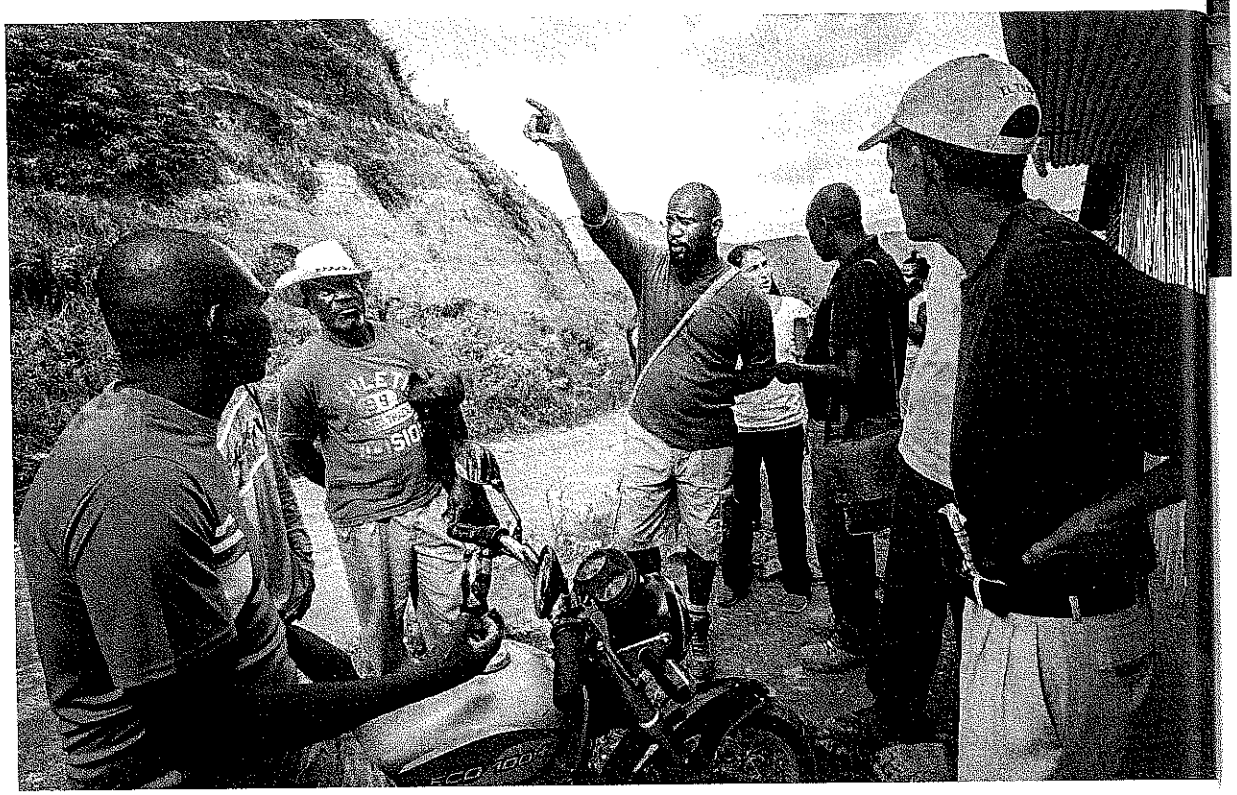
In addition, Colombia's ratification of ILO 169 and its adoption into Law 21/1991 established special measures designed to safeguard the integrity and survival of the people, institutions, goods, work, cultures, and natural habitats of recognized Indigenous and ethnic communities. *Consulta previa* is the fundamental tool that enables these pledges to be fulfilled.

There is no procedural agreement on how to interpret ILO 169, in part because the Convention's main objective is to be interpreted broadly in its allocation of rights. As a result, Colombia has relied on trial and error to close this procedural gap. To date, there is no statutory law to regulate issues of *consulta previa*.

In large part the reason is that any statutory law on *consulta previa* would itself have to undergo a process of consultation with Colombia's ethnic communities, something previous governments, the current Santos administration and even ethnic communities have been unwilling—or incapable—of doing.

The result of this impasse is a scattered number of norms, guidelines, decrees, and presidential directives that, for the time being, must serve

PHOTOGRAPH BY RIC FRANCIS



as a compass on how to fulfill the state's duty to consult ethnic minorities. However, they provide no legal security for the stakeholders.

A PIECEMEAL APPROACH

As early as 1993, the first attempt to regulate *consulta previa* in Colombia was the enactment of Law 99/1993, which created Colombia's national environmental authority. Along with the Ministry of the Environment and the National Environmental System, the law also established the responsibility to consult ethnic minorities as a prerequisite for granting environmental licenses whenever extractive projects—or, for that matter, any other development plans—were expected to have an impact on ethnic communities.

In accordance with the Colombian legal system, regulatory decrees are often enacted to implement new laws. With that in mind, Decree 1320/1998 was established in 1998 to provide guidelines for analyzing the economic, environmental, social, and cultural impacts of natural resource extraction on Indigenous and Afro-descendant communities within their territories, and at the same time established a set of measures that would protect their integrity.

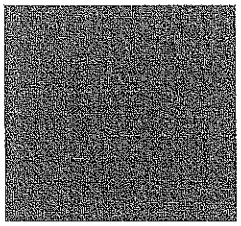
The critical new elements of Decree 1320/1998 included:

- Making the *Dirección de Etnias* (later Office of Prior Consultation—DCP), under the Ministry of the Interior, responsible for identifying and certifying the presence of any communities likely to be affected by any development project;
- Requiring the *Instituto Colombiano de Desarrollo Rural* (Colombian Institute of Rural Development—INCODER) to certify the existence of all territories that ethnic communities have legal title to; and
- Requiring any entity (public or private) interested in carrying out a development project or activity subject to *consulta previa* to complete an environmental impact assessment (EIA) with the participation of the affected communities—and, if necessary, describe the measures it will undertake to prevent, correct, mitigate, control, and/or compensate communities for any impacts that the entity carrying out the project identifies, in collaboration with affected communities.

But alas, Colombian lawmakers failed to consider a somewhat important detail while they developed the guidelines in Decree 1320/1998: *consulta previa* itself. Decree 1320/1998 never underwent a process of consultation with the communities it would directly affect.

As a result, the guardian of fun-

PHOTOGRAPHS BY SEB AGUDELO



La Toma residents gather around the joint community center/*discoteca* high in the hills of the province of Cauca (far left). **Power and protests: The Salvajina Dam and hydroelectric plant built in 1985 on the Cauca River allegedly displaced thousands of inhabitants from the area and provoked a wave of protests** (above).

damental and constitutional rights in Colombia—the Constitutional Court—deemed Decree 1320/1998 unconstitutional, and thus, inapplicable. Confronted with the lack of a normative legal framework to regulate *consulta previa*, the Constitutional Court has stepped in to fill the void.

As early as 1993, in a case involving the Embera-Katio—an Indigenous community from Antioquia who said that logging and the incursion of heavy machinery into their ancestral territories had endangered their subsistence economy and culture—the Court determined that ethnic minorities possess fundamental rights as a collective entity. The Court observed that an ethnic community's right to subsistence is inherently linked to the right to life—and therefore, is worthy of special and differentiated constitutional protection. Based on this interpretation, the Constitutional Court has since held jurisdiction over cases involving the fundamental, inviolable rights of ethnic groups.

The Constitutional Court has produced a number of rulings that have recognized and expanded on the fundamental rights of ethnic groups to be consulted about resource extraction projects. The breakthrough came in 1997, when the Court reasoned in Ruling SU039/1997 that the right to ethnic groups' participation through *consulta previa* was a fundamental right, and thus essential to preserve the ethnic, social, economic, and cultural integrity of ethnic communities.

In 2008, this right was reinforced through another ruling (C030/2008), which clarified for the first time how administrative or legislative acts likely to affect ethnic communities were to be consulted. As a consequence, the Forestry Law of 2006, the Rural Development Statute of 2007 and the reform to the Mining Code of 2010 were all ruled unconstitutional because they, too, were created without consulting ethnic minorities.

Another Court decision, T129/2011, delineated parameters that, in the Court's judgment, would make it possible for ethnic communities to exercise their rights in line with the established principles of *consulta previa*. Here, the Court highlighted that, among other things, the state was responsible for establishing a dialogue between parties based on good faith and agreeing to a flexible methodology, based on the particular needs of each community.

It also mandated securing communities' free, prior and informed consent before community members are resettled or displaced, whenever proposed activities pose a risk of discharging toxic waste or involve storing waste on ancestral lands, and/or there is a substantial risk that a proposed activity could have a high social, cultural or environmental impact. Finally, it required ensuring the involvement of the *Defensoría del Pueblo* (National Ombudsman) and *Procuraduría General* (Inspector General's Office) during the *consulta previa* process.

Since then, the Colombian government has issued more detailed instruc-

The Constitutional Court has produced a number of rulings that have recognized and expanded on the fundamental rights of ethnic groups to be consulted about resource extraction projects.

tions about how to carry out *consulta previa*. In 2013, Santos issued Decree 2613/2013, with the aim of improving institutional coordination. The same year, he issued Presidential Directive 10/2013, which lays out five specific steps for carrying out *consulta previa* and expands the responsibilities of the DCP. However, neither the decree nor the directive is legally binding.

AT THIS POINT, NO ONE IS BENEFITING

Despite the Constitutional Court's rulings and the various executive guidelines, the private sector still has a high level of uncertainty on how to budget and plan consultation processes. As a result, tension between all parties—the government, private sector and communities—remains.

The lack of certainty has contributed to an escalation of costs and delays for investment projects, leaving some public officials, the private sector and members of the public to conclude that far too many projects of interest to the nation—mostly within the infrastructure and mining sectors—are being sacrificed to the convenience of ethnic groups.

However, *consulta previa*, classified as a fundamental right by the Constitutional Court, protects the survival of ethnic communities. To be sure, the clash of seemingly different development models is precisely what *consulta previa* aims to resolve. By consulting ethnic minorities on development projects or administrative acts that affect them, *consulta previa* allows an intercultural dialogue to take place to reconcile these different visions.

To be sure, the clash of seemingly different development models is precisely what *consulta previa* aims to resolve.

Indeed, the Constitutional Court deemed the protection of cultural values, social rights and economic interests of Indigenous peoples to be in the general interest of the nation. As a result, the stance taken by human rights groups and scholars has highlighted the necessity of embarking on a true and transparent intercultural dialogue that respects and safeguards ethnic rights. A key part of that process involves establishing clear rules to prod stakeholders toward a desperately needed consensus on how to promote economic growth and inclusive development.

Any trip around Colombia will reveal how the country's mining and infrastructure sectors, far from being the engines of economic growth, are now practically at a standstill because of consultation processes that continue to be unregulated—leaving all actors to fend for themselves or to face long and costly litigation processes. In an interview with *El Colombiano* in January this year, Claudia Jiménez, director of the *Sector de Minería a Gran Escala* (Large Scale Mining Sector), said that some $7.3 billion in mining investment has been held up because of *consulta previa* issues regarding environmental licenses and the dip in commodity prices internationally. For example, mining licenses are on hold because of the 2011 decision over the Mining Code. The infrastructure sector does not fare much better. In late 2012, a report released by the *Comisión de Infraestructura* (Commission on Infrastructure), a high-level commission appointed by Santos to assess major deficiencies and opportunities across the sector, concluded that one of the major obstacles holding back the much-needed revitalization of infrastructure across the country was the issue of unregulated *consulta previa*.

Although the newly enacted Decree 2613/2013, and Presidential Directive 10/2013 seek to improve institutional coordination and provide more detailed steps on how to carry out *consulta previa*, they fall short in at least two ways: first, the presidential directive only mandates internal institutional action and is not binding on

communities; and second, both the decree and directive delegate too many responsibilities to the weak and overburdened DCP, a sub-agency within the Ministry of the Interior that does not have the means, the manpower, the skills, or the budget to execute any of its basic duties as a facilitator and guarantor of the consultation process.

Thus, because of institutional incapacity, much of the consultation process that the state is required to guarantee has been delegated, de facto, to the private sector—in violation of the fundamental principle of state responsibility under *consulta previa*. This has converted what could be an opportunity to reconcile inherently different concepts of development through an intercultural dialogue into a corrupted battleground where, at best, "social licenses" are up for sale, and, at worst, where no opportunity for inclusive development can be found.

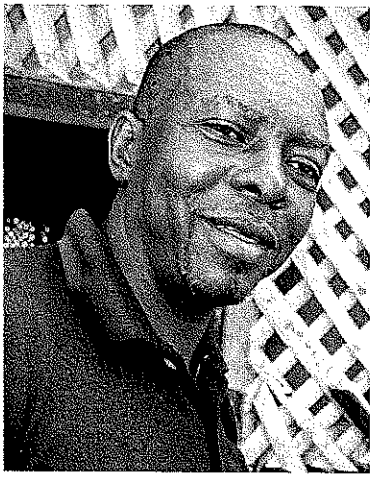
WHAT NEXT?

In Colombia, as in many places, extractive projects tend to exist in remote areas that often overlap with the ancestral territories of the most vulnerable ethnic communities. A legacy of blatant discrimination dating back to colonial times, exacerbated by the complete absence of the state, has meant that most ethnic communities not only lack access to basic services, they also have endured the violence from Colombia's armed conflict.

These are the areas in which *consulta previa* has taken place or should. But in some cases, the precarious situation of ethnic communities has been misunderstood by some companies that have converted "consultation" into a highly transactional process, where communities consent to investment projects in exchange for money or basic goods and services.

Consulta previa was conceived as a way to fulfill the rights of ethnic communities—not to fill pockets. Nonetheless, in cases where *consulta previa* has actually taken place, too often the rights of those communities have been subsumed by more material, short-term interests. And when those interests are met, investors often become subject to lawsuits.

It's this cheapened process and the extortion-like threat behind it that adds to the current paralysis of both the mining and infrastructure sectors in Colombia, as well as the continued violation of the basic rights of ethnic communities. And if *consulta previa* goes unregulated in the country and mismanaged by either party for too much longer, the dollars for much-needed investments will find a better-prepared recipient elsewhere—or worse, there will be no more ethnic communities left to protect.



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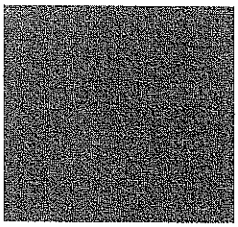


Taking action: Eduar Mina López is the president of the community council of La Toma and member of *Proceso de Comunidades Negras* (Process of Black Communities—PCN).

