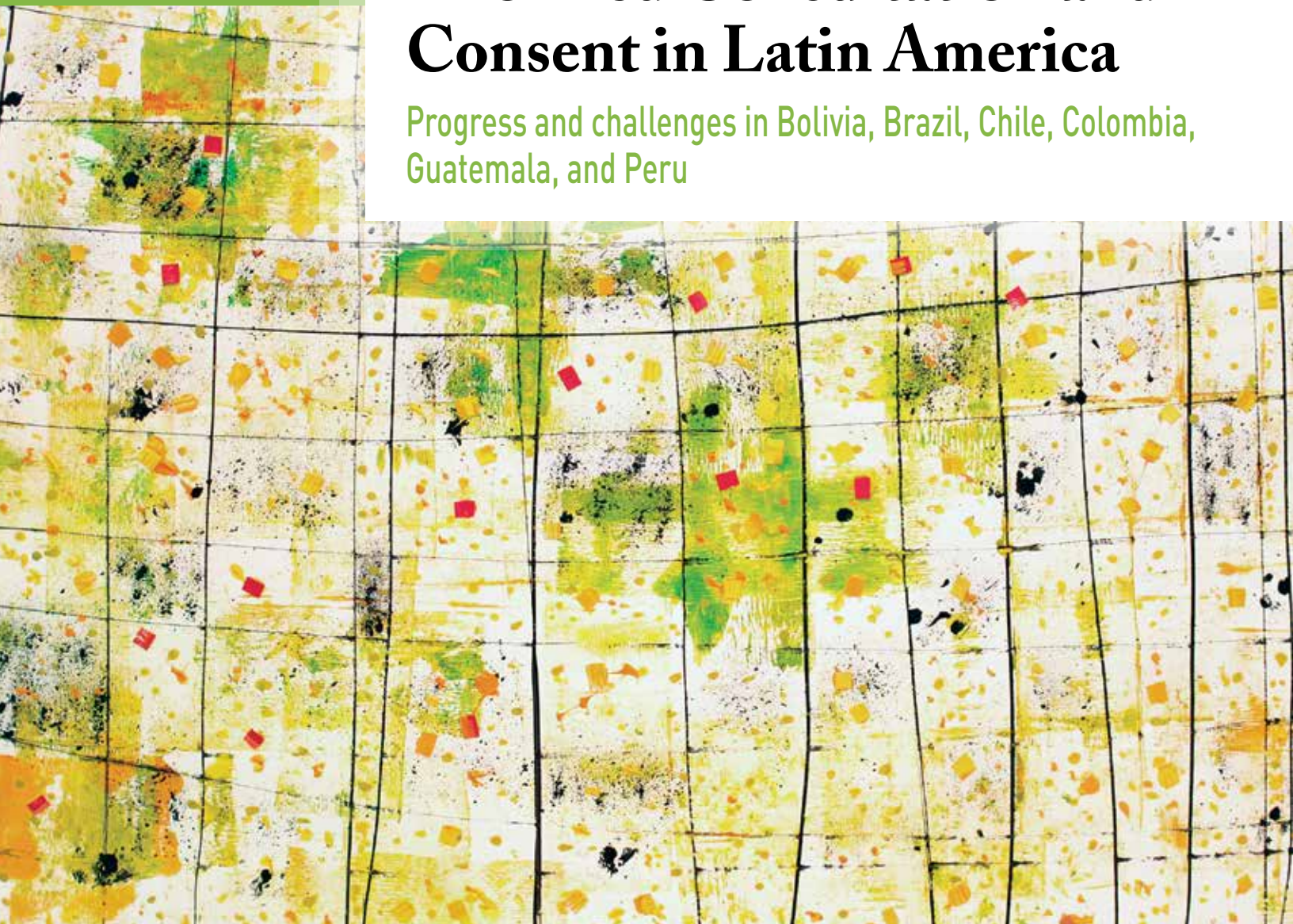
Due Process of Law Foundation

OXFAM

EXECUTIVE SUMMARY

Right to Free, Prior, and Informed Consultation and Consent in Latin America

Progress and challenges in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru



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Introduction

In recent decades, two parallel processes have emerged in Latin America. Since the 1990s, private investment in the intensive extraction of natural resources of ten indigenous territories has been promoted as part of the region's economic development model. The expansion of that model has been facilitated by mechanisms such as privatization, tax exemptions, and relaxed environmental licensing. One particular omission regarding these policies is the absence of government supervision and oversight. Within the framework of an economic model that depends on the export of natural resources, **the extractive industry has entered a new cycle of expansion that has been associated with the increasingly pronounced ability of transnational corporations to influence domestic political processes.**[1]

At the same time, the rights of indigenous peoples have been recognized in several countries of the region. **Indigenous peoples have made inroads in the international sphere as a result of multiple and lengthy processes to reclaim self-determination in the exercise of their rights.** These efforts have focused, at the global level, on the adoption of Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples, 1989 ("ILO Convention 169") and the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in September 2007 (hereinafter "UNDRIP" or "UN Declaration on Indigenous Peoples"). In the Americas, recognition of indigenous peoples' rights has been solidified with the development of standards by the Inter-American Commission on Human Rights ("Inter-American Commission" or "IACHR") and the Inter-American Court of Human Rights ("Inter-American Court"). The right of indigenous peoples to prior, free, and informed consultation and consent has been a pivotal factor in those international instruments and the decisions of the Inter-American System.

These processes, in constant tension, have presented significant challenges to the States of the region in terms of their obligation to bring their domestic laws into line with international standards, which ultimately requires making human rights obligations compatible with corporate interests. A common manifestation of this tension is that **implementation of extractive projects has brought with it numerous social conflicts with peoples, communities, and local populations in general, whose rights and interests are adversely affected when their lands and the natural resources on those lands are not respected.** Failure to address complaints, and the lack of interest shown at times by national authorities, has meant that some of these situations have led to unfortunate

[1] Gudynas, E. (2009). Diez tesis urgentes sobre el nuevo extractivismo. Contextos y demandas bajo el progresismo sudamericano actual. In *Extractivismo, Política y Sociedad.* Quito: CAAP, CLAES, & Rosa Luxemburg Foundation; Zibechi, R. (2011). *Crisis civilizatoria. Encuentro Continental de los Pueblos del Abya Yala por el Agua y la Pachamama.* Cuenca, Ecuador; & Villafuerte Solís, D. (2014). Neoextractivismo, megaproyectos y conflictividad en Guatemala y Nicaragua. Espiral, 61, 109-141.

episodes of violence. The development of these types of projects has too often resulted in divided communities, the corruption of local leaders and authorities, criminalization of indigenous leaders and human rights defenders, and even the death of project opponents.[2] These violations are particularly pronounced where projects are developed on lands and territories historically occupied by indigenous and tribal peoples and communities.

