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From issue: **Consulta Previa and Investment** (Spring 2014)

### ■ AQ FEATURE

## Country Study: Peru

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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.<sup>1</sup>

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 class-based "peasant communities."<sup>2</sup>

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.<sup>3</sup> 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**



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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.<sup>4</sup> 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.<sup>5</sup> After months of strikes and protests, García's administration declared a state of emergency and sent in an unprepared police force to break up a local roadblock, which led to the tragic events.

As a consequence of 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*<sup>6</sup> 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.<sup>7</sup>

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 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,<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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 re-opening the approval processes for some of the most important mining and hydrocarbon

projects in the country. They also propose that the law involve the right to prior consent and not just consultation.<sup>11</sup>

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 Indigenous 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> The following month, however, the new vice minister of interculturalism, Patricia Balbuena,

gave the project a green light.<sup>16</sup>

## 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.<sup>17</sup> 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.

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