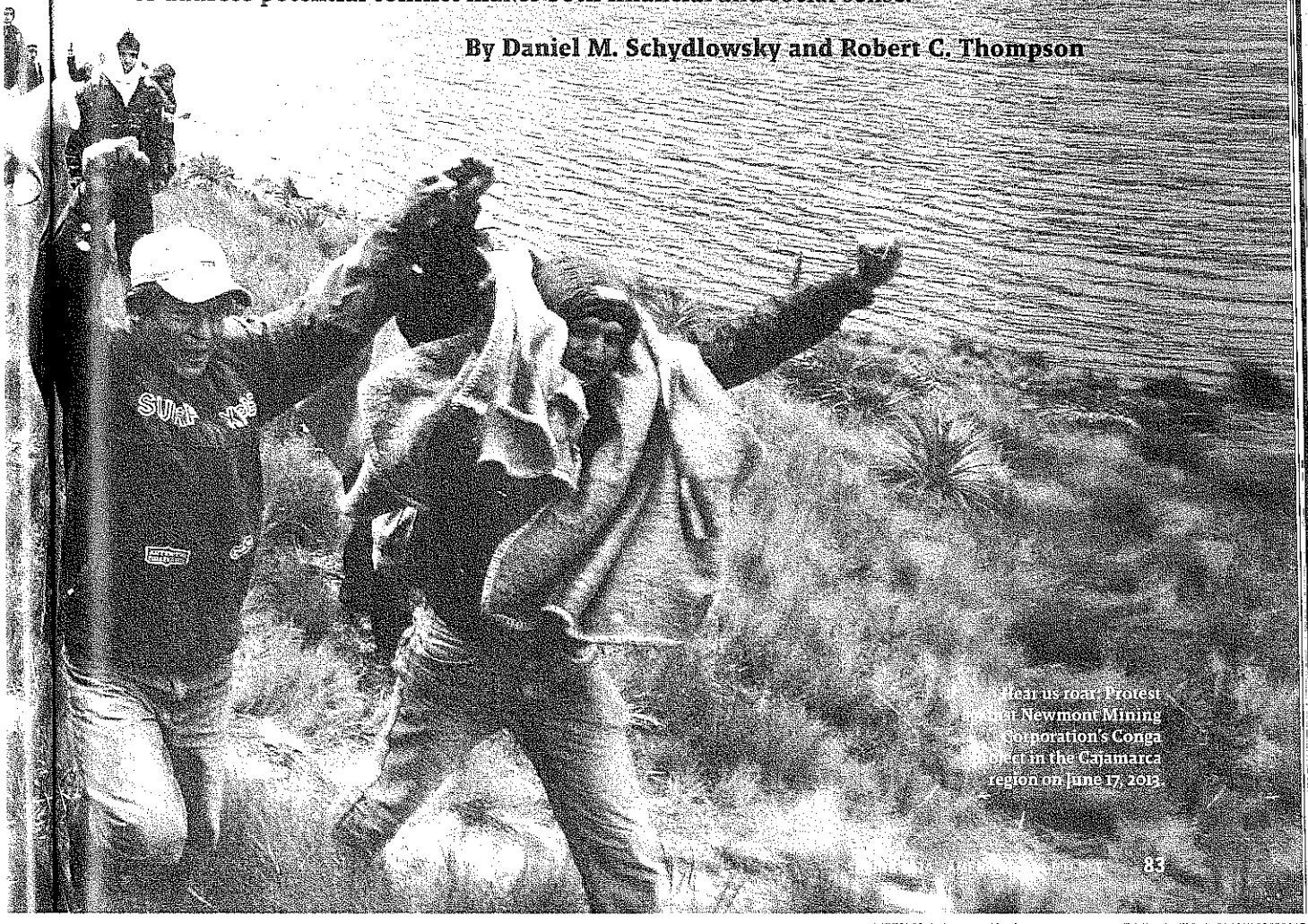
Diana María Ocampo *is the founder of Ocampo Duque Abogados, a consultancy firm specializing in land law.* **Juan Sebastián Agudelo** *is a legal researcher at Ocampo Duque Abogados.*

1 The *Raizales* are an English-Creole speaking Afro-Colombian community; *Palenqueros* are a community descended from free slaves who speak a Spanish-based Creole; and the *Rom* are a gypsy community who speak the Romani language.

Reducing the Financial Risk of Social Conflict

Social conflict touches on more than mining companies; it inevitably affects banks, large and small. Requiring banks to review the efforts of companies to address potential conflict makes both financial and social sense.

By Daniel M. Schydlowsky and Robert C. Thompson



Protesters chant as they march during a protest against Newmont Mining Corporation's Conga project in the Cajamarca region on June 17, 2013.

The Peruvian economy has experienced exceptional growth in the past 10 years, with its GDP expanding at an average yearly rate of 6.5 percent. Much of this growth is due to the mining sector, which in 2012 accounted for 9.6 percent of Peru's GDP, 1.3 percent of its employment and 56.9 percent of its exports.

Unfortunately, this robust growth has been accompanied by an increasing epidemic of sometimes violent socioeconomic conflicts between mining enterprises and surrounding communities.

Conflicts in Bagua (2009) and at the Conga mine (2011-2012) cost 33 and 15 lives, respectively. Overall, the number of conflicts reported in 2013 shot up to 216, from 63 in 2004.

Containing the negative fall-out constitutes a major policy challenge for Peru. To help, the Peruvian banking supervisory agency has developed a regulatory framework to ensure that banks and their customers join efforts to reduce the risk of social conflict by engaging with local communities and performing their own due diligence.

Conflicts in the mining sector have adverse economic effects locally, regionally and nationally: the loss of hours of employment, a fall-off in consumer spending, delayed projects, and defaults on loans. Moreover, the effects usually ripple outward from the mining site itself—affecting nearby towns, suppliers and customers of the company, as well as tourism and transportation enterprises in the area. Resource conflict also affects tax revenues and fiscal expenditures of the local governments.

From a financial perspective, a major part of the problem is the collateral damage inflicted on those not actively participating in the conflict; what economists call "externalities." These secondary effects are widespread, typically a multiple of those directly associated with the conflict itself. All of these losses adversely affect banks' balance sheets, as borrowers become unable to meet their financial commitments, investment projects are postponed or cancelled, contracts of various sorts are cancelled, and interest rates rise in response. There are, of course, also associated human rights risks.

The contagion can also skip across mountain ranges, from one ethnic community to another and from one political context to another. If the conflicts bring international notoriety, then credit ratings and interest costs can be affected, with further repercussions on the financial sector and even the national exchequer.

THE LEVERAGE POINT: REGULATORS-BANKS-COMPANIES

Regulating socioeconomic credit risk due to potential conflicts is a relatively new field in bank regulation. One cannot predict with certainty whether a given project will experience socioeconomic conflict. Indeed, the understanding of how to prevent, mitigate or resolve such conflicts is at an early state of development.

However, some basic precautions can be taken.

As with other types of risks, banks already make provision for conflict-related losses, as required by regulations for all expected losses. But such provisions as they exist today are not sufficient because they imply only writing off bank losses while ignoring the losses that stay on company balance sheets or are absorbed by third parties.

The first step in a financial regulator's attempt to deal with conflicts is to move from a strictly accounting approach to a more proactive, preventive approach. In other words, rather than simply writing off the losses from conflict, banks need to engage in preventing the conflict from happening in the first place; or, failing that, act to contain the conflict and limit the loss.

Prevention and abatement is much more cost-effective. The operative question is how to do it.

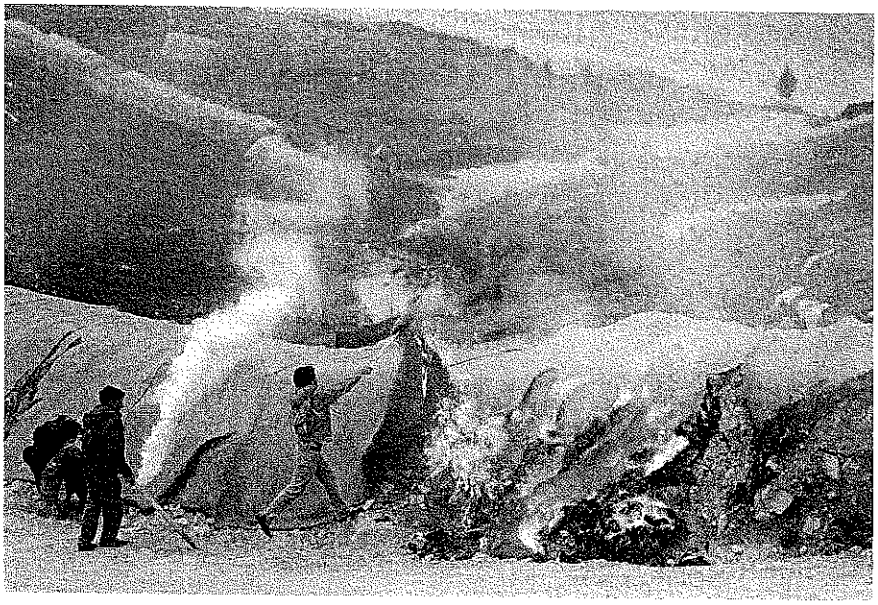
Fortunately, there is leverage. Banks listen to their regulators. Companies listen to their bankers. If the bank regulators spread the word that conflict prevention and abatement on the part of the banks will earn points in bank supervision, and, in turn, banks spread the word that customers with conflict prevention and abatement credentials will get priority attention, we have leverage at work.

It is well established that the role of the banking regulator is to keep bank risk down. Socioeconomic conflict raises that risk. So it is the obligation of the regulators to induce bank behavior that will contain and abate social conflict, following a venerable tradition of using regulation to deal with externalities, i.e. with situations where the effects of concentrated events are widespread.

RISK REDUCTION IN ACTION

Risk mitigation is a highly technical task and not a political intervention. Political prescriptions and reactions need to be reserved for political authorities. Bank supervisors need to concern themselves with risk, especially risk that might affect the stability of the financial system.

Peru is tackling the problem of socioeconomic conflicts from a variety of angles. In 2011, the government



This will help the environment: Protesters set fire to a barricade near Perol Lake to protest the environmental impact of the Conga project.

PREVIOUS PAGE AND BOVE: ENRIQUE CASTRO-MENDIVIL/REUTERS

passed the *Ley del derecho a la consulta previa a los pueblos indígenas u originarios* (Law on the Right to Prior Consultation with Indigenous Peoples) with the enabling regulations issued in 2012 (see page 54 for more details on the regulations and their application). The *Defensoría del Pueblo* (ombudsman) is engaged in mediating many existing conflicts, as is the high commissioner of the national office for dialogue and sustainability in the prime minister's office.

Recently, the Superintendency of Banks, Insurance Companies and Pension Fund Administrators has joined these state institutions in seeking to stem the epidemic of social conflict in Peru. Invoking its mandate to protect the financial sector from exposure to excessive risks, the Superintendency is about to issue its "Bank Regulations on Socioeconomic Credit Risk." These regulations were the product of a two-year consultation with banks, mining companies, Peruvian governmental agencies, and other interested stakeholders within and outside Peru.

The regulations will require banks that lend to large mining developments and other large projects (defined as having an overall investment greater than $10 million) with the potential for socioeconomic conflict to engage in a targeted due diligence process.

The first step in that process is to ensure that each lender adopts appropriate policies and procedures, including clear lines of responsibility, to govern its own role in the due diligence process. Then, for each covered new loan, the bank must require the prospective borrower to provide sufficient information about the proposed project to enable the bank to evaluate the principal risk factors for the potential of socioeconomic conflict.

When mining claims are bought and sold, information on the socioeconomic climate at or around the site of the mine is as important as knowing the quality of the ore, because both will determine the profitability of the venture. This involves an assessment of the potential for labor conflict at the site, and an evaluation of the tolerance of local communities for the work to be conducted there.

Since environmental disruption and damages are often cited as a major reason for conflict, in Peru banks will want to obtain the environmental impact study the government requires of such projects. This ensures that banking regulations act in harmony with other regulatory programs, both for the environment and other areas.

The new regulations will require banks to obtain information about the community's past history of conflict. Also important is an assessment of community leaders' ability to effectively deliver the benefits that the tax revenues generated by the project are intended to fund. If the community does not perceive that it is actually receiving something tangible in return for the adverse impacts it is suffering, then trouble is likely.

Information involving *consulta previa* is also of critical importance in the evaluation. Banks will be required to obtain information about the consultation process that the borrower has developed with the community in the neighborhood of the project.

This involves learning what specific steps have been taken to inform the community about the project and its impacts, and evaluating the extent to which the com-

THE NEW REGULATIONS ENSURE A LEVEL PLAYING FIELD WITHIN THE FINANCIAL SECTOR BY REQUIRING BANKS OF ALL SIZES TO COMPLY WITH THE SAME OVERALL FRAMEWORK.

munity's concerns have been addressed. If there is substantial opposition to the project, this must be disclosed.

Another important factor is the capacity of the borrower to manage community relations throughout the life of the project, including a description of its grievance mechanism and its access to experts in dealing with local communities and conflict resolution. Once a bank has the required information in hand, it must assign a risk level to the proposed project's potential to generate socioeconomic conflict, using a four-level scale.

A project that is assigned a high or medium-high risk level is subject to two additional requirements. The first is that a third-party expert must be brought in to evaluate and report on the degree to which the borrower's *consulta previa* actions have been correctly carried out and what the level of acceptance of the project is among the community. This is to ensure that the *consulta previa* has taken place in an effective and useful way—not just as lip service, but as an integral part of reducing the socioeconomic risk affecting a project.

Second, the bank must require the borrower to develop a risk management plan to measure and address the anticipated impact of the project, including full implementation of any mitigation measures. The plans must outline the approach to be taken in any conflict. This includes: policies and procedures; staff trained and prepared to engage in local conflict resolution; and senior executives' commitment to community relations and to the resolution of any potential problems. A critical part of the plan is the development of a proper grievance procedure and a framework for the kind of sustained and credible dialogue that is likely to build mutual trust. This will substantially lower the temperature in a conflict.

All the commitments made by the borrower that emerge from the due diligence process, including permitting obligations, mitigation measures, action plan commitments and the like, must be incorporated into the loan documents, thus making them enforceable by the lender. The banks must then report annually on how borrowers are meeting their commitments and how the conflict abatement measures are working in practice.

FOR THE GOOD OF SOCIAL PEACE AND BANKING

Some banks in Peru, particularly those that subscribe to the Equator Principles (a set of voluntary guidelines agreed to by major banks), have already instituted substantial due diligence programs aimed at reducing socioeconomic conflict. The new regulations will ensure a level playing field within the financial sector by requiring banks of all sizes to comply with the same overall framework.