In view of this, and at the request of Oxfam, the Due Process of Law Foundation (DPLF) published a report in March 2011 on the right of indigenous peoples to prior, free, and informed consultation in four countries of the Andean region: Bolivia, Colombia, Ecuador, and Peru.[3] The report addressed the principal international regulations that have emerged from the various international bodies with jurisdiction to hear and decide these matters, as evidence of the soundness of the standards on the right to prior, free, and informed consultation and consent in international human rights law. It also included an analysis of the situation in those countries, highlighting the progress made at the constitutional, legislative, and judicial levels, and noting setbacks, through the examination of illustrative cases. Based on this analysis, recommendations were made with respect to each of the actors involved.

This study aims to update the processes described in 2011 and to contribute to the debate on the scope and content of this right, as well as the need for mechanisms that will enable indigenous and tribal peoples to not only take part in the decisions that affect their rights, but also to be the architects of their own development. To this end, DPLF and Oxfam agreed to move forward with this update.

Four years after the initial report, it is clear that **there is an ongoing climate of social unrest in the region linked to the extraction of natural resources and its particular effects on indigenous and tribal peoples**. This is due, in part, to the persistence of the root causes of many of the violations of their rights, such as the profound discrimination that has become entrenched over centuries and permeates the State apparatus. Lack of consultation about hydroelectric plants, in spite of the risk to human lives; the impact of economic projects on the livelihoods of communities; and the sale to third parties of lands historically occupied by indigenous and tribal peoples are expressions of that discrimination, and they reflect an indifference toward development based on a harmonious relationship between those peoples and the natural resources on their land.

At the same time, there have been changes in recent years that can be considered favorable to the development of the right to consultation in the region. **In the vast majority of the countries of Latin America there is increased awareness among government leaders and other relevant political, economic, and social actors**[4]

[2] For example, in Guatemala, according to the *Unidad de Protección a Defensoras y Defensores de Derechos Humanos* (Unit for Protection of Human Rights Defenders, (UDEFEGUA), 657 attacks on human rights defenders were reported in 2013, nearly 20 per cent of which were against peasant leaders and related to the defense of indigenous peoples' rights of consultation. In 2013 alone, there were 18 reported murders of human rights defenders, three of which were linked to the defense of indigenous lands and territories. UDEFEGUA. (2013). *El Silencio es historia. Informe sobre situación de Defensoras y Defensores de Derechos Humanos. Enero a Diciembre de 2013*, p. 11. Available at: http://www.udefegua.org/images/informesanuales/informe_final_2013. Other human rights organizations have also reported ongoing threats and harassment of indigenous leaders, authorities, and individuals in the context of development and investment projects and extractive concessions in Guatemala. See, OHCHR. Report of the High Commissioner for Human Rights on the activities of her Office in Guatemala, 2012. A/HRC/22/17/Add.1, January 7, 2013, paras. 47-50. OHCHR. Report of the High Commissioner for Human Rights on the activities of her Office in Guatemala, 2011. A/HRC/19/21/Add.1, January 27, 2012, para. 40. Available at: http://www.ohchr.org/EN/countries/LACRegion/Pages/GTIndex.aspx. IACHR. (August 24, 2013). *IACHR Condemns Attack against Maya Q'eqchi' Children in Guatemala.* Press Release 61/13. IACHR, Cobán, Alta Verapaz, Guatemala. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2013/061.asp

[3] DPLF & Oxfam. (2011). *The Right of Indigenous Peoples to Prior Consultation. The Situation in Bolivia, Colombia, Ecuador and Peru.* Washington DC: DPLF/Oxfam. Available at: http://www.oxfamamerica.org/static/oa3/files/the-right-of-indigenous-people-to-prior-consultation-exec-summary.pdf

[4] Among other actors, it bears mentioning that the International Council on Mining and Metals (ICMM) has corporate and global policies on consultation and consent. See, e.g., ICMM. (May 2013). *Indigenous Peoples and Mining. Position Statement.* London: ICMM. Available at: http://www.icmm.com/document/5433

of the need and the obligation to implement prior consultation mechanisms for indigenous and tribal peoples, and certain actions have been taken to this end. This is the result of several factors, in particular, the numerous struggles waged by indigenous peoples, communities, and organizations in defense of their rights when faced with extractive projects; the actions of civil society organizations; and court decisions that have played a crucial role in each country. We are thus at a point where, unlike years ago, there is no question that mechanisms must be implemented to ensure the right to consultation: rather, the principal debate now revolves around how to implement them.

We are therefore at a crucial juncture in the region, where the challenge lies mainly in fostering the consolidation of this right to consultation and consent at the domestic level through effective implementation—regulatory, institutional, and practical—in accordance with international human rights standards. Nevertheless, experience in several countries shows that such implementation is no easy task, for several reasons. First, political will—which is often absent—is required at the highest levels to create a mechanism that makes it possible to respect and guarantee the rights of indigenous peoples and communities at stake when extractive projects are carried out. There is also an environment in which **the significant dependence of national economies on natural resource extraction tends to favor corporate interests that run counter to the rights of indigenous peoples**. It also allows for multiple actors such as business associations, transnational corporations, foreign governments, the media, public opinion, and others to exert their influence. In addition, certain principles of prior consultation lack a single formula, applicable to all cases, that incorporates clear, accessible, measurable, and evaluable procedures, that would address the particularities of each indigenous people or community to be consulted.

It is worrisome that in the region's implementation processes there is harsh criticism of the restriction of the content of the right to consultation under domestic laws, the adoption without consultation of legal texts distorting this right, and the use of consultation processes that are not an effective guarantee of rights, but rather a mere formality. Accordingly, a regressive trend has gained strength or, in the best cases, there have been declarative acknowledgements that contrast with the setbacks in their implementation. In some cases, advances in the regulation of prior consultation have been minimal, in large measure due to the power asymmetry between indigenous and tribal peoples and communities, and certain business and political sectors.