The new regulations build substantially on the Superintendency's existing policies and procedures for dealing with risk management. But they have also been influenced by other sources that reflect decades of experience throughout the world in dealing with socioeconomic issues. Among these are: the Performance Standards on Environmental and Social Stability of the International Finance Corporation, the Guiding Principles on Business and Human Rights adopted by the UN Human Rights Commission, the Equator Principles, the OECD Guidelines for Multinational Enterprises, and various environmental laws dealing with due diligence.

Ongoing discussions in Peru that involve all participants in the conflict abatement process will produce new approaches that can be shared among the banks, borrowers and others. The Superintendency also recognizes that as more practical experience is gained and lessons are learned, it will likely amend the regulations to reflect these new approaches.

The Superintendency also anticipates—and hopes—that Peru's universities and other educational institutions will train a new generation of conflict management professionals who can help the country address this critical issue. Such professionals would include experts in community relations, conflict resolution, mediation, and public finance, among others.

Daniel M. Schydlowsky *is Peru's superintendent of banking, insurance and private pension fund administrators.* **Robert C. Thompson** *is a retired attorney and former associate general counsel of the U.S. Environmental Protection Agency.*

FOILED ENERGY PROJECTS By Richard André

Hydroelectric projects have been thwarted by questions over community rights.

Hydroelectric dams are increasingly touted by national governments as a renewable way to meet the hemisphere's growing energy demand. But the projects are also encountering strong local and international resistance along the way—much of it centered on a lack of community consultation.

The Belo Monte hydroelectric dam in the Amazonian state of Pará is one example. Belo Monte may be Brazil's best chance to wean itself from fossil fuels and meet the electricity consumption needs of its growing middle class. But the project—which would generate as much as 11,233 megawatts of electricity by diverting up to 62 miles (100 km) of the Xingu River—has come under fierce attack for its potential environmental and cultural impact.

Amazon Watch, an NGO opposed to the dam, says that the Belo Monte dam would flood 932 square miles (1,500 sq km) of rainforest, displacing an estimated 20,000 to 40,000 Brazilians, most of them Indigenous.[1] The Brazilian government has claimed a more conservative estimate of 300 square miles (500 sq km) and 16,000 displaced people.[2]

The Belo Monte project, owned by the Norte Energia consortium, held four public hearings and 12 public consultations, as well as workshops and 30 visits to Indigenous villages between 2007 and 2010.[3] But members of the Munduruku, Xipaya, Kayapó, Arara, and Tupinambá tribes and a dozen other Indigenous groups have repeatedly occupied the dam's construction sites, demanding further consultation. Even *Avatar* director James Cameron has become a staunch critic of the project.[4]

Legitimizing their objections, a Brazilian federal district court ruled in October 2013 that the Congress' authorization of the project was illegal, thereby halting construction.[5] According to Judge Antônio Souza Prudente, who wrote the ruling, Belo Monte failed to conduct sufficient and targeted consultation with Indigenous peoples in accordance with ILO 169, which Brazil ratified in 2002 and enacted in 2004.

Though the ruling was later overturned by the Supreme Court and construction resumed, it sent a clear message that failure to properly consult communities can be politically and economically costly. In February 2014, IE Belo Monte, a Sino-Brazilian consortium, won the rights to build and operate a power line connecting the massive dam to southeastern Brazil.[6]

But those who think that resistance by Indigenous groups and environmentalists is simply a speed bump in the process need look no further than the cautionary tale of Chile's HidroAysén hydroelectric project.

Once thought to be a sure thing, HidroAysén would consist of five megadams and a 2,000 mile (3,220 km) northbound transmission line that would traverse six national parks and eight Indigenous regions, on ancestral territory that mostly belongs to the Mapuche, Chile's largest Indigenous group.

Though the dams were approved in 2011 by then-President Sebastian Piñera, the project faced increasing opposition, especially from the *Patagonia Sin Represas* (Patagonia Without Dams) campaign, a network that brought together Indigenous groups, environmentalists and tourism groups.

HidroAysén promised to cover a third of Chile's energy demand through 2024. And though the Chilean government held public consultations, a 2012 report by the Chamber of Deputies' Commission on Human Rights and Indigenous Peoples found irregularities in the project's environmental impact studies and a lack of institutional procedures to consider the opinions of affected communities.[7]

Responding to mounting pressure, Endesa, which owns a 51 percent stake in the project, removed it from its investment portfolio in January 2014, distancing itself from the controversial plan. President Michelle Bachelet's government has said that it will decide on HidroAysén's fate in May,[8] but after she called the project "unviable" during a televised debate, its future is in jeopardy.[9]

There is still hope for Belo Monte. Brazil could make an effort to properly consult Indigenous groups, and negotiate a plan for mitigation and compensation that all parties can agree to. If not, Belo Monte will follow in the footsteps of HidroAysén—reduced to a footnote in efforts to address the region's expanding energy needs.

Man vs. machine: A Munduruku man surveys the quarry at Belo Monte dam in May 2013.

TAYLOR WEIDMAN/LIGHTROCKET VIA GETTY

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By Angela Bunch

CONTRADICTION IN INTERNATIONAL LAW

Do communities get a veto? International law isn't clear on the matter.

Indigenous peoples' control over natural resources continues to be one of the most controversial issues in international law.[1] Numerous international human rights treaties recognize Indigenous communities' right to be consulted over the use of resources on or beneath their communal lands. But international law tends to consider third parties' exploitation of natural resources on Indigenous land to be legal—as long as Indigenous rights to consultation, participation and redress, among other rights, are met.[2]

But there are disputing interpretations of whether Indigenous communities have the right to free, prior and informed consent (FPIC)—the right not only to be consulted about, but to reject activities that adversely affect them.

This is evident in the two main international human rights instruments that apply specifically to Indigenous peoples: the legally binding ILO 169 (1989), and the non-binding United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[3] While ILO 169 does not clearly recognize Indigenous and tribal peoples' right to veto measures or investment projects that they oppose, UNDRIP does.

The ILO Committee of Experts on the Application of Conventions and Recommendations[4] has declared that under ILO 169, Indigenous peoples' ownership and possession rights can be subordinate to the interests of states, if states retain ownership of subsoil resources and comply with the following:

- Consult with Indigenous communities before natural resources on their lands are explored or exploited;
- Ascertain the impact of resource extraction;
- Provide Indigenous communities a fair share of the benefits accruing from any natural resource extraction; and
- Provide fair compensation for any damages caused by natural resource exploration and exploitation.[5]

ILO 169 also declares that "relocation of these peoples [...] shall take place only with their free and informed consent." If consent is not granted, states must follow procedures established under national law to allow for the "effective representation" of the communities involved before relocating them.[6]

While ILO 169 sets the standards that should be met under any consultation (including a "genuine dialogue" between governments and Indigenous peoples and an "objective of reaching agreement or consent"), it does not state explicitly whether Indigenous peoples have the right to veto.[7]

UNDRIP, on the other hand, establishes that "Indigenous peoples shall not be forcibly removed from their lands or territories," and that states need to obtain Indigenous peoples' free and informed consent before the approval of any project or legislative or administrative measure that may affect them.[8] This is a major step in the advancement of Indigenous peoples' right to veto.

In light of these differing interpretations, what should happen when consultations do not take place, go sour, or when Indigenous peoples do not consent? In the Americas, Indigenous peoples' territorial rights have been interpreted primarily through cases that have come before the Inter-American Human Rights System (Commission and Court). In 2002, the Court declared that Indigenous peoples' "right to property over natural resources may not be legally extinguished or altered by State authorities," unless they obtain the peoples' full and informed consent, and comply with other legal requirements.[9]

What should happen when consultations do not take place or go sour?

But in later judgments and opinions, the Court has suggested that FPIC is not required, as long as a consultation process has been carried out in line with the recommendations of the ILO Committee of Experts—"undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures"[10]—except in cases where development projects involve displacement, deprive communities of the use of their lands, or involve the storage or disposal of hazardous waste.[11]

Recently, the Court endorsed a qualified FPIC that differentiated between small and large-scale development projects.[12] The judges ruled that for large-scale projects, states must not only consult with Indigenous peoples, but also obtain their free, prior and informed consent; but small-scale projects require only consultation.[13]

Exactly what constitutes a small- and a large-scale project was not set and appears to have been left up to judicial interpretation.

This approach attempts to reconcile the rights of Indigenous people with those of states and investors. But does it adequately protect Indigenous rights? The answer remains unclear.

Angela Bunch *has an LLM in international human rights law from Oxford University.*

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COMMUNITY CONSULTATION: TwoViews

A View from Indigenous Peoples

The Guatemalan state has failed in its obligations to consult Indigenous peoples, so we are exercising our right to make decisions through our community consultations. We believe they are binding.

By Mash-Mash and José Guadalupe Gómez

Guatemala is a plurinational country that 22 Maya nations, Xinka, Garifuna, and Ladino people jointly call home. The efforts to gain access to natural resources—often without the consent of the communities affected—constitute another stage in the long history of dispossession and repression of Maya peoples since colonization.

The Maya peoples' understanding of Earth stands in conflict with capitalism. To capitalists, Earth is defined as a source of raw materials that can be sold to the highest bidder. Maya people, in contrast, do not place a monetary value on our natural resources. We call Earth "*Qtxutx'Otx*,"[1] or Mother Earth, because she gives us life, water, air, fire, and nourishment, and she protects us. We are part of her and she of us.[2]

Since the Spanish invasion in 1524, the Maya have been systematically robbed of their land and exploited. Colonialism imposed the feudal system of *encomienda* (share cropping) and dispossessed communities of their land. The repression increased under President Justo Rufino Barrios (1873–1885) in the so-called Liberal Reform, when Indigenous peoples' communal lands were divvied up among landowners and businessmen for coffee and later banana plantations.

The overthrow of President Jacobo Árbenz in 1954 unleashed over three decades of violence that directly affected and often targeted Indigenous peoples. According to data from the *Comisión para el Esclarecimiento Histórico* (Commission for Historical Clarification—CEH) and the *Proyecto Interdiocesano de Recuperación de la Memoria Histórica* (Inter-Diocesan Recovery of Historical Memory Project—REMHI), more than 1 million people were displaced, hundreds of communities destroyed, and more than 250,000 people killed or "disappeared" during the armed conflict. Other victims include 80,000 widowed women, 200,000 orphans, 700,000 people conscripted by paramilitary groups such as the *Patrullas de Autodefensa Civil* (Civil Self-Defense Patrols), and more than 50,000 identified and 25,000 unidentified refugees.

A new Constitution of the Republic, established in 1985, opened certain opportunities for Indigenous peoples and marked the beginning of a transition. An end to the armed conflict came in December 29, 1996, with the signing of the Agreement on a Firm and Lasting Peace; but the accord and its commitments had been negotiated by and among established economic interests. As a result, 17 years after its signing, less than 5 percent of its goals have been met; objectives like bilingual education and the reduction in the size of the military have fallen by the wayside.

MINING AND THE MAYA PEOPLES

Today, the Maya are experiencing another stage in their history of marginalization and dispossession. A new threat comes from the exploitation of the Mesoamerican Biological Corridor—a large corridor connecting national parks and nature refuges in Mexico and Central America—by multinational corporations in alliance with local governments and oligarchies.

The exploitation violates domestic and international laws that protect the rights of Maya and other Indigenous peoples. During the peace process in 1996, Gua-

FORGE DAN LOPEZ/REUTERS

temala ratified International Labour Organization Convention 169 (ILO 169), commiting the state to honoring the rights of Indigenous peoples, including their right to be involved and make decisions through their own representative institutions in processes affecting their land, territories and natural resources.[3]

After the peace accord, Guatemala turned to the development of the country's natural resources to create economic prosperity, peace and progress. However, the government ignored its obligations to respect the human rights of Indigenous peoples. We were never asked to participate in discussions on decisions about the development of resources on our lands and territories. The Congress of the Republic passed various laws and regulations that further violated our rights—among them, the Mining Law of 1997, which sought to privatize the state's assets, companies and resources.[4] No Indigenous peoples were ever consulted about this law—a clear contravention of the American Convention on Human Rights,[5] as well as ILO 169[6] and Guatemala's own constitution.

Currently, the Ministry of Energy and Mining has authorized 345 exploration and exploitation licenses for precious metals and minerals for multinationals such as Goldcorp Inc., Nichromet Extraction Inc. and Tahoe Resources Inc. In addition, the state has also granted hundreds of permits for oil production and the construction of hydroelectric plants and megaprojects such as the Northern Transversal Strip, the Dry Canal—which involves building a highway, a cargo rail line and other infrastructure in six Guatemalan departments—and the extension of an electrical grid by TRECSA to provide energy to mining and agricultural companies.

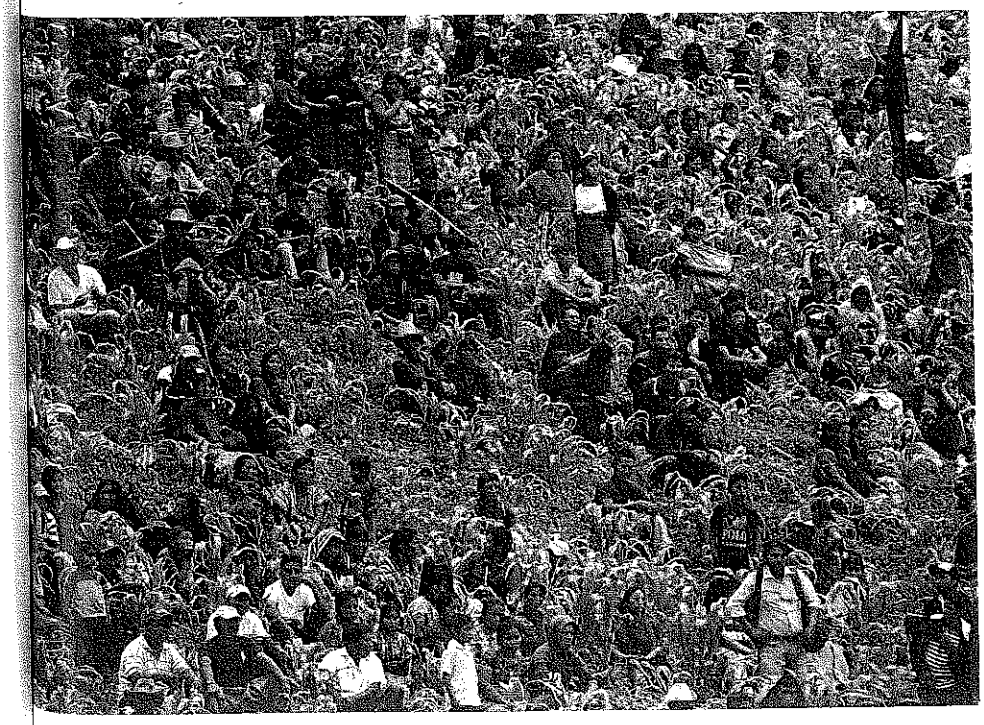
These licenses are evidence of the government's failure to comply with its obligations to Indigenous rights over our ancestral lands and our right to self-determination.

OUR RIGHT TO MAKE DECISIONS RELATED TO OUR LANDS AND RESOURCES

Since the state has failed to meet its own obligations of consultation, our communities are exercising our rights, which are also recognized by national and international laws.

The Maya, Xinka and Garifuna peoples have come together and reconstituted our own forms of self-government and ancestral organization. The *Consejo Plurinacional del Pueblo Maya* (Plurinational Council of Maya Peoples—CPO) is the political manifestation of Guatemala's Indigenous peoples. Today, the Council comprises representatives of the Mam, Sipakapense, K'ichè, Kaqchiquel, Q'anjob'al, Chuj, Akateko, and Poptí peoples, among others.[7]

To date, more than 75 community consultations have been carried out in good faith. More than 1.5 million people—women, men, children, and elders have participated. They have said an overwhelming "no" to the imposition of mega construction projects and the development of their territories. The community consultations are binding because they represent the peoples' voice and decision, and no other laws



JORGE DAN LOPEZ/REUTERS

A protest in San Juan Sacatepéquez in July 2013.

or private interests can take precedence over them. They have halted the advance of companies in Indigenous territories, obligating the government to declare a moratorium on new mining licenses. The moratorium, however, does not solve the root of the conflict.

The self-government of Maya peoples and their legal system includes consultation as one of its key principles and foundations. The goal of consultation is consensus and mutual agreement for the attainment of *tb'anil qchwinqlal*, or *el buen vivir* (life with dignity). All community members are called upon to fulfill this community norm. The Pop u'j—one of our sacred books—describes our traditional thinking and this ancestral legal process: "and so they sat, they came together, united their thoughts and words, and came to an agreement."[8]

THE STATE'S RESPONSE

The government, the oligarchy and multinational corporations have repressed Indigenous peoples who have fought for their land rights—portraying us as being against development. The repression has increased in response to social and political conflict. Our lands have been militarized and some of our leaders have been persecuted, criminalized and assassinated.

On October 4, 2012, for example, the administration of Otto Pérez Molina mobilized the armed forces to crush a peaceful protest over constitutional and educational reforms and against increases in the electricity prices in Totonicapán, killing six citizens of the K'iché people.

In 2013, leaders of the Maya, Xinka, Garifuna, and Mestizo peoples were repressed and terrorized because of various conflicts stemming from mining, hydroelectric projects, the agro-industrial sector, petroleum prospecting, and protected areas. The list of victims is getting longer across the country. For example, in Huehuetenango, an arrest warrant was issued for Rigoberto Juárez; Rubén Herrera was jailed; and Daniel Pedro Mateo was murdered—all for speaking out against the Spanish capital-backed hydroelectric power station Hidro Santa Cruz.

RECOGNITION OF OUR RIGHTS

National and international norms and institutions have sided with us. The Constitutional Court declared in 2009 that "Indigenous peoples' right to consultation is a fundamental right and collective in nature, through which the state is obligated to establish, in good faith, procedures that seek to determine the views and the free and informed consent of these communities whenever government actions—be they administrative or legislative—may have a direct impact on them, with the goal of establishing agreements or measures that have their welfare in mind."[9]

However, in its decision, the Court also stated that "the consultations are not binding," showing a clear inclination toward the interest of the oligarchy and multinational corporations.[10]

In contrast, Dinah Shelton, then-special rapporteur for Indigenous peoples at the Inter-American Commission on Human Rights (IACHR), emphasized, "Consultation and consent are not limited to subjects that affect Indigenous territorial rights, but also any administrative or legislative actions by states that have an impact on the rights or interests of Indigenous peoples."[11]

MINING CONFERS FEW BENEFITS

Most of the revenue generated by mining goes to the company, and of the small fraction of taxes collected on company profits by the national government, very little flows back to the communities. At the same time, mining often brings negative effects such as the contamination of surface and subterranean waters, air pollution, harmful effects on human and animal health, death of flora and fauna, deforestation, and soil erosion. It has also generated social conflicts and divisions.

Last but not least, natural resource extraction also jeopardizes food production by using (and often polluting) land that communities rely on to feed themselves.

Our Plurinational Council, through its legal commission, filed a petition before the IACHR in defense of our territory and rights in September 2013.[12] Our peoples, acting through our legitimate authorities, filed suit against the Guatemalan state for violating our rights through the 1997 Mining Law, approved after Guatemala had already ratified ILO 169.[13] Nonetheless, during this new *B'aqtun* (Maya long count of 5,200 years) and in spite of this difficult situation, our peoples will continue exercising our rights in pursuit of a good, full life for all of humanity.

Mash-Mash *and* **José Guadalupe Gómez** *are members of the Maya Mam Nation Council and the Plurinational Council of Maya Peoples (CPO).*

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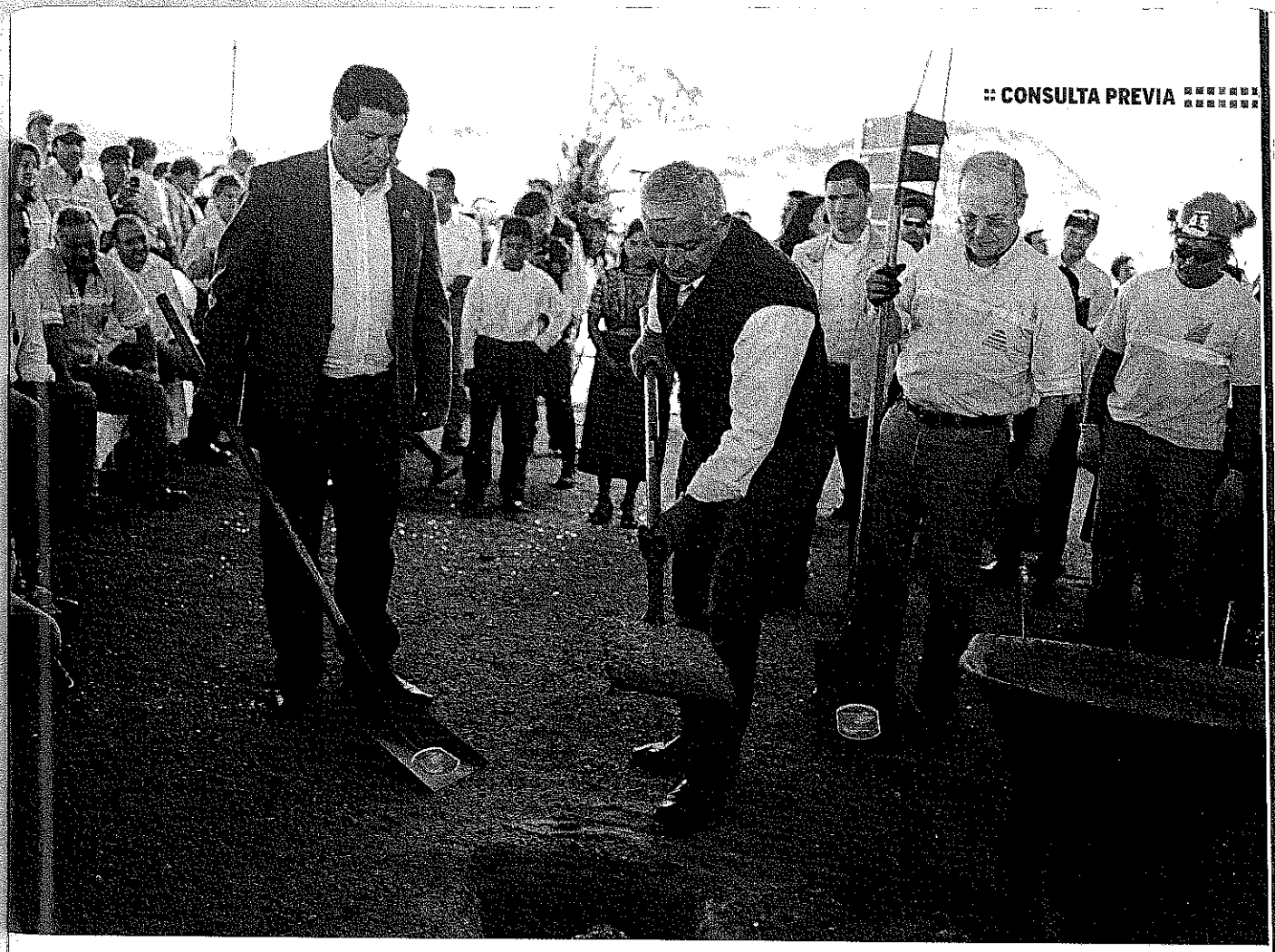


Cementing the deal? Guatemalan President Otto Pérez Molina pours the first shovel of cement for the contested factory in San Juan Sacatepéquez in July 2013.

A View from the Private Sector

Lack of clarity of the regulations and lack of good faith by a small number of community leaders have slowed and even halted important investments in Guatemala. The real losers are the communities that ILO 169 is intended to defend.

By Cementos Progreso, S.A.

JOHAN ORDONEZ/AFP/GETTY

Guatemala ratified International Labour Organization Convention 169 (ILO 169) on June 5, 1996, more than a year after Guatemala's Constitutional Court, the highest court in the country, ruled in Document 199-95 that the Convention did not contradict the Guatemalan Constitution.[1]

But the lack of clarity in ILO 169 and the absence of clear national guidelines for setting up a *consulta previa* process, despite the Court's decision, have left the door open for conflict and misinterpretation that has harmed, rather than helped, the people the Convention intended to serve. Nearly 10 years later, Guatemala still does not have a clear path for the development of regulations that can balance commercial and investment interests with the rights of Indigenous peoples.

Guatemala isn't alone. Latin American countries make up the largest group of signatories to the Convention: as we like to say, ILO 169 "speaks Spanish." Of the 185 ILO member states, only 22 have ratified the Convention—and 13 of those countries are Spanish-speaking Latin American states.[2] Yet most of them are still waiting for clear guidelines about how to proceed.

Article 6 of ILO 169 obligates states to consult with Indigenous communities on all the "legislative or administrative measures that might directly affect them." Many countries, lacking the capacity to exploit their nonrenewable natural resources, have granted concessions to private companies in exchange for tax revenue. That has provoked conflict.

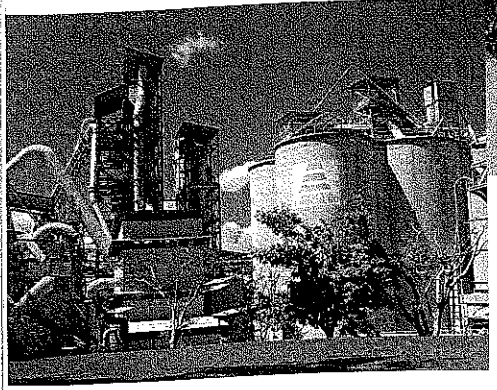
But today, the right has expanded to other areas: decisions to approve laws, build schools and roads to distant communities or spray illicit crops.

THE COMPLEXITY OF CONSULTATION IN GUATEMALA

Most of the movements that claim to represent and uphold the defense and rights of Indigenous peoples in Guatemala, including the defense and promotion of *consulta previa*, have common characteristics. They emerged from the conflict and the peace negotiations; they make intensive use of social networks and communications; and they are led by a few leaders who monopolize the causes of excluded, minority groups. In their name, they fight for land rights, for ancestral rights over natural resources, and against discrimination.

Although these movements proclaim passive resistance, their methods and actions can turn violent and sometimes fatal. When members of the groups are prosecuted, they rely on special treatment and denounce what they call the criminalization of social protest. In reality, they are engaging in criminal acts such as attacking company employees and trespassing. As a result, they avoid conviction and remain outside the law.

The leaders of these movements are also active internationally. They frequently use forums like the Inter-American Human Rights system to denounce the lack of consultation on the projects—often bypassing the requirement that groups must have exhausted all domestic judicial recourse before receiv-



The San Miguel factory in El Progreso, Guatemala, produces more than 7,000 tons of cement daily (left). **The company invests more than $18 million in reforestiation programs** (above).

CEMENTOS PROGRESSO (2)

ing a hearing at the Inter-American Commission on Human Rights. As a result, the burden of proof is placed on the state and the private company holding title to the concession through a contract or license.

Quite frequently, even after no incriminating evidence is found against the accused entity following an investigation, no favorable pronouncement is released. But unfortunately, none of these decisions offers compensation for the damage suffered to the reputation of the state or the private investor.

THE IMPACT

In Guatemala, in cases related to firms such as Cementos Progreso, the government has been put on the defensive even when all parties to the agreement have played by the rules. Many communities have undertaken what are erroneously named "community consultations" related to mining projects, but which are, in fact, plebiscites that manipulate information about a project to ensure its rejection.

The fact that such false consultations take place underlines the central problem of lack of clarity. The problem was recognized by former UN special rapporteur on the rights of Indigenous peoples, James Anaya, who said in a preliminary report on his June 2010 visit to Guatemala that, "The absence of a legislative and institutional framework for this subject has resulted in consultation processes that are, at the very least, inadequate from the point of view of international standards recognizing the rights of Indigenous peoples."[3]

Meanwhile, those whom the Convention was intended to benefit have only continued to suffer. In Guatemala, the economic condition of Indigenous peoples, who make up more than 50 percent of the population, has not improved since the government signed ILO 169 in 1996. Some 73 percent of Guatemala's Indigenous communities live in poverty; 28 percent live in extreme poverty.[4] The foreign investment that could have brought jobs and raised standards of living has been sadly absent. Concerns about crime and violence, the lack of qualified labor and deficient infrastructure have been factors, along with the mounting uncertainty over property rights.

So why has a convention on Indigenous rights, created by an organization supposedly dedicated to creating dignified and decent jobs, impeded investment that would bring work and development to those most in need of it? Was this the original intention of this political instrument, or has it simply been used by multinational groups with ideological interests who are determined to block investments, promote institutional instability or nationalize industries?

When the international and Guatemalan advocates for ILO 169 can start answering these concerns, solutions will start to emerge.

Guatemala has large, unexploited mineral reserves that represent a great opportunity. Although most of the projects extracting non-renewable natural resources are developed on private property, the most recent examples of consultation—again, the misnamed "community consultations"—have been manipulated by diverse social groups from across the country that do not represent the people living near the projects.