The main objective of this publication is to evaluate the implementation of the right of the region's indigenous peoples to prior, free, and informed consultation and consent by examining the situation in six countries. The progress and challenges in making the right a reality in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru are approached comparatively. The framework for analysis is international human rights law and, in particular, the international legal framework discussed at length in the 2011 publication of DPLF and Oxfam.[5]

This study also rests on the acknowledgement of four essential aspects common to the six countries. The first is the **need to historically contextualize the current situation of indigenous peoples in Latin America, and their present relationship to the States**. The intention is not to provide an account of the cycles of historical dispossession. Rather, it is to show that this history has created a fundamental mistrust and rejection of State representations by indigenous peoples, a situation that requires a historically sensitive perspective and an approach based on the rebuilding of trust.

It must be acknowledged that **the indigenous peoples and communities where proposed extractive projects are to be implemented very often live in poverty or**

[5] DPLF & Oxfam. (2011). *The Right of Indigenous Peoples to Prior Consultation. The Situation in Bolivia, Colombia, Ecuador and Peru.* Washington DC: DPLF/Oxfam, pp. 11-28. Available at: http://www.oxfamamerica.org/static/oa3/files/the-right-of-indigenous-people-to-prior-consultation-exec-summary.pdf

extreme poverty. Historical exclusion and discrimination, together with numerous assimilation policies, systematic dispossession, and denial of rights to ancestral lands and territories, have placed indigenous peoples in the Americas at a disadvantage in comparison to society in general. This is reflected, for example, in the high rates of malnutrition among indigenous children; limited access to health and education services, which in any case may not be culturally appropriate; and reduced participation in the political sphere and representation in government.[6] These conditions serve as the backdrop to the consultation processes.

Third, it is crucial to recognize that **prior consultation is framed, in the broadest terms, by the relationship between States and indigenous peoples**. Although this right has for a number of years been at the core of the struggles of indigenous peoples and civil society organizations, it should not be seen as an isolated guarantee, much less as the only relevant right. The main issue is the establishment of relationships between indigenous peoples and the State based on recognition of indigenous peoples as societies that predate colonization and the establishment of current State borders and consequently as collective rights-holders with the freedom to determine their own development priorities. Recognition of indigenous peoples' right to self determination, enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, translates into other rights such as self-government, territoriality, autonomy, and identity. Although effective implementation of prior consultation processes can provide an opportunity to settle historical debts relating to these rights, it cannot be the State's only policy on the issue, as it would be destined to fail, crippled by unsatisfied demands. **The realization of the specific rights of indigenous peoples requires, among other things, differential public policies and effective opportunities for participation in local, regional, and national forums where decisions that affect these rights are made.**

[6] See, inter alia, ECLAC. (2014). *Guaranteeing indigenous people's rights in Latin America. Progress in the past decade and remaining challenges.* Santiago, Chile: ECLAC/UN.

A fourth issue is related to the **recognition and protection of the lands, territories, and natural resources historically utilized by indigenous peoples**. Although significant progress has been made in recognizing the territorial rights of the region's indigenous peoples—as discussed in the first edition of this text—it is an unfinished process and there is important work still to be done in each country. In those countries that have recognized lands and territories, there are significant difficulties in protecting them from outside actors. This element must also be taken into account in addressing the right to prior consultation and consent, as it must be implemented in a manner consistent with the territorial rights of indigenous peoples.

This publication is divided into two sections. The first discusses the aspects that will make it possible **to determine whether the current legal system is favorable to the right to prior consultation**, based on analysis of the constitutional, legislative, and judicial framework in each country. The second addresses the **specific advances in and challenges to the implementation** of the right to consultation and consent. It considers essential aspects of the regulatory system, such as the determination of its scope of application and the entities responsible for implementing it, as well as the identification of inter-sectoral conflicts, gaps in jurisdiction, budgetary shortcomings, overlapping regulatory frameworks, vagueness in the timing of consultation, and other limitations that affect consultation processes. Finally, several **recommendations** are made to each of the relevant actors.

In preparing this report, the research team coordinated with Oxfam staff in the countries under study in order to interview key actors. Those interviews were conducted in 2014: from June 30 to July 8 in Guatemala City, El Estor, and San Miguel Ixtauhacán-Sipacapa, Guatemala; from August 12 to 15 in La Paz and Santa Cruz, Bolivia; from September 27 to October 1 in Santiago and Temuco, Chile; from September 11 to 16 in Bogotá, Colombia; from October 13 to 20 in Lima, Peru; and from December

8 to 14 in Brasilia and São Paulo, Brazil. **More than 80 interviews were conducted with various actors, including organizations representing indigenous peoples, civil society organizations, government institutions, and leading academics.** The team also relied on the valuable reports and written input of Juan Carlos Ruiz (Peru), Liana Lima (Brazil), Marco Canteo (Guatemala), and Nancy Yañez (Chile). This document is the result of the systematization and analysis of the interviews conducted, input from consultants in the countries concerned, and available documentary information.

The report was coordinated by Katya Salazar and Daniel Cerqueira, Executive Director and Senior Program Officer of DPLF, respectively. Cristina Blanco, an international human rights law attorney and consultant to DPLF was responsible for researching and drafting the document. The final text was edited by Tatiana Rincón-Covelli, a human rights attorney and consultant to DPLF.

It is our intention that this report contribute to the effective realization of the rights to which indigenous peoples are entitled in the international sphere by closing the sizeable gaps among regulatory advances, institutional functionality, and the daily lives of the hemisphere's indigenous peoples. In the final analysis, the aim is to achieve more equitable and effective forms of development based on equality and sustainability.

PART ONE

Consultation and Consent in National Legal Systems

Latin America is the region in which the right of indigenous peoples to prior, free, and informed consultation and consent has undergone the most extensive legal and political development. This is no accident, given that indigenous people account for 8% of the region's total population—some 45 million individuals belonging to more than 800 groups.[7] It is also the region with the greatest number of States party to ILO Convention 169, currently the only international convention that contains specific obligations regarding participation and prior consultation, among other topics fundamental to indigenous peoples.[8] On September 13, 2007, every State in the region adopted the Declaration on the Rights of Indigenous Peoples at the United Nations General Assembly. Although Colombia abstained from voting during its adoption, it later supported the Declaration. In addition, the Inter-American System is, without doubt, the regional human rights system that has developed the most numerous and most specific standards for the protection of this right.