Instead, the local communities have become tools of a broader anti-mining campaign. As a result, a mechanism that was intended to aid sustainable community development has become an obstacle to that very end.

LOCAL COMMUNITIES HAVE BECOME TOOLS OF A BROADER ANTI-MINING CAMPAIGN. AS A RESULT, A MECHANISM THAT WAS INTENDED TO AID SUSTAINABLE COMMUNITY DEVELOPMENT HAS BECOME AN OBSTACLE.

OUR CASE

Since 2006, Cementos Progreso, a company with 100 percent Guatemalan capital, has invested more than $478 million (of $800 million in total) to develop the San Gabriel project in the municipality of San Juan Sacatepéquez, one of the poorest areas of the country just 12 miles (20 km) from the capital.

Our aim was to generate industry, development and prosperity through five components: the construction of a cement plant with an investment of $750 million;

the development of education programs to benefit the children of the area; the establishment of reforestation programs with investments amounting to $18 million; the establishment of alliances between the *Secretaría de Planificación y Programación de la Presidencia* (Ministry of Planning and Programming—SEGEPLAN), the municipality and the company to design and execute development plans for the project's zone of influence, with an investment of $250,000; and finally, the construction of a nine-mile (14.5 km) stretch of highway at a value of $63 million that will form part of the regional ringroad, indirectly benefiting over 600,000 people in the northwest of the country—an historically abandoned area due to lack of infrastructure.

As a firm with one of the longest histories in Guatemala, having produced cement and superior aggregates for over 114 years, Cementos Progreso has provided work for more than 6,000 Guatemalans. Since 2007, the company has paid the state over $500 million in taxes. In the past 10 years, our corporate foundation, the Carlos F. Novella Foundation, has provided technical and financial assistance to education programs benefiting more than 1,500 teachers, 650 schools, 260,000 children and youth, and approximately 1,300 adults.

THE GOVERNMENT MUST PROMPTLY ESTABLISH CLEAR AND DEFINITIVE GUIDELINES FOR *CONSULTA PREVIA* AND ENFORCE THOSE NORMS.

We have attempted to engage local communities and comply with the letter and spirit of ILO 169, despite the lack of clear guidance on the issue. The company has participated in all the initiatives and efforts of the government to promote dialogue between the parties concerned.

Nevertheless, isolated but important instances of confrontation have occurred in San Juan due to information irresponsibly manipulated and disseminated by regional and national Indigenous, *campesino* and environmental organizations. A few small groups have even threatened the communities who support the project and the company. Their tactics have prevented an informed, balanced discussion of the project. And in some cases, they have blocked workers' access to the site, harassing employees and surrounding communities.

Notwithstanding this opposition, the Guatemalan government, through its 2010 *Memoria de Labores* (Annual Work Report) from the Ministry of Labor and Social Prevention to the ILO Committee of Experts on the Application of Conventions and Recommendations, approved the ongoing dialogue that Cementos Progreso was conducting.

The Guatemalan government's report to the Committee of Experts regarding the implementation of ILO 169 said that the consultations Cementos Progreso has conducted over the previous three years were in accordance with the spirit of Article 15, Number 2 of ILO 169.[5]

"Therefore," the report concluded, "the commitment to carry out a process of *consulta previa* for the construction of the cement plant in San Juan Sacatepéquez has been complied with, although to date there still exists a diffuse social leadership, which does not represent the legitimate interests of local communities and is determined to obstruct the development of the project [....]"[6]

It should be mentioned that the national and municipal governments, the local communities and the company keep an open space for dialogue, in the spirit of consultation that is "without end."

Given Guatemala's dire economic situation and the challenges to investment in the country, the government must promptly establish clear and definitive guidelines for *consulta previa* and enforce those norms.

Not all companies, Guatemalan or foreign, can make such enormous efforts to carry out projects as we have. In truth, if the government doesn't step up soon and define and enforce specific regulations to govern *consulta previa*, our economy will suffer.

Worse, opportunities for those who need them most will be delayed or lost.

Cementos Progreso S.A. *is a Guatemalan company that has been dedicated to the production and commercialization of cement, concrete, lime, and other construction materials and services for more than 114 years.*

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THE RISE OF POPULAR CONSULTATIONS

By Diana Rodríguez-Franco

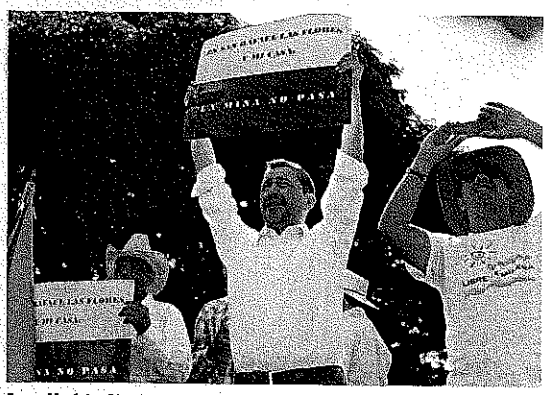
Are community popular consultations binding?

On a hot Sunday morning in July 2013, the inhabitants of Piedras, a small municipality in the Colombian Andes, gathered to decide whether large-scale mining activities should be permitted in their territory.

Piedras, traditionally a rice farming community, could soon be a neighbor to one of the biggest open-pit mining projects in the world. The South African transnational AngloGold Ashanti announced plans to exploit gold reserves at La Colosa—56 miles (90 km) from Piedras and estimated to contain 24 million ounces with a current market value of $31 billion—within the next two years. The farmers in Piedras, a non-Indigenous *campesino* community, fear that La Colosa's tailings dam, which would be built in the municipality, will pollute and reduce their water supply.

Last year, when the project was put to a vote through a popular referendum known as a *consulta popular*, or popular consultation, 99 percent of Piedras' 5,105 eligible voters said "no." However, the Colombian government has dismissed the results of the consultation, saying municipalities do not have the right to determine subsoil use. Meanwhile, as exploration continues at La Colosa, AngloGold Ashanti has offered jobs, improved local roads, housing, and health facilities—and even given money for the local soccer team—in an effort to gain community support.

Popular consultations like the one in Piedras have become increasingly common in Latin America in the past decade. Beginning in towns like Tambogrande, Peru, in 2002, Esquel, Argentina, in 2003, and Sipacapa, Guatemala, in 2005, communities across the region—many of them non-Indigenous—have been using this form of direct democracy to overwhelmingly reject extractive projects. In Guatemala, local communities rejected extraction projects in 74 different popular consultations between 2005 and 2012.



Legally binding? In Guatemala, which has staged a number of popular consultations, a protester holds up a sign, "[...] in my house, the mine does not pass."

Popular consultations are now occurring throughout the hemisphere alongside the mechanism of *consulta previa*, and are gaining attention as an alternative way for communities to register their concerns about extractive projects.

International Labour Organization Convention 169 gives Indigenous and tribal peoples the right to be consulted before the adoption of any legislative or administrative decision that could affect them. In contrast, popular consultation is codified in national legislation and enables any eligible voter (including, but not limited to Indigenous and tribal peoples) to decide any issue of importance to the community. Popular consultations also differ from prior consultations in the manner in which they are carried out: while prior consultations are meant to involve a process of ongoing discussion and dialogue between the government and community, popular consultations usually involve a single yes-or-no vote by ballot.

Popular consultations can inspire civic participation in a way that traditional elections do not. In the oil-producing Colombian municipality of Tauramena—where 96 percent of 4,610 eligible voters said "no" to additional exploratory activities by Colombia's state oil company, Ecopetrol, in 2013—more people participated in the consultation than in the regular mayoral election.

The degree to which popular consultations are considered legally binding is a source of great debate, and depends on national legislation. In Colombia, as in most of Latin America, the Constitution states that subsoil resources are owned by the national government and not by the owners of the land. In December 2013, Colombian President Juan Manuel Santos said in an interview with *El Espectador* that popular consultations like the ones in Piedras and Tauramena are "illegal and have no legal effect. The subsoil belongs to all Colombians. There is no room for discussion."

Yet Colombian law (Law 134 of 1994, Article 8) says it is obligatory for national authorities to respect the results of popular consultations. The increasing use of these consultations has fueled an intense national debate about which level of government should have the power to decide on the use of natural resources in the subsoil.

As popular and prior consultations increase, they are viewed by some as obstacles to economic development. But they may help reduce the rising number of socioenvironmental conflicts in Latin America. Such mechanisms could also provide the impetus for a resource extraction process that takes into account communities' views of what development should look like.

Diana Rodríguez-Franco *is a PhD candidate in sociology at Northwestern University and an affiliate researcher at Dejusticia.*

PHOTOGRAPH BY JAMES RODRIGUEZ

Oh! The Places You'll Go

AQ CHARTICLE

Want to complete a *consulta previa*?

In most countries the process isn't always clear or direct. Who does it, how to do it and how long it can take varies from country to country—a reflection of the vagueness of ILO 169 and the uneven development of government regulations across the hemisphere. To compare, here are the steps you would need to take in Chile, Colombia, Guatemala, and Peru.

CHILE

While decrees and regulations have been approved in Chile, they are still being tested, especially as they involve the role of the government as mediator and guarantor. There has also been some confusion between the narrower process of community consultation on environmental impacts—and the *estudio de impacto ambiental* (environmental impact study—EIA)—as well as the scope of the consultation within the community.

1. Planning

What is done: 1) Company or organization proposing project must turn in information to the *Servicio de Evaluación Ambiental* (SEA) on measure to be consulted with Indigenous populations; 2) Indigenous community and petitioning organization jointly determine methods, agreements to be decided, how to distribute information, and logistics.

Who does it: Company or organization proposing project submits application to SEA, which then coordinates with affected communities.

What's produced: A description of methods used. If there is no agreement, petitioning party must record what occurred and methods it will use to protect principles of consultation.

20 BUSINESS DAYS

(THE PETITIONING PARTY CAN MODIFY THE DEADLINES DURING THE PLANNING STAGE.)

2. Education and Information Dissemination

What is done: Petitioner provides information to Indigenous community on: measure to be consulted; objectives of investment or project; and expected area of impact of measure. If necessary, information must be given in the Indigenous language, using culturally appropriate methods.

Who does it: Company or organization proposing project. Ministry of Social Development and National Corporation of Indigenous Development maintain information for project and its proposed implementation.

What's produced: Information on the project and its expected impact.

20 BUSINESS DAYS

3. Internal Deliberation by Indigenous Communities

What is done: Designated Indigenous communities analyze, study and determine their position on measure to develop consensus for dialogue that follows.

Who does it: Indigenous communities, though the government can assist communities in understanding the matter being consulted.

What's produced: Consensus among the community for dialogue that follows.

20 BUSINESS DAYS

4. Dialogue

What is done: Discussion of measure to be consulted between affected parties—petitioning organization and Indigenous community—using culture, language and tradition of the community.

Who does it: Petitioning organization and community, with SEA serving as mediator and directing process of consultation.

What's produced: Agreements and disagreements are recorded, as well as mechanisms and methods to follow up, monitor and, if necessary, continue process over points of disagreement.

20 BUSINESS DAYS

5. Communication of Results and Terms of Consultation

What is done: Develop a detailed account of the consultation process, evaluate the consultation, the agreements reached and the disagreements. If a legislative measure is required, the president of Chile must initiate the process.

Who does it: Petitioning party, with the government.

What's produced: Final report detailing process, agreements and disagreements. Petitioning party can modify deadlines during planning stage, with agreement of the Indigenous communities.

20 BUSINESS DAYS

Relevant norms, decrees, laws and regulations: *Constitución de la República de Chile (artículo 5); Decreto Supremo N°236/2008, Ministerio de Relaciones Exteriores; Ley N°19.253 (artículos 34 y 35); Ley N°19.300 (artículo 4); Decreto Supremo N°40/2013, Ministerio del Medio Ambiente (artículo 85); Decreto Supremo N°124/2009, Ministerio de Planificación; Decreto Supremo N°66/2013, Ministerio de Desarrollo Social.*

COLOMBIA

The government assumes a more central role in the process in Colombia, with the specially created *Dirección de Consulta Previa* (Office of Prior Consultation—DCP) in the Interior Ministry making the determination of when the norm and process should be applied, convening the communities, conducting the consultations, and guaranteeing that the agreements will be upheld.

1. Request

What is done: Investor or organization proposing a project that may require *consulta previa* presents request to *Dirección de Consulta Previa* (DCP) in Interior Ministry.

Who does it: The investor or organization proposing project. DCP receives and verifies the request.

What's produced: DCP verifies whether request contains all relevant information to identify location of the project or activity (coordinates). Should this not be enough, DCP, within three days, should request further information from investor to fulfill this duty.

NO TIME LIMIT

2. Review

What is done: Government studies request a determination whether project requires *consulta previa*, including if there are ethnic communities in project area. If necessary, government conducts field visit.

Who does it: DCP.

What's produced: An administrative act that includes: when certification was submitted; brief description of activity; identification of affected areas; information-gathering methods; identification of certified communities and legal representatives; and the decision on whether *consulta previa* is required.

15 BUSINESS DAYS

3. Preparing for Consultations

What is done: When community groups cooperate, DCP provides assistance to initiate consultation.

If they do not cooperate, the DCP sends three notifications during *preconsulta* stage and then two more during *consulta* stage. If communities still do not attend, consultation concludes, and DCP notifies *Defensoría del Pueblo, Procuraduría General de la Nación, Instituto Colombiano de Antropologia e Historia* and others to discuss if activity should proceed.

Who does it: DCP, community representatives, petitioner, *procuraduría*, and ombudsman.

What's produced: Notifications and strategies for consultation process.

NO TIME LIMIT

4. Preconsultation

What is done: DCP defines team, convenes communities in a series of preconsultations in which they determine how consultation will be carried out. DCP presents information regarding rights of *consulta previa* and details of the project to be discussed.

Who does it: DCP

What's produced: The methodology and protocol to guide the actual consultation process.

NO TIME LIMIT

5. Consultation

What is done: Meetings held to identify and analyze impact of proposed project, develop means to address or mitigate them, and reach agreement on how to resolve potential conflicts.

Who does it: DCP convenes meetings and oversees consensus-building process.

What's produced: A set of written, formal agreements between community and petitioner; in absence of agreement, a document detailing disagreements.

NO TIME LIMIT

6. Guaranteeing Agreements

What is done: Consultation is closed, and parties agree on follow-up and monitoring.

Who does it: DCP with petitioner and community, as well as environmental authority, *procuraduría*, and *defensoría*.

What's produced: Requirements for periodic follow-up on agreements reached.

NO TIME LIMIT

GUATEMALA

In the absence of defined national regulations governing *consulta previa* in Guatemala, the existing processes have taken place under the municipal code with the local government, raising the complication of national coordination on the topic.

1. Request

What is done: At least 10 percent of registered voters or Indigenous authorities request consultation.

Who does it: Community members who consider their interests are being affected by a project request consultation and present it to municipal council.

What's produced: Request for consultation.

NO TIME LIMIT

2. Review

What is done: Municipal council decides whether to accept or reject request to carry out consultation.

Who does it: Two-thirds of council members must vote to accept request for a consultation.

What's produced: A decision to go forward or not, and the procedure for consultation.

2 MONTHS

3. Information Dissemination

What is done: Inform community that process will take place.

Who does it: Community.

What's produced: Community receives information about event.

2 MONTHS

4. Consultation

What is done: Voting in ballot designed specifically for the purpose, with date, place and issue to be decided. If in an Indigenous community, process is done using traditional methods.

Who does it: Municipal government organizes the event and municipal electoral tribunal oversees voting.

What's produced: A community decision.

1 DAY

5. Vote Counting and Decision

What is done: Vote is counted. Decision is official if at least 20% of registered voters in community participate.

Who does it: Municipal electoral authorities tabulate vote and notify Ministry of Energy and Mines (MEM) of outcome.

What's produced: An act sent to MEM. However, the Guatemalan Supreme Court ruled in 2009 that community consultations are not binding.

8 DAYS

"The Guatemalan Supreme Court ruled in 2009 that community consultations are not binding, even when 90% of voters rejected a project."

Relevant norms, decrees, laws and regulations: *Constitución Política de Guatemala (Artículos 66 al 69); Acuerdo sobre Identidad y Derechos de los Pueblos Indígenas; Código Municipal. (Artículos 17 y 20). Capítulo 1 Información y participación ciudadana (Artículos 63, 64, 65 y 66).*

PERU

Of all the countries in the study, Peru has made the most advances in defining the steps to request and conduct a *consulta previa*, what qualifies as a potential reason for *consulta previa*, and the state agencies responsible for defining, convening and negotiating the consultation with the communities. That has not meant, though, that the process is free of questions, concerns and even conflict.

1. Identification of the Need for a Consultation

What is done: Identification of legislative or administrative issues that require consultation based on collective rights, for example of language, land, water, or culture.

Who does it: Relevant government agency (for example, Ministry of Mining and Energy, Infrastructure, or Environment) consults with Vice Ministry of Intercultural Affairs (VCIM) to see if *consulta previa* is necessary. If determined that people affected are Indigenous and/or entitled to *consulta previa*, relevant government office carries out next steps of the consultation process with community or group, with technical assistance from VCIM.

What's produced: A decision on whether measure requires consultation.

NO TIME LIMIT

2. Planning

What is done: Relevant government office meets with representatives of Indigenous groups to inform them of measure for *consulta previa* and determine methods, rules and responsibilities, how to distribute information, and logistics.

Who does it: Relevant government office with assistance from VCIM.

What's produced: Consultation plan, including obligations and responsibilities of all parties in process, deadlines, method, access, transparency and publicity, and places and languages in which meetings will take place.

NO TIME LIMIT

3. Information Dissemination

What is done: Indigenous people receive proposal of measure to be consulted from the government in a culturally respectful manner and in appropriate languages.

Who does it: Relevant government office or agency.

What's produced: Documents are published on website of government agency responsible for consultation and disseminated through radio, TV and word of mouth.

NO TIME LIMIT

4. Ini… ab… Me…

What is done: Information is provided to affected community about measure: motives, implications, impact, and consequences of project—if necessary, using local language and customs.

Who does it: Relevant government agency with technical assistance of VCIM.

What's produced: Community understanding of proposal to be consulted.

1–2 MONTHS

(OR AS IS ESTABLISHED BY THE RELEVANT GOVERNMENT AGENCY. ALSO FROM THIS POINT TO DIALOGUE STAGE CANNOT TAKE LONGER THAN 120 DAYS.)

AQ CHARTICLE

5. Evaluation by Indigenous Communities

What is done: Communities analyze, measure, study, and determine their position and impact project will have on their collective rights.

If they come to a consensus:
1) Decision is documented and signed with signature or fingerprint;
2) Decision is given to relevant government agency;
3) Process ends and certificate of consultation is produced.

If they have modifications or questions: Dialogue stage begins.

Who does it: Indigenous communities.

What's produced: Consensus among community in favor of consulted measure OR consensus to go into dialogue stage.

If the Indigenous community does not respond within allotted time, the government begins dialogue stage. However, the community must present results of deliberation stage or organization will skip dialogue stage and go directly to the decision-making stage.

30 DAYS

"If the Indigenous community does not respond within the allotted time, the government begins dialogue stage."

6. Dialogue

What is done:
1) Dialogue between Indigenous community and relevant government office to reach agreement and consensus;
2) Disagreements that result from internal deliberation stage are presented;
3) Additional Indigenous communities can be added to process during this stage. It is understood that parties are negotiating in good faith toward finding points of consensus.

Who does it: Relevant government office and Indigenous community.

What's produced:
1) Petitioning organization can finalize dialogue process if it feels dialogue is not being conducted "in good faith," but it cannot finalize a decision;
2) Indigenous groups can refuse to participate, but petitioning organization must exhaust other possibilities for dialogue with Indigenous communities.

30 DAYS
(CAN BE EXTENDED UPON AGREEMENT OF BOTH PARTIES)

7. Decision

What is done: Analysis of suggestions and recommendations of community and verification that collective rights of Indigenous communities and environment are ensured. If consensus was reached during dialogue stage, it is binding for both parties. If consensus was not reached, it is the responsibility of relevant government agency to ensure protection of the Indigenous community's rights.

Who does it: Relevant government agency.

What's produced: Final report published on websites of petitioning organization. Report must include measure consulted, consultation methodology, process, and final decision and agreements.

NO TIME LIMIT

Compiled from information provided by: Jerónimo Carcelén and Valentina Mir (Chile); Diana María Ocampo and Juan Sebastian Agudelo (Colombia), Silvel Elías and Geisselle Sánchez (Guatemala), Cynthia Sanborn and Álvaro Paredes (Peru).

Relevant laws and regulations: Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT), y el Reglamento de la Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT).

BUSINESS RESPONSIBILITY TO RESPECT INDIGENOUS RIGHTS

A number of tools and standards are available to help businesses

While numerous United Nations mechanisms[1] have addressed the impact of business activities on Indigenous rights, it was only in 2011—with the UN Human Rights Council's unanimous endorsement of the UN Guiding Principles on Business and Human Rights—that the role of businesses in respecting, or abusing, these rights was officially acknowledged.

The Guiding Principles' "do-no-harm" approach was developed by Harvard University Professor John Ruggie, the UN special representative to the secretary general for business and human rights. They rest on three pillars.

1 States are obliged to protect against human rights abuses by companies.
2 Corporations are obliged to act with due diligence to ensure that their activities do not adversely affect the rights of those living on the targeted lands.
3 Victims of adverse impacts have the right to seek a remedy.

The Guiding Principles call on businesses to ensure, at a minimum, that—regardless of the size, location and type of project—their activities adhere to those rights contained in the International Bill of Rights and the International Labour Organization core conventions. Moreover, corporations should comply with the additional requirements under ILO 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), such as free, prior and informed consent (FPIC)—or *consulta previa*.[2]

Adhering to the Guiding Principles requires the following.

1 Policy Commitment

Human rights principles must be a policy within the company. That policy should be made clear to all personnel and business partners through compulsory training, and must also be communicated directly to affected Indigenous groups in their own language. A notable example is the policy adopted by

States are obliged to protect against human rights abuses by companies.

Repsol S.A., a Spanish multinational oil and gas company based in Madrid that mandates that all company employees recognize and respect Indigenous rights, irrespective of whether these rights have been incorporated into national legislation in the countries where it operates.[3]

2 Human Rights Due Diligence

Companies must identify, prevent, mitigate, and account for the human rights impact of their activities. Known as "human rights due diligence," this practice is understood to meaningfully involve Indigenous communities in every phase of a proposed project, including design, evaluation of potential impacts and implementation.

Such due diligence includes:

Impact Assessments Companies should incorporate human rights considerations into Environmental, Social and Health Impact Assessments (EISHAs).[4] These assessments, typically used by extractive industries, do not always include specific procedures to identify and address actual or potential human rights impacts. Whether they are contained in an EISHA or are produced separately, the assessments should be designed to include meaningful consultation that enables community members to influence decisions that may affect them, and to flag risks before they become abuses.[5] Prior consent of the affected community is necessary for resettlement or whenever the exploitation of Indigenous land or resources could affect cultural heritage.[6] If such consent is not forthcoming, a company should consider adjusting project design, or whether it can proceed with the project at all.[7]

Repsol S.A., for example, uses independent third-party studies based on interviews with a broad group of community members, local authorities and NGOs, to analyze real and potential impacts on Indigenous rights in the areas of operation. Following any study, an action plan to align operations with the company policy is developed, and implementation is reviewed each year.[8]

Integration of Findings Companies must integrate the findings of their impact assessments—on areas ranging from hiring and environmental management to gender equity—with relevant policies and procedures at every level.[9] For instance, to ensure that personnel are held accountable, a company may include human rights in key performance indicators for staff and provide relevant training.[10] For example, the staff at Colombia's Cerrejón coal mine, located in the La Guajira Department, receives training in the Indigenous Wayúu culture to better understand the group's relationship to nature, language, identity, culture, and ethnicity.

Tracking Monitoring for adverse human rights impacts should continue throughout the project, using qualitative and quantitative

By Paloma Muñoz Quick

integrate human rights concerns into their practices.

indicators that reflect the local context and Indigenous peoples' perspectives, and can often be developed and tracked in consultation with communities.[11] According to the Global Reporting Initiative, indicators can include:

- Internal process indicators that measure to what extent the company has established processes and procedures for human rights risk management, such as a grievance mechanism;
- Incident indicators that measure how often the activities of a company result in human rights abuses, for example how many community grievances have been logged in a given month;
- Outcome indicators measuring any changes in human rights–related areas that affect the standard of living of affected groups, such as the percentage of the local community with access to clean water.[12]

Communicating

Transparency is essential. Companies should regularly report to affected communities on the efforts they are making to respond to any identified human rights impacts, in a manner that allows stakeholders to evaluate the company's human rights performance. That includes, for instance, producing information in local languages and ensuring that it is widely disseminated.

The flagship human rights reporting example is the white paper "Talking the Human Rights Walk," produced by Nestlé. In 2013, Nestlé became the first major multinational to report publicly on the human rights impacts of its activities, and on the efforts it has made to address them at the corporate and country level.[13]

Speaking out: UN Special Rapporteur James Anaya (right) visits Peruvian Indigenous communities affected by industrial contamination.

CRIS BOURONCLE/AFP/GETTY

3 Remediation

When companies identify their responsibility for adverse human rights impacts, they should provide for, or cooperate in, their remediation. This can be done through the establishment of operational-level grievance mechanisms, such as hotlines, community relations offices or mediation roundtables, or by fully cooperating in any judicial process arising from adverse impacts. The grievance mechanisms should recognize the role of traditional laws and customs governing land use, and the authority of Indigenous governance institutions. Special attention should be paid to physical, linguistic, cultural, and gendered accessibility. Logbooks of reported grievances should be accessible to Indigenous communities to ensure transparency, and a periodic review of the mechanism should incorporate feedback from Indigenous communities.

A good example of such grievance mechanisms is BHP Billiton's efforts to address complaints of Indigenous communities at its former Tintaya copper mine in Peru. The company worked with local and international NGOs to establish dialogue and participated in a multi-stakeholder "Dialogue Table" where participants formed working commissions to investigate and resolve grievances relating to land, environmental impacts, sustainable development, and human rights. The resulting Tintaya Agreement established a three-year development fund for communities, and ensured ongoing joint environmental monitoring.

Since their creation, the Guiding Principles have gained acceptance. Many multinationals have adopted human rights due diligence measures of their own, not least because they offer protection against lawsuits and other liability issues.

A 2012 study found that 65 percent of mining companies were actively working toward compliance with the Guiding Principles.[14]

Companies seeking to prevent and mitigate adverse impacts on Indigenous communities have a number of resources at their disposal, including representative NGOs and government ministries in many countries with sizeable Indigenous populations. At the international level, the Human Rights and Business Country Guide identifies major Indigenous groups in a number of Latin American countries, and provides links to further resources and representative bodies.

Recognizing the special vulnerability of Indigenous peoples creates an opportunity, as well as a responsibility, for companies. The platform established by the Guiding Principles establishes a template for engagement that not only ensures sustainable, peaceful relationships with local communities, but creates long-term value.

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CONTE CONT

What's going wrong in South America with the development and application of domestic laws to implement

By Carlos Andrés Baquero Díaz

The right to free, prior and informed consent (FPIC), or *consulta previa,* has expanded throughout South America. Nine states have ratified the International Labour Organization's Convention 169 (ILO 169)—the principal treaty regarding *consulta previa.** But regulations created by four of those states—Colombia, Chile, Peru, and Ecuador—contradict the commitments they accepted when they ratified the treaty, in effect violating the right of Indigenous people to be consulted on administrative and legislative measures that could directly affect them.[1]

ILO 169 clearly establishes that before a government decides to begin an oil extraction project, change a law about logging, build a dam, or create a bilingual education law, it must consult in advance with local commu-

* The South American countries that have ratified ILO Convention 169 are: Colombia (1991), Bolivia (1991), Paraguay (1993), Peru (1994), Ecuador (1998), Argentina (2000), Venezuela (2002), Brazil (2002), and Chile (2008).

STED LANDS, ESTED LAWS

consulta previa, and how to change it.

nities and reach an agreement with them.

The right to *consulta previa* takes the form of a dialogue between the state and an Indigenous community. But since ILO 169 does not provide guidelines regarding how this dialogue should be structured and carried out, much of the debate in South America has focused on verifying what requirements are necessary for this dialogue to happen—such as who will participate and what the participants' functions will be. Since the pursuit of natural resources has turned the ancestral lands of ethnic peoples into zones of dispute, clear guidelines that govern the implementation and authority of ILO 169 are essential. Given the vagueness of the original convention, it has been up to individual countries to develop guidelines in the form of domestic regulations.

Such regulations can be a mixed blessing. Many national-level Indigenous and Afrodescendent organizations are opposed to domestic regulation, arguing that it will reduce the protection afforded to them by ILO 169. They claim it will be difficult—if not impossible—to create a universally acceptable procedure that takes into consideration both cultural differences and the differences in the types of projects being explored.