Although a broad international legal framework is in place, **the effective implementation of the right to prior, free, and informed consultation and consent continues to be an unfinished project in most of the region's States.** Three aspects of this situation will be examined: (i) the constitutional provision of the right to consultation in the six countries under study and their acceptance of the international standards; (ii) the process for the legal implementation of prior consultation and the participation of indigenous organizations in their design; and (iii) the jurisprudential framework and constitutional protection of the right to consultation in those countries.

1 Constitutional provision and acceptance of international standards

Since the 1980s, nearly all States in the hemisphere with indigenous peoples have recognized them in their constitutions. Similarly, some of their fundamental rights have been included in the text of those constitutions, such as the rights to participation, consultation, and autonomy, as well as territorial and cultural rights.[9] Accordingly, the Latin American region has the most constitutionally and legally advanced systems of indigenous peoples' rights in the world. This recognition in domestic legal systems varies greatly across states, due to the complex political and social processes unique to each country. With respect to the right to consultation in particular, a comparative look at the constitutions of the countries examined enables us to identify at least three different levels of constitutional recognition of the right.

In the first category—the most rights-based—is the 2009 Constitution of the Plurinational State of Bolivia, which expressly recognizes the right to consultation in terms similar to those established in international instruments. This constitution contains several provisions on the right to consultation, most notably Article 30.II.15, which recognizes it as a fundamental right of Native Indigenous Peasant Nations and Peoples (NPIOC), which must be implemented "[…] through appropriate procedures, and in particular through their institutions, whenever legislative or administrative measures that may affect them are established." That provision adds that, "Within this framework, the right to mandatory prior consultation, conducted by the State in good faith, with respect to the exploitation of nonrenewable natural resources in the territory they inhabit, shall be respected and guaranteed." In addition to Article 30.II, the constitution contains other provisions relating to the right

[7] ECLAC. (2014). *Guaranteeing indigenous people's rights in Latin America. Progress in the past decade and remaining challenges.* Santiago, Chile: ECLAC/UN, pp. 6 & 43.

[8] In Latin America, the countries party to ILO Convention 169 are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela; only five Latin American States have not ratified this instrument, to wit: Cuba, El Salvador, Panama, the Dominican Republic, and Uruguay.

[9] Aylwin, J. (2014). La consulta previa de los pueblos indígenas en el derecho comparado. In *El derecho a la consulta de los pueblos indígenas: Antecedentes en el sistema jurídico chileno, internacional y comparado.* Santiago, Chile: Observatorio ciudadano.

to prior consultation[10] and a wide spectrum of indigenous peoples' rights.[11]

The second tier comprises those States whose constitutions do not explicitly contain the right to consultation, but do contain other related rights. Most of the countries examined in this study fall into this category, although there are significant differences among them in terms of degree of recognition. For example, the **Colombian** Constitution of 1991 contains numerous provisions on the rights of indigenous peoples that are closely linked to, and serve as the basis for, the right to prior consultation.[12] Similarly, the 1993 Constitution of **Peru** does not contain an express provision on the right to prior consultation, but does have articles related to the rights of indigenous peoples that support that right, although in lesser terms than in the Colombian counterpart.[13] The 1988 Constitution of **Brazil** also contains provisions recognizing the rights of indigenous peoples and Afro-Brazilian communities known as quilombos.[14] The 1985 Constitution of **Guatemala** also does not contain provisions on prior consultation, although it does include certain rights related to indigenous peoples.[15]

The final category covers those few constitutions that lack provisions recognizing the rights of indigenous peoples. The 1980 Constitution of **Chile** is the only one in Latin America—besides Costa Rica—that does not contain any articles recognizing indigenous peoples' rights or the right to prior consultation.

Although it is exceptional to find the right to consultation in national constitutions, other connected rights that contribute to their protection are recognized in most of the States. It must also be noted that, even if the right to consultation is recognized in the constitution, its effective enforcement is not guaranteed.

The acceptance of international law in the domestic law of the States is another key element in the protection of human rights. ILO Convention 169—to which all of the States in this study are parties—is a treaty of this type. An initial aspect that determines the relationship between international law and domestic law is the rank or status granted to human rights treaties in the national legal system. **With the exception of Brazil and Chile, the States examined in this study grant constitutional status to human rights treaties within their national legal systems.** In some cases, the constitution itself establishes the constitutional status of these treaties, while in others that status has been affirmed by the highest constitutional courts. The constitutions of Bolivia,[16] Colombia,[17] and Guatemala[18] expressly provide for the constitutional status of human rights treaties.

A second relevant aspect is the incorporation of international instruments and decisions on the right to prior consultation into the body of constitutional law to be used—together with the constitution—to delineate the framework for evaluating the substantive validity of the laws. **Most of the constitutional courts** have adhered

[10] In particular, the Constitution of the Plurinational State of Bolivia recognizes prior consultation as part of a democratic system of government (Article 11.II.1), consultation for the formation of autonomous native indigenous peasant territories (Articles 290, 293, 294 and 295), consultation on decisions relating to the environment (Article 342), and consultation relating to the exploitation of natural resources and indigenous territories (Articles 352 and 403).

[11] The provisions that recognize the rights of indigenous peoples include Article 30, which contains the right to exist and the right to cultural identity, among others, based on the free determination of indigenous peoples (Article 2), the recognition of their own institutions (Article 2), own law, own authorities, and indigenous jurisdiction (Article 190-192).

[12] See, *inter ali*a, Articles 1, 7, 63, 287, 329 and 330 of the 1991 Constitution of Colombia.

[13] The relevant provisions of the Peruvian Constitution include Articles 2.19, 88, 89, 149, and 191.

[14] See, in particular, the chapter entitled "Indigenous Peoples" (*Dos Índios*) and Article 68 of the Transitional Constitutional Provisions Act on the territorial rights of Afro-Brazilian communities.

[15] See, Constitution of the Republic of Guatemala, Articles 58, 60, 62, 66, 67, and 68.

[16] Constitution of the Plurinational State of Bolivia, Articles 410 and 13.IV.

[17] Constitution of the Republic of Colombia, Article 93.

[18] Constitution of the Republic of Guatemala, Article 46.

to the constitutional standards doctrine, affirming that international instruments on the right to prior consultation form part of the body of constitutional law.[19] Only **Brazil** departs from this doctrine. Since 2008, the interpretation of the Federal Supreme Court has prevailed, holding that human rights treaties ratified by Brazil are higher-ranking than ordinary laws, but inferior to the Federal Constitution and as such do not form part of the body of constitutional law.[20]

The high courts of the countries examined in this study have used the UN Declaration on the Rights of Indigenous Peoples to provide content to the constitutional text. In fact, the Constitutional Court of **Colombia** has used the Declaration as a source of indigenous peoples' rights.[21] The Constitutional Court of **Peru** has availed itself of the Declaration to recognize the rights of indigenous peoples,[22] although it has held that it is not binding in the strict sense.[23] Similarly, the **Guatemalan** Constitutional Court has established, based on the Declaration, the obligations of the Guatemalan State with respect to indigenous peoples.[24]

The value that national legal systems have placed on the decisions of international human rights bodies should also be taken into account, given that **courts must apply the provisions of international human rights law in accordance with the decisions of the supranational authorities.** This has been done frequently by the high courts of the countries in this study. For example, there are decisions by the Plurinational Constitutional Court of **Bolivia**, which has interpreted the provisions on indigenous peoples' rights in light of the case law of the Inter-American Court.[25] In general terms, the high courts of justice in **Chile** apply international human rights instruments in accordance with the interpretations of the treaty bodies.[26] The Constitutional Court of **Colombia** has also referred to the case law of the Inter-American Court in matters concerning this issue.[27] The Constitutional Court of **Peru**, for its part, has repeatedly recognized the binding nature of the case law of the Inter-American Court and the decisions of the ILO.[28]

2 Legal framework and participation of indigenous organizations in its design

In the countries examined here, there are three scenarios for the legal implementation of the right to consultation and consent: (i) those that have a specific body of law, like Peru and Chile; (ii) those that are in the process of enacting specific laws, such as Bolivia; and (iii) those that do not have any specific law at this time and whose attempts to enact one have failed. This last category includes Brazil, Colombia, and Guatemala. Nevertheless, the reasons the laws have not passed and the degree of implementation of this right are very different in each country.

[19] In this respect, see: Plurinational Constitutional Court of Bolivia. Judgment No. 2003/2010-R, Case File No. 2008-17547-36-RAC. October 25, 2010; Chile. Supreme Court, *Caso Agua Mineral Chusmiza con Comunidad Aymara Chusmiza-Usmagama*, Case File No. 2480-2008; Colombia. Constitutional Court. Judgment U-039 of 1997, Judgment U-383 of 2003, Judgment T-704 of 2006, Judgment C-030 of 2008, Judgment C-461 of 2008, Judgment C-175 of 2009 & Judgment T-514 of 2009; Guatemala. Constitutional Court. Case File No. 199-95. Advisory Opinion of May 18, 1995; Peru. Constitutional Court. Case File No. 03343-2007-PA/TC. Lima. Jaime Hans Bustamante Johnson. Judgment of February 19, 2009, & Case File No. 06316-2008-PA/TC. Loreto. *Asociación Interétnica de Desarrollo de la Selva Peruana* (AIDESEP). Judgment of November 11, 2009.

[20] Federal Supreme Court. Extraordinary Appeal Judgment - RE 466.343-15, *en banc*, Opinion of J. Gilmar Mendes, 12/3/2008, *DJe* [Court Gazette] of 6/5/2009.

[21] See, inter alia, Constitutional Court. Judgment T-376, para. 16

[22] Constitutional Court. Case File No. 01126-2011-HC/TC. *Juana Griselda Payaba Cachique.* Judgment of September 11, 2012, para. 23.

[23] Constitutional Court. Judgment 00022-2009-PI.

[24] Constitutional Court. Case File No. 3878-2007. Judgment of December 21, 2009, conclusion of law IV (d).

[25] Plurinational Constitutional Court. Judgment No. 2003/2010-R, Case File No. 2008-17547-36-RAC. October 25, 2010, conclusion of law III.5.

[26] Cfr. Court of Appeals of Santiago. *Case of Miguel Ángel Sandoval Rodríguez.* Case File No. 11.821-2003, Conclusions of Law 49 and 50.

[27] See, *inter alia*, Constitutional Court. Judgment T-376, para. 18.

[28] Constitutional Court. Case File No. 725-96-AA/TC, p. 1; Case File No. 632-2001-AA/TC, p. 3; Case File No. 1396-2001-AA, p. 7; Case File No. 008-2005-PI/TC, p. 17; Case File No. 008-2005-PI/TC, p. 52.

In **Bolivia**, ILO Convention 169 was incorporated into the domestic legal system in terms of Law 1257 of 1991. Bolivia also has Law 3760 of 2007, which "recognizes the 46 Articles of the United Nations Declaration on the Rights of Indigenous Peoples as national Law of the Republic." Bolivia's domestic legal system also contains specific provisions on the right to consultation, principally in matters concerning oil and gas and elections.[29] Nevertheless, there is currently no general law of prior consultation, although a bill is before the Plurinational Legislative Assembly.

In order to implement this right, in 2012 the Ministry of Interior and the National Commission for drafting the Framework Act on Consultation prepared a **Draft Framework Act on the Right to Consultation**. In 2013, the State held several meetings with indigenous peoples and organizations to reach consensus on the draft bill. There are opposing views regarding the legitimacy of this process. According to some, the process involved the broad participation of different sectors of society and the State. For others, it was not sufficiently participatory because representative indigenous organizations were not present. Some of the challenges to the process relate to the participation in the National Commission of actors other than organized indigenous peoples, such as mining cooperatives, which diminishes the influence of indigenous organizations and forces them to make agreements with non-relevant actors regarding legislation that will be applied in their territories.[30]

At the same time, organized indigenous peoples have drafted their own parallel framework laws. For example, in 2011 the National Council of Ayllus and Markas of Qullasuyu (CONAMAQ) introduced a bill; and in 2012, they did so together with CONAMAQ and the Federation of Indigenous Peoples of Bolivia (CIDOB). These proposals are not reflected at all in the bill currently before the legislature. At the same time, there is increasing support among indigenous organizations and civil society for the direct application of ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples in reliance on the rights recognized in the Bolivian Constitution. There is a growing perception that a legal structure with weak consultation mechanisms is being consolidated in order to promote extractive activities without proper consideration for the rights of indigenous peoples.

Brazil ratified ILO Convention 169 by Legislative Decree 143 of June 20, 2002, enacted through Decree 5.051 of April 19, 2004. Although Brazil has federal laws regulating consultation, there are several notable decrees that establish obligations related to those provided for in Convention 169.[31] For their part, some Brazilian states have sought to regulate certain aspects of prior consultation.[32] Among the countries examined, **Brazil is perhaps the one that has made the least progress in the regulation of prior consultation**. It was only in January 2012, because of a complaint brought by the Central Workers' Union (CUT) to the Tripartite Committee of the ILO,[33] that such regulation began to move up the federal government's agenda.