The validity of their concerns was demonstrated by the efforts of Colombia, Peru, Ecuador, and Chile to regulate *consulta previa*. Each country's measures varied in level of detail, but in all cases the mandated procedures actually reduced the level of protection afforded by international law and endangered the physical and cultural existence of Indigenous peoples.

COLOMBIA

In Colombia, the right to *consulta previa* has been regulated primarily through two presidential decrees and the judgment of the Constitutional Court. While the two presidential decrees did not, however, lead to an increased protection of rights, the Court's rulings have resulted in enhanced protection.

IT HAS BEEN UP TO INDIVIDUAL COUNTRIES TO DEVELOP GUILDELINES IN THE FORM OF DOMESTIC REGULATIONS.

Decree 1320, introduced in 1998, regulated the *consulta previa* process in natural resource extraction cases. It came under immediate criticism from national Indigenous and Afro-Colombian organizations, the ILO and the Colombian Constitutional Court. They claimed that the decree violated ILO 169 because there was no consultation with ethnic organizations. Specifically, the ethnic organizations argued that the decree established a fixed timeline for all consultation processes, which—according to ethnic groups—should be determined on a case-by-case basis. The ILO requested that the government modify the decree, guaranteeing the participation and protection of ethnic peoples.[3]

In 2013, the national government enacted another decree that sought to regulate the right to *consulta previa*, this time assigning different tasks to state entities to develop consultation processes.[4] This national measure was a repeat of 1998—enacted without the consultation of the Indigenous community and with content that violated the right to *consulta previa*. For example, the current decree protects only those communities that live in titled territories, ignoring those that live in ancestral territories.

In contrast to the lack of protection from the executive branch, Colombia's Constitutional Court has been a staunch supporter of strengthening *consulta previa* rights. For example, the Court has declared unconstitutional laws that were enacted without consultation with the communities—for example the General Forestry Law of 2006, which regulated logging. The Court has also incorporated the strongest protection standards—established by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which is another instrument of international law— within its jurisprudence.[5] When continued opposition from communities in the Chidima and Pescadito territories to the construction of a highway, an electricity project and a mine was ignored, the Court stepped in.[6] It declared that the community must give its consent if residents were going to be displaced, if toxic waste was likely to accumulate on their lands, or if the project was the opposite. The governments approved measures without consulting the appropriate Indigenous groups and their representative organizations.

PROPOSALS FOR REGULATION

Regulation is a critical tool for ensuring the right to *consulta previa*, but some efforts give more weight to the interests of extractive companies that want a fast-tracked consultation process. Countries have argued that national legislation is necessary for implementing the right to *consulta previa* because ILO 169 and the Inter-American Comission on Human Rights (IACHR) jurisprudence provide little support in developing a consultation process.

Meanwhile, Indigenous organizations argue that national and international courts must protect their right to *consulta previa*.

For national implementation of the right to *consulta previa* to be in accordance with international standards, states must keep the following four points in mind.

1 Issuance of the regulations must itself respect the right to *consulta previa*.
All national laws and decrees that regulate the implementation of the right to *consulta previa* must be subject to a consultation process. The cases of Colombia, Peru and Ecuador demonstrate

2 Regulations must reflect all international standards and treat them as a minimum baseline of protection.
Regulations must include all international standards—ILO 169, IACHR jurisprudence and the UNDRIP. In that way, they will be able to construct—collaboratively with ethnic groups—standards that better guarantee protection of the right to *consulta previa*.

likely to cause a social, cultural or environmental impact that put the community's existence at risk. In this ruling, the Constitutional Court explicitly adopted the international standards developed by the UNDRIP.

PERU

In 2011—in response to the deadly Bagua conflict of 2009—the Ollanta Humala administration enacted Law 29785, which regulates the right to *consulta previa*.[7] Yet by establishing that the consultation processes must take place within reasonable time frames and that the state has the right to make the final decision on a project—even if the groups oppose the measure—the law actually violated ILO 169, which explicitly rules out any time frame for consultation. More broadly, the right to FPIC cannot be upheld if the government is able to override the decision of the Indigenous community.

There were further problems when trying to detail the procedure for *consulta previa*. For one, the law did not define the process of how consultation should take place. In response, the government enacted the Supreme Decree No. 001 of 2012[8] and the Methodological Guide to fill these gaps.[9] Yet because Indigenous communities were not consulted in their development, some Indigenous organizations have opposed these tools. Additionally, the Supreme Decree has similar problems as the law: it includes a closed list of administrative and legislative measures that must be consulted; establishes a universal timeframe (120 days) for the prior consultation processes; and ignores the rights of Afro-Peruvians to *consulta previa*.

ILO 169 DOES NOT DEFINE A SPECIFIC LIST OF ISSUES OR MEASURES THAT MUST BE SUBJECT TO CONSULTATION.

ILO 169 does not define a specific list of issues or measures that must be subject to consultation. It also acknowledges that cultural differences may require differences in time frames for consultation, and refers to both Indigenous and tribal peoples, which could include Afro-Peruvians.

One of the most debated tools is the *Base de Datos de Pueblos Indígenas u Originarios* (Database of Indigenous or Native Peoples), which determines who is legally considered Indigenous and therefore has the right of consultation. In a class-action lawsuit presented to the Superior Court of Justice of Lima, the

3 Regulations must focus on the means of implementing *consulta previa*, not the content. National mechanisms should propose a general methodological framework of the right to *consulta previa* that outlines the steps that must be carried out in the process, the institutions that must participate and the costs of the process. Each consultation process is unique and includes the goal of protecting cultural diversity. As such, to guarantee the right the regulations should be seen as a tool that can help expand the application of *consulta previa* by the parties during each process, not limit it.

4 Regulations must respect the right to free, prior and informed consent. The right to *consulta previa* includes the right to free, prior and informed consent, not merely consultation. A meticulous reading of ILO 169 establishes that right. As such, national measures must protect the right to consent in two senses. First, the consultation process—as the Chilean Indigenous organizations have argued—must end with consent on the final version of the regulation, law or decree. Second, the regulation must explicitly adopt the standard of consent recognized in international law.

The regulation of the right to FPIC will continue to be a contentious discussion in South America. The physical and cultural survival of Indigenous peoples has been put at risk with some of the regulatory measures that have been enacted—as mentioned above—because they violate the very rights they are ostensibly intended to protect.

Despite the tensions that growing extraction activities bring to the region, it is essential for Indigenous organizations, defenders of human rights, state officials, and advisors to private businesses to understand the importance of multiculturalism and to build tools that protect the right to FPIC.

District Federation of Peasants of Chichaypujio questioned the database on the grounds that the additional criteria— of the use of an Indigenous language and property on communal land, which were required to qualify as Indigenous—excluded many communities from their right to *consulta previa*.

Although the national government has said the database serves only as a point of reference, the Indigenous organizations maintain that its implementation will impede the right to *consulta previa* for those communities that do not meet these additional requirements.

ECUADOR

Consulta previa regulation in Ecuador was issued amid great debate over oil exploration in the Amazon region. Nationally, the discussion was focused on the development of the 11th Oil-Licensing Round—a project seeking private investment to explore land located in the previously unexplored southeastern Amazon region—at which the state offered approximately 2.6 million hectares for oil exploration. Internationally, the Sarayaku people requested the IACHR to step in to protect their right to *consulta previa*, which they argued had been violated by the Ecuadorean government when, in 1996, it allowed an Argentine oil company, Compania General de Combustibles S.A., to explore their territory without consultation.**

Executive Decree No. 1247 was finally adopted in 2012, and it regulated *consulta previa* in cases of oil exploration.[10] Indigenous groups in Ecuador argued that the enactment of Executive Decree 1247 had violated their rights of consultation because they had not been consulted about the law itself.

INDIGENOUS GROUPS ARGUED THAT THE ENACTMENT OF EXECUTIVE DECREE 1247 HAD VIOLATED THEIR RIGHTS OF CONSULTATION.

The debate over the decree and the 11th Oil-Licensing Round highlights the conflicting government priorities. The administration of President Rafael Correa is determined to promote economic development through natural-resource extraction in Yasuní National Park. But the strategy to exploit the country's oil reserves will endanger several Indigenous communities that live in voluntary isolation, and put the environment at risk.[11]

Moreover, the Pachamama Foundation—a prominent foundation that had historically supported the Indigenous peoples of the Ecuadorian Amazon region and had questioned the tools used by the Ecuadorian government to implement the right to *consulta previa*—was closed after the oil exploration debate. According to the government, some of its members attacked foreign diplomats during protests against the 11th Oil-Licensing Round.

CHILE

In Chile, the debate over the right to *consulta previa* triggered a more than two-year dialogue between Indigenous groups and the national government. The discussions began in March of 2011 and expanded between March and August of 2013, following the modification of the Supreme Decree 124.[12]

The government presented a final text that Indigenous groups opposed on the grounds that it excluded all legislative measures and a specific list of administrative measures from the obligation to consult, and therefore violated their right to consent to the measures. This led the government to modify the decree and to enact the Supreme Decree 66 of 2013, which incorporated some of the communities' objections, such as the obligation to consult legislative measures.[13]

In January of 2014, the *Sindicato No. 1 de Panificadores Mapuche de Santiago de Chile* (No. 1 Labor Union of Mapuche Bread Bakers of Santiago) presented a complaint before the ILO's Committee of Experts in which they argued that the Chilean government's enactment of the new Supreme Decree of 2013 violated ILO 169 because it reduced the protection of the right to *consulta previa* in two ways: in its definition of measures that could affect Indigenous peoples, and in its evaluation of the projects that enter the Environmental Assessment Service.[14] The ILO decision is still pending.

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** In its ruling in favor of the Sarayaku people, the IACHR ordered the government to adopt—among other things—all legislative and administrative measures necessary so the Ecuadorean Indigenous communities had the right to FPIC. Yet, a year and a half after the ruling, the state has still not complied with the order given by the IACHR.

Getting to the Table

How a new generation of organizations is improving dialogue and reducing conflict over mining in Latin America.

Diana Arbeláez-Ruiz and Daniel M. Franks

Mining is a lot more than complex technology, logistics and finance. While mineral extraction does require an amazing array of machinery, computers, and processes for transporting and treating the materials, it is just as much a social project that is negotiated and conducted within a social context.

And just as the technological challenges require qualified engineers, geologists and other specialists, the social aspects of mining demand skilled, sophisticated experts who can lay the foundations for productive dialogue between communities, governments and project proponents.

Such a dialogue is critical to the viability of mining projects today. Securing the support of not only the communities immediately surrounding a site but of the larger society can be accomplished only within a framework of understanding that can endure throughout the life cycle of a project. Whether this step is required by law or pursued voluntarily, few mining projects can hope to succeed over the long term without it. Continuous dialogue among governments, communities and extractive companies that involves a consensus about both sharing opportunities and managing risk is essential.

Latin America is ahead of other regions in the expertise and practice of dialogue around mining. Largely as a result of its history of conflicts over mining, the region has generated scores of groups dedicated to fostering dialogue at all levels: project, regional and national.

With the support of the International Mining for Development Centre, we conducted two workshops in November 2013 in Lima, Peru, that were aimed at tapping this rich experience—and learning from it. The workshops included more than 60 specialists from 10 countries in the Americas: Argentina, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, Guatemala, Panama, and Peru—with representatives from Australia.

Here are some of the things we learned.[1]

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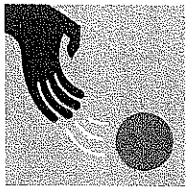
GET STARTED EARLY AND KEEP IT GOING

Dialogue is important in the early phases of development. Early dialogue, such as free, prior and informed consultation and/or consent, is important not just to reach out to communities, but also to help inform decision making and integrate a plurality of perspectives and norms into the company's plan and operation. Early on, there are also opportunities to optimize project design for social and environmental outcomes and to establish the forums to maintain this focus over the life of the project.

But dialogue must also be a continuous process with multiple actors. Dialogue plays an important role in policy making, impact assessment, regulatory approval, and negotiating agreements with Indigenous and local communities. It also involves participatory monitoring and collaboratively setting the conditions for the closure of the mine. In short, dialogue must be embedded into all aspects of the life cycle of a project.



Spaces for dialogue on natural resource extraction have emerged in many countries in Latin America over the past decade. Peru's long-standing *Grupo de Diálogo Minería y Desarrollo Sostenible* (Dialogue Group on Mining and Sustainable Development—GDMDS), established 13 years ago, is now a network of over 500 people.

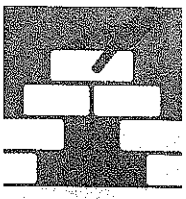
In the past three to five years, similar groups have emerged in Argentina, Chile, Ecuador, Brazil, and Colombia, to mention a few, and there is interest in Guatemala, the Dominican Republic and Panama. Within Latin America, a network now exists that promotes exchange between members, organizes international, multi-stakeholder forums, and seeks to support the technical capacity of dialogue initiatives at the national and regional levels.

The core function of these dialogue groups is to create social capital among diverse participants. While the motivations and support for a dialogue group might vary, they generally share an understanding that dialogue, as an approach in itself, must be promoted and dialogue skills developed. The groups help build a culture for dialogue by allowing participants to learn through non-binding processes that permit seemingly incompatible actors to approach each other.

Dialogue groups have a multitude of functions. Some put forward position papers (e.g. Peru). Others commission research to inform the public about mining (e.g. Colombia). Several host speakers from different backgrounds to speak to particular issues. Most serve as a platform for forming relationships outside the pressures of negotiation processes, giving participants an opportunity to challenge stereotypes about different stakeholders. In national contexts where the debate on mining and its role in development is highly polarized, such as in Colombia or Argentina, dialogue tables can generate reliable information and shift polarization to informed debate.

The dialogue groups of Peru and Argentina have formed sub-groups that focus on specific themes, such as impact assessment and royalties. The Peruvian group has been particularly influential in the debate around the *canon minero* (the redistribution of mining revenue to regional and local governments) and citizen participation in the mining sector, while providing support for regional dialogue tables and regional leaders.

Knowledge-sharing among groups and countries is a key benefit of broader dialogue networks, helping to improve processes and even regulations around complex topics such as *consulta previa* and revenue sharing.



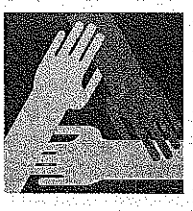
BUILD BRIDGES

Sustaining dialogue isn't easy. Mining industry proponents may fear losing control when the mining project is opened to outsiders. Some find that government or industry willingness to participate in a non-binding dialogue process is limited or changes over time. Early on, a key challenge is to begin bridging ideological, political or trust barriers to get actors to "talk mining."