[29] Bolivia has a Hydrocarbons Law (Law No. 3058 of 2005), Regulations on Consultation and Participation in Hydrocarbon Activities (Supreme Decree No. 29033 of 2007) and Regulations on Socio-Environmental Monitoring of Hydrocarbon Activities within the Territory of Native Indigenous Peoples and Peasant Communities (Supreme Decree No. 29103 of 2007). Bolivia also has the Electoral System Act (Law No. 26 of 2010), Chapter IV of which refers to the "Prior Consultation Process."

[30] Interview with Fundación Construir, La Paz, Bolivia, August 2014.

[31] See, Decree 4.887 of November 20, 2003, which regulates the territorial rights of quilombolas; Decree 6.040 of February 7, 2007, establishing the National Policy on the Sustainable Development of Traditional Peoples and Communities; Decree 7.747 of June 5, 2012, on the National Policy for the Territorial and Environmental Management of Indigenous Lands.

[32] For example, Decree 261 of November 22, 2011, supplemented by Regulatory Instruction IDESP 001 of August 6, 2013, both of the State of Pará, establishes the authority of the Economic, Social, and Environmental Development Institute of Pará to conduct the consultation process for the "Socioeconomic, Environmental, and Sustainable Use and Development Plan." IDESP-PARÁ. Record of prior consultation, August 6, 2013.

[33] See, Secretaria-Geral da Presidência da República, Secretaria Nacional de Articulação Social Processo de regulamentação dos procedimentos de consulta prévia no Brasil Convenção 169 OIT. Processo de regulamentação dos procedimentos de consulta prévia no Brasil Convenção 169 OIT, May, 2013, p. 4.

In this context, an Interministerial Working Group (IWG), composed of various federal bodies and coordinated by the General Secretariat of the Presidency and the Ministry of Foreign Affairs, held a seminar in March 2012 with approximately 100 indigenous leaders, residents of *quilombos* (*quilombolas*) and traditional communities, as well as civil society representatives, academics, and public servants. The participants agreed on the stages of work for the regulation of consultation and, although the IWG carried out a number of activities, decisions made by federal entities regarding the demarcation of indigenous territories undermined the confidence of the indigenous organizations, to the point of causing a breakdown in the dialogue in late 2013.[34] Only some *quilombola* communities and organizations remained in talks with the federal government.[35] Additionally, civil society organizations stated that indigenous peoples felt excluded or underrepresented in various activities carried out by the IWG. Given the difficulties involved in the centralized regulation of prior consultation, **a number of indigenous peoples and communities have begun drafting their own consultation protocols in Brazil**. This is the case, for example, of the Munduruku people, whose Assembly approved its own consultation protocol on December 14, 2014.[36] On July 25, 2014, the Wajãpi people, located in the State of Amapá in northern Brazil, approved the "Wajãpi Consultation and Consent Protocol." This document was submitted to the National Secretariat for Social Policy Coordination of the Presidency of the Republic, to the National Indigenous Foundation (FUNAI, *Fundação Nacional do Índio*), and to the Federal Public Ministry of Brazil.[37]

The **Chilean** State ratified ILO Convention 169 in 2008, 15 years after it was introduced into the National Congress for ratification. On September 25, 2009, **Decree 124 of the Ministry of Planning** (MIDEPLAN, now the Ministry of Social Development) was published a few days after Convention 169 entered into force. With this law, the State aimed to temporarily enforce the obligations of participation and consultation. Nevertheless, its wording and content did not reflect its provisional nature, so the decree remained in force for nearly three years and was applied on various occasions. It was plagued by flaws that hindered rather than facilitated the implementation of ILO Convention 169, and it was drafted without the participation of indigenous people. As a result, it was rejected by indigenous organizations and criticized by international experts and civil society.[38]

In 2011, the Chilean government came up with a new proposal to regulate Convention 169 and began a consultation process that was called into question nearly unanimously by indigenous organizations on the grounds that the government had failed to take account of their observations. Several organizations asked for the process to be suspended, which finally occurred in September 2011 when it was announced that priority would be given to defining the mechanisms for indigenous participation. Nevertheless, the Environmental Assessment Service resumed the process of indigenous consultation within the framework of the Regulations for the Environmental

[34] Among the decisions of government entities that caused the breakdown of the dialogue with indigenous organizations and communities, Administrative Order 303 (Order No. 303) of the Attorney General of the Union (*Advocacia Geral da União*) is particularly notable. In the legislative sphere, draft constitutional amendment PEC 215, sponsored by the parliamentary bloc known as the "*bancada ruralista*" (large-scale monocrop farmers with ample representation in the House of Representatives), has also caused mistrust among indigenous organizations. PEC 215 aims to assign the demarcation of indigenous territories, quilombolas, and conservation units to the Congress of the Republic.

[35] Interview with Juliana Miranda of the General Secretariat of the Presidency of the Republic, December 10, 2014.

[36] See, Federal Public Ministry. Office of the Federal Public Prosecutor of Pará. (December 18, 2014). *Munduruku decidem como deverão ser consultados sobre hidrelétricas e outras obras.* Available at: http://www.prpa.mpf.mp.br/news/2014/munduruku-decidem-como-deverao-ser-consultados-sobre-hidreletricas-e-obras

[37] See, Rede de Cooperação Amazônica. (October 6, 2014). *Protocolo proprio de consulta wajãpi é apresentado a órgãos do governo federal.* Rede de Cooperação Amazônica. Available at: http://www.rca.org.br/2014/10/protocolo-proprio-de-consulta-wajapi-e-apresentado-a-orgaos-do-governo-federal/

[38] See, *MAPUEXPRESS.* (September 21, 2009). "Reglamento fraudulento dictado por Viera Gallo mutila Convenio 169, se burla de Pueblos Indígenas y coloca al Estado chileno al margen del derecho"; *La Nación.* (September 13, 2011). "MIDEPLAN abre proceso de Invalidación de DS N° 124 sobre consultas indígenas."

Impact Assessment System (SEIA), which authorize the implementation of investment projects. In spite of the challenges by indigenous organizations, new SEIA Regulations were adopted in **Supreme Decree 40 of the Ministry of the Environment**, which was published on August 12, 2013.