These issues are more significant where a critical mass around dialogue has not been built, and industry, civil society, community, and government actors from various territorial levels have not developed the habits or skills for effective dialogue. Effort is needed to harmonize often diametrically opposed understandings of critical timelines. Some actors seek immediate results, while others need time to come to the table.

Even the act of bringing people together from diverse sectors can be unexpectedly complicated. Such processes typically require time commitments that might be difficult to accommodate for public servants or industry professionals. Regional or local stakeholders may need dialogue to come to them or may require resources or time for issues to be consulted on at a grassroots level.

Furthermore, difficulties might arise in connecting a dialogue table or group with other relevant dialogue processes and institutions in the government or private sector.

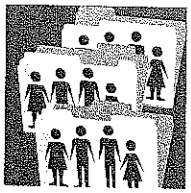


STAY CONNECTED

In countries like Peru, there is already an established dialogue infrastructure with numerous local and regional levels. At the local level, organizations such as the Tintaya *mesa de diálogo* (dialogue table) have many years of experience working through project-specific issues. At the national level, the Peruvian government has the *Oficina Nacional de Diálogo y Sostenibilidad* (National Office for Dialogue and Sustainability) that has devised indicators to monitor conflict potential and deploys personnel nationally to help bridge conflicts and promote agreement negotiation.

The office has proposed a National System for Conflict Prevention and Management. Peru also has a *Defensoría del Pueblo* whose mandate centers on supervising the work of the state and defending fundamental rights. Over the past decade it developed a framework on conflict that ranges from conflict monitoring and early warning systems to mediation. The Ministry of Energy and Mines is also playing a role promoting *mesas de diálogo* as spaces of intersectorial dialogue. All of these multiple spaces reflect various ways of approaching conflict transformation or of situating dialogue and mining in relation to each other. An encouraging trend is that across Latin America, groups like the Latin American Dialogue Group are networked and meet regularly to share experiences and promote a common agenda.

ILLUSTRATIONS BY NATASHA TIBBOTT



PRE-PROJECT ASSESSMENTS AND CONSULTATIONS AREN'T ENOUGH

The environmental impact assessment that governments require for new mining projects can be a vehicle for underlying or emerging conflict or dissatisfaction to get some air time. A new extractive project invariably brings uncertainty, fear of change and clashing priorities. This early stage of a project mobilizes opponents and creates a period of vulnerability for project proponents.

For this reason, the environmental impact assessment should be perceived as a political process, in which building relationships and trust can weigh more than scientific conclusions about impacts and their management. There are many examples of projects that have received formal approval from government agencies on the basis of their environmental impact statement, only to face community backlash on the very same issues that were addressed in it.

Impact assessment can be largely meaningless to communities in the absence of conditions that can give it credibility. This is where dialogue comes in. Dialogue can help to build a credible and meaningful process.

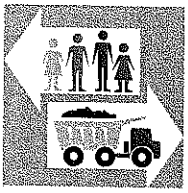
To have credibility, legitimacy and reliability, impact assessment needs to be conceived as part of an ongoing process of understanding and adjusting. People have to trust the information they see.

One way to address this is through participatory or independent monitoring that takes place not just at the time of the assessment but throughout the life of projects. An exercise in citizen oversight, monitoring committees also allow relationship and trust building, the generation of reliable data, and the development of social capital to negotiate systems of environmental management.

In Peru, there have been experiences of participatory environmental monitoring in many regions, including Apurímac, Ancash, Cajamarca, Cusco, Junín, Moquegua, Pasco, and Puno. For example, in the case of Tintaya mine in Cusco, the community and business created a monitoring committee that lasted.

YOU NEED TO TRUST THE INFORMATION

But how do you create relevant and credible monitoring for mining projects? A scientific approach is not enough. Reporting on project impact needs to respond to community concerns, which only become clear through dialogue. And monitoring without a starting point—the baseline conditions in the absence of a project—can leave many community questions unanswered; hence the importance of early dialogue. All of this requires resources. Who will pay for monitoring and for creating channels of participation? The costs need to be internalized within project budgets—not left for civil society and communities to carry out on a voluntary basis.



INTEGRATE CONSULTATION/ASSESSMENT PROCESSES WITH DIALOGUE AND MONITORING PLANS

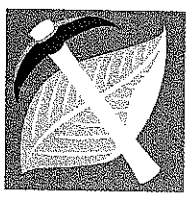
The connection between impact assessment and other planning processes, such as free, prior and informed consultation and/or consent, is a key and unresolved issue in many countries. For example, how can consultation or consent be informed if a community does not have access to the information generated by impact assessment for the activities they are being consulted about? How is traditional knowledge articulated in impact studies? Is impact assessment communicated in an inclusive way?

Beyond the early stages, how does impact assessment inform prior consultation for project expansion or for closure?

These are questions that demand study and considered responses, which might come from integrated forms of impact assessment that consider cultural interaction and social inclusion. Impact assessment and dialogue need to be ongoing processes informing each other as well as informing negotiation and decision making throughout the project life cycle. Given that mining often evolves in clusters, an understanding of the cumulative dimensions of impact is also necessary, including the fatigue for communities that may be associated with repeated consultations.

UNDERSTAND THE DIVERSITY OF THE COMMUNITY AND ITS DEMANDS

Differences in goals and perceptions—often based on ethnicity, gender, age, disciplinary background, language, and education—inevitably color a community's perspective on a mining project. These differences must be accounted for in the dialogue process. For example, what are the economic opportunities for younger generations? How are rural women affected by environmental changes? Are notions of development consistent with Indigenous understandings of *buen vivir* (having a good way of living)?



Is information presented in a clear language, in local languages, and in appropriate formats? Are all affected and interested groups represented in the dialogue processes, and do they have opportunities for meaningful participation? Attention to difference is the core of dialogue, whether it is situated within a dialogue group, *consulta previa* process, impact assessment, negotiated agreement, participatory monitoring, or development planning. It is not surprising that key issues such as gender equity or intercultural dialogue are still not addressed at the dialogue table with the depth they require. But posing such problems also helps dialogue participants consider strategies to address them.

When stakeholders can discuss their concerns openly and frankly—and work out ways to manage differences—it is almost certain that everyone will benefit. Getting to that point is a long-term process and requires the creativity and efforts of various sectors.

The dialogue groups of Latin America are the result of dedicated efforts from regional civil society movements, complementing and informing responses from industry, local communities and the state. Through their activism, they remind us of our collective responsibility as beneficiaries of the products of the mining industry and our role in getting people to the table to talk about the consequences and benefits of mining.

[1] The four-day series of workshops was made possible thanks to the financial support of Australia's International Mining for Development Centre, and the collaboration of Peru's *Grupo de Diálogo Minería y Desarrollo Sostenible*, *Societas Consultora de Análisis Social* and CARE Perú.

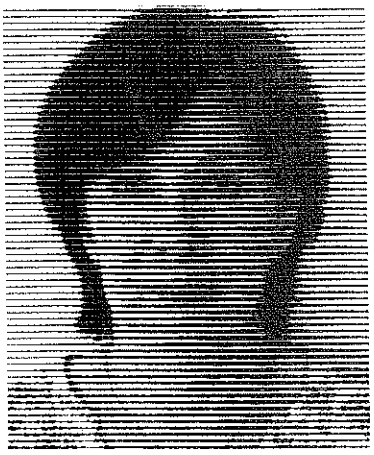
ASK THE EXPERTS

SONIA MEZA-CUADRA
is an economist specializing in mining and development.

SONIA MEZA-CUADRA

What have been the benefits of countries adopting *consulta previa*?

Governments aim to make decisions that will improve the economic and social development and welfare of their citizens. But historically, decisions affecting Indigenous and tribal people's culture, ancestral lands and habitats have too often been made without their participation. ILO 169 and the UN Declaration on the Rights of Indigenous Peoples seek to redress this situation.

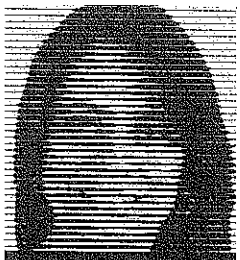


The processes of free, informed prior consent, or *consulta previa,* have faced several challenges, most of which are rooted in the historical mistrust between governments and Indigenous peoples. Rebuilding this trust and reaching a consensus is complicated by the long absence of the state and, consequently, minimal public services in remote areas where most Indigenous people live.

Progress in the implementation of ILO 169 has already benefited countries. First, the convention has improved awareness and understanding of Indigenous peoples' rights among the general population and the Indigenous community itself. Second, the laws, regulations and court decisions that have followed have laid the groundwork for more responsible and socially, economically and environmentally sustainable public and private investment. Third, in seeking to meet their commitments under the convention, governments and public officials have improved their capacity to seek popular consultation and consensus. Fourth, already the dialogues that have been established among governments, companies and communities have improved discussions among these stakeholders and lowered the long-term legal risks of these investments.

Moreover, adoption of ILO 169 has increased stakeholders' commitment and changed their perspective on how to ensure that—whether or not they are extractive projects—all investments benefit neighboring communities, while also respecting those communities' culture and way of life and minimizing negative impacts. This effort requires government, companies and communities to work as partners.

PHOTOS COURTESY OF THE AUTHORS



KATYA SALAZAR
is the executive director of the Due Process of Law Foundation (DPLF).

What have been the benefits of countries adopting *consulta previa*?

KATYA SALAZAR ANSWERS:

To assess and understand the benefits of ILO 169 and *consulta previa* you have to first understand how complex this right actually is. Unlike rights that trigger concrete and clear obligations on the part of state, the right to *consulta previa* is fulfilled through an intercultural dialogue between the government and the affected Indigenous peoples. Although exercise of this right is usually seen as a single activity ("the consultation"), it should be regarded instead as an opening for the state to approach important sectors of the population usually excluded from national discussions and engage them in a transparent and participatory process. At the very least, it is a great opportunity to build confidence in state institutions, which is one of the main challenges facing Latin America.

> **"*Consulta previa* is an opportunity to build confidence in state institutions.**

Over the past decade, most of the social conflicts related to the extraction of natural resources in Latin America have stemmed from the lack of prior consultation with affected populations. As a result, from Mexico to Chile, judicial and administrative decisions have halted and even cancelled projects approved without *consulta previa*. Is it the right to *consulta previa* that has brought on all these conflicts and complications? Certainly not. It is, rather, the lack of compliance by states in their obligations under ILO 169.

It's not an easy path, though. In many countries, there are several contradictory laws and norms that do not comply with international standards, leading to more confusion. Implementing the right to *consulta previa* remains a work in progress and is the responsibility of the executive branch as well as the courts, which need to give it content. Nevertheless, there have been important advances, and the region needs to listen to what its domestic courts are saying and synchronize these decisions with measures taken by other state agencies.

Just having a real dialogue that puts all this information on the table would shed new light on the subject, and would benefit communities as well as the states and companies involved. States will benefit by building more effective and trusted institutions to better comply with the letter and spirit of *consulta previa*. And companies will benefit when they see that their projects have a greater possibility of avoiding expensive and, too often, tragic delays.

CÉSAR RODRÍGUEZ-GARAVITO
is associate professor of law and founding director of the program on Global Justice and Human Rights at the Universidad de los Andes.

CÉSAR RODRÍGUEZ-GARAVITO ANSWERS:

Since the ratification of ILO 169 in 1989, 15 countries in Latin America have legally committed themselves to consulting Indigenous and Afrodescendant peoples before approving laws, regulations or economic projects that may affect them. This step has brought on two fundamental advances in these countries' national legal systems.

Free, prior and informed consultations (FPIC), or *consulta previa*, will strengthen national democracies by including the voices of populations historically discriminated against in debates about core issues, from economic policies (e.g. the rise and impact of extractive industries in Colombia, Mexico or Peru) to environmental policies (e.g. the preservation of the Ecuadorian or Brazilian Amazon).

Furthermore, since the 1980s, *consulta previa* has become the most important legal tool in fulfilling the promise of multiculturalism included in several national constitutions. When rigorously applied, *consulta previa* sets the

PHOTOS COURTESY OF THE AUTHORS

What have been the benefits of countries adopting *consulta previa*?

CÉSAR RODRÍGUEZ-GARAVITO CONTINUED:

path for transition from a tolerance–focused multiculturalism (which recognizes cultural diversity and nothing more) to one that enshrines empowerment and autonomy (which takes the initial recognition and derives from it the ability of Indigenous and Afrodescendant peoples to decide the course of their culture, their territory and their political organizations). This human rights–based interpretation of *consulta previa* is clear, for example, in the jurisprudence of the Inter-American system of human rights or the Constitutional Court of Colombia, among others, both of which have recognized states' obligation to obtain the consent of the peoples affected by policies or projects that place their physical or cultural survival in danger.

Nonetheless, there is still a considerable gap between the obligations countries assume as per ILO 169, on one hand, and legislation, judicial rulings and individual application of FPIC, on the other. If the past 25 years have consisted of legal advances, the next 25 should see progress in their implementation.

There is a considerable gap between the obligations countries assume and their applications.

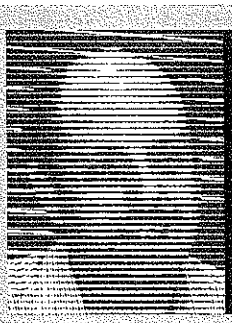
What have been the benefits of countries adopting *consulta previa*?

ROBERTO JUNGUITO POMBO ANSWERS:

Due to the complexities of its implementation, *consulta previa* for Indigenous and tribal peoples has been a matter of public discussion in recent years. This mechanism that seeks to reconcile the social, cultural and economic integrity of ethnic communities with the implementation of development projects—often linked to natural resources—has been surrounded by a marked uncertainty from judicial and legislative institutions as well as from international law.

In the case of Colombia, progress is evident: there has been significant improvement in institutional, legislative and jurisprudence strengthening that strives to balance the fundamental rights of Afrodescendants and Indigenous peoples with national interests and the multicultural vision established in the national constitution. However, in practice, the lack of certain definitions is worrisome: the concept of *consulta previa* as a right to veto without reasons, the length of time required for a consultation and the topics addressed, as well as the weight of technical arguments versus ideological positions.

These challenges must be addressed from different perspectives. First, it's important to strengthen the role of the state as a provider of basic services to Indigenous people, using the taxes and royalties from projects to ensure the well being of different ethnic groups.



ROBERTO JUNGUITO POMBO
is president of Cerrejón.

Second, it's necessary to have clear and legitimate rules in which the common good is identifiable and the means to reach it are agreed upon by all.

Finally, the joint construction of an environment of trust is vital for communities to be able to see companies as their allies beyond consultation requirements. In our view, this is the way in which *consulta previa* adds value to investment and projects and satisfies the legitimate aspirations of the communities living close to business activities.