In August 2012, the Executive Branch submitted New Proposed Regulations on Consultation to the Board of the National Indigenous Development Corporation (CONADI) to be distributed to indigenous peoples. The proposed regulations were aimed at regulating the indigenous consultation procedure and repealing Supreme Decree 124 of 2009. Toward the end of the process, a "Consensus Panel" was formed with the indigenous organizations to discuss the content of the proposal. Critizism focused largely on the composition of this body and its lack of representativeness. Multiple indigenous organizations were left out of the meeting for the same reason. On November 15, 2013, through **Supreme Decree 66**, published on March 4, 2014, the **Ministry of Social Development** approved the Regulations for the indigenous consultation procedure by virtue of Article 6(1) (A) and (2) of ILO Convention 169, and repealed the law specified therein. These regulations have also been called into question by indigenous organizations and civil society, not only for reasons related to the process that resulted in their approval, but also for substantive reasons. The main regulation adds requirements not established in ILO Convention 169 for the applicability of consultation, and narrows its scope.

In **Colombia**, the right to consultation has been implemented through different laws and infra-legal instruments, without there being any general law at this time. Since 1993, the legal system has included certain provisions—most notably Law 99 of 1993, the **Environmental Act**—stipulating that the exploitation of natural resources must involve prior consultation with the representatives of indigenous and Afro-descendant communities. **Decree 1320**, which regulates prior consultation with indigenous and Afro-descendant communities for the exploitation of natural resources within their territories, was issued in 1998. Nevertheless, international bodies[39] and the Constitutional Court[40] have repeatedly noted its incompatibility with ILO Convention 169 and the constitution. The government later issued **Presidential Directive 001 of 2010** to take the required actions and establish the required mechanisms. This directive was similarly criticized by Colombian civil society and indigenous organizations,[41] as well as international bodies.[42] The government later issued **Decree 2893 of 2011** creating the Directorate of Prior Consultation within the Ministry of Interior, which is in charge of leading the consultation processes, as well as **Decree 2613-2013** and **Presidential Directive 10-2013** to improve institutional coordination with the Directorate of Prior Consultation.[43] However, these have also been called into question for having been adopted without consultation, given that they implicitly regulate consultation.

Recently, the Ministry of Interior has prepared a draft law on fundamental rights (*Ley Estatutaria*) that seeks to regulate the right to prior consultation, but this has reportedly not been subject to consultation to date. According to information disseminated in the media, there are at least two other sets of draft regulations that different government authorities have been working on without input from indigenous organizations, giving rise to a certain degree of rejection on their part. In

[39] See, ILO. CEACR. General Report and Observations Concerning Particular Countries. International Labor Conference, 99th session, 2010; ILO Council of Administration. Report of the Committee set up to examine the representation alleging non-observance by Colombia with ILO Convention 169, filed by the Central Workers' Union (*Central Unitaria de Trabadores*) (CUT), 2001; ILO Council of Administration. Report of the Committee set up to examine the representation alleging non-observance by Colombia with ILO Convention 169, filed by the Central Workers' Union (*Central Unitaria de Trabadores*) (CUT), and the Colombian Trade Union Medical Association (Asociación Médica Sindical Colombiana) (ASMEDAS), 2001.

[40] See, Constitutional Court. Judgment T- 652 of 1998, Judgment T-880 of 2006, & Judgment T-745 of 2010.

[41] DPLF & Oxfam. (2011). *The Right of Indigenous Peoples to Prior Consultation. The Situation in Bolivia, Colombia, Ecuador and Peru.* Washington DC: DPLF/Oxfam, pp. 52-53.

[42] Committee on Economic, Social and Cultural Rights, Concluding Observations on Colombia, Doc. E/C12/COL/CO/, May 2010.

[43] Interview with the Directorate of Prior Consultation of the Ministry of Interior, Bogotá, Colombia, September 2014.

this context, there has been growing debate about the advisability and necessity of passing a general law on the right to consultation. The main arguments of the indigenous organizations for challenging a law regulating fundamental rights can be summarized as follows: (i) it appears to be an unnecessary mechanism, as the case law of the Constitutional Court has been sufficient and there are firmly established practices and institutions for implementing this right; (ii) there is no guarantee this law will reflect the progress that has been made, especially because it has to be enacted by Congress; and (iii) the countries that have general laws have been criticized for establishing standards that are more restrictive than the international standards.[44] The drafting of specific consultation protocols for different indigenous peoples has emerged as an alternative.

With respect to **Guatemala**, although ILO Convention 169 has been in force since June 1997, the country still lacks a comprehensive legal framework for the right to consultation. The implementation of mechanisms for consulting with indigenous peoples regarding measures likely to affect them was one of the commitments undertaken in the Peace Accords that put an end to the armed conflict the country experienced between 1960 and 1996.[45] In this context, a few laws were passed that contain certain provisions on the right to consultation. The **Municipal Code**, enacted through Decree 12-2002 of the Congress of the Republic, provides for consultation with residents (Article 63), consultation at the request of residents (Article 64), and consultations with indigenous communities or authorities in the municipality (Article 65).[46] These provisions establish mechanisms of "citizen information and participation" in different aspects of local life. **These articles have been used by indigenous peoples to express their positions regarding projects in their ancestral territories, through so-called good faith community consultation or self-organized consultation.** There are other relevant provisions in the **Law on Urban and Rural Development Councils**[47] and in the **Decentralization Act**.[48]

Nevertheless, the nature of the jurisdiction established in these provisions and the diverse legal actions in which the Constitutional Court has ruled on the need to regulate indigenous peoples' right to consultation, confirm that those provisions are insufficient.[49] Between 2010 and 2011, an Intersectoral Commission of the Office of the President of the Republic drafted regulations to implement consultation.[50] The mechanism used to publicly disclose the document consisted of inviting the submission of written and electronic observations and remarks during a 30-day period.[51] Then-UN Rapporteur on the Rights of Indigenous Peoples, James Anaya, made comments on the draft, indicating that it did not meet international standards and that it "will not be able to meet the international standards unless it is submitted to a suitable process of prior consultation with indigenous peoples."[52] The draft regulations were also called into question by the indigenous peoples of Guatemala, who called them a government imposition and expressed their rejection of any attempt to limit the rights enshrined in ILO Convention 169.[53] The Council of Western Peoples

[44] Interview with the National Indigenous Organization of Colombia, Bogotá, Colombia, September 2014, and interview with Dejusticia, Bogotá, Colombia, September 2014.

[45] Agreement on the Identity and Rights of Indigenous Peoples (Mexico D.F., March 31, 1995), granted status of law through the Framework Law of the Peace Accords, Decree 52-2005 of the Congress of the Republic, ch. IV, § D, para. 4. & ch. IV, § E, para. 5 a).

[46] Municipal Code, Decree 12-2002, Articles 63, 64, 65 and 66.

[47] *Ley de Consejos de Desarrollo Urbano y Rural*, Decree 11-2002 of the Congress of the Republic, Article 26.

[48] *Ley General de Descentralización*, Decree No. 14-2002 of the Congress of the Republic, Article 18.

[49] Constitutional Court. Case File No. 3878-2007. Judgment of December 21, 2009, conclusion of law IV.

[50] Draft Regulations on the Consultation Process of Convention 169 of the International Labor Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries. February 23, 2011.

[51] See, numeral V of the introduction to the Regulations on the Consultation Process of Convention 169 of the International Labor Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries.

[52] United Nations. Report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. Addendum. Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories. Doc UN A/HRC/16/XX, March 4, 2011.

[53] Nisgua. (March, 2011). *Comunidades rechazan iniciativa por normar las*

(*Consejo de Pueblos de Occidente*, CPO) filed a petition for a constitutional remedy challenging the proposed regulations, which was granted by the Constitutional Court on November 24, 2011.[54] Since then, there have been no reports of any serious initiative to legally implement the right to consultation in Guatemala.

In **Peru**, ILO Convention 169 has been in force since February 1995. Until a few years ago, the Peruvian legal system did not have a specific and comprehensive body of law on the right to consultation beyond a few isolated and sector-specific provisions. Against this backdrop of legislative omission, the Constitutional Court played a fundamental role in developing the content and stages for the implementation of the right to consultation in its case law.[55] A favorable political climate, in addition to the work of various indigenous peoples and civil society organizations, led to the 2011 enactment of Law 29785, the **Law on the Right to Prior Consultation for Indigenous or Native Peoples, recognized in the Convention 169 of the International Labor Organization**, published on September 7, 2011. The Prior Consultation Law, together with the **Regulations** thereto, enacted by Supreme Decree 001-2012-MC on April 3, 2012, are now the two most relevant laws on this right in Peru, and they place Peru among the few States in the region that have managed to enact a law of this kind.

Although this law is undeniably a positive step in the guarantee of rights, indigenous peoples' and civil society organizations challenged certain substantive aspects after a process of review and reflection following its enactment. Similarly, there has been criticism of the regulations and their consultation process from some indigenous organizations that decided to withdraw from the process.[56] Regardless of the challenges, both laws are in force and in the process of being fully enforced by the competent State entities. Viewed in perspective, the enactment of the Prior Consultation Law can be considered one of the main achievements of the Peruvian indigenous movement and a step toward the establishment of clear rules for the implementation of the right to prior consultation in Peru.

The processes for the implementation of laws undertaken in the countries of the region are quite varied. Nevertheless, it is possible to identify some guidelines that are applicable to different situations. The first is that **the absence of legislation, or inconsistencies in the existing laws, in no way relieve the State of its duty to comply with an international obligation. Another essential criterion is the need to incorporate existing international standards into the national legal system**, especially ILO Convention 169, the UN Declaration on Indigenous Peoples, and the relevant decisions of international human rights bodies.

Analysis of these different experiences shows the impossibility **of proposing a single formula, or even a "most appropriate" formula applicable to the distinct realities of the region's countries**. Although comparative experiences are extremely relevant, we must not make the mistake of thoughtlessly adopting a model that is not suited to the national situation. It bears emphasizing that a specific and comprehensive law implementing the right to consultation is a positive step, but this is not the only path toward its effective implementation. Indeed, the view that having a general law is inadvisable is gaining ground among indigenous peoples and civil society organizations in some countries, including Colombia, Bolivia, and Brazil. This is related to the fundamental premise that **there is an obligation to consult with indigenous peoples and their representative organizations regarding the implementation of the right to consultation, even if it will be through a general law**. We note that challenges of this kind have arisen in all the countries examined, be they because of the total absence of consultation processes in the enactment of laws, the lack of legitimacy of the decision-making entity, asymmetries of representation in

consultas comunitarias.

[54] Constitutional Court. Case File 1072-2011 of November 24, 2011, Background and holding.

[55] Constitutional Court. Judgment 00022-2009-PI.

[56] Pacto de Unidad. (March 5, 2012). Statement of Pacto de Unidad regarding the Regulations to the Prior Consultation Law. *Pachamama. La voz del sur andino.*

the process, or other factors. Similarly, bringing national legal systems into line with international obligations entails not only the positive duty to adopt rules but also the duty to **repeal incompatible provisions and abstain from adopting contrary rules**.

3 Jurisprudential framework and constitutional protection of consultation and consent

Legislative and regulatory development and case law development are parallel rather than isolated processes. Constitutional litigation has been, and continues to be, crucial to untangling political processes, especially when regulatory debate and development comes to a standstill or encounters resistance from certain actors. Similarly, political processes play an important role when high courts show signs of regression, in which case discussion of the right to consultation is taken into the political arena.

In **Bolivia**, the now-defunct Constitutional Court narrowly interpreted the scope of the right to consultation, holding that it entails

> […] examining whether the interests of indigenous and tribal peoples are in jeopardy, in view of their particular sociological circumstances; such consultation is not meant to be determinative or definitive in obtaining the necessary acquiescence of those peoples for the exploitation of the underground resources owned by the State.[57]

In other words, the Court found that "[…] there is a duty to consult with regard to the potential harm to their interests, so that they can be properly and fairly compensated."[58] This interpretation was reflected in subsequent decisions, a prime example being the judgment handed down in the constitutional challenge to the Hydrocarbons Law. The Court held in that case that it was unconstitutional for the obtaining of consent from native and indigenous peoples to be an objective of consultation.[59]

This position differs from that of the current Plurinational Constitutional Court of Bolivia (TCPB), which recognizes the existence of situations where consent is mandatory in every consultation process, in light of the international instruments and case law. The TCPB has championed the guarantees and characteristics of the right to consultation by following the international standards and the judgments of other constitutional courts, supplemented by its own interpretive work. Nevertheless, there are decisions that warrant criticism, such as the one handed down in the constitutional challenge to the laws issued in connection with a highway project that would affect the Isiboro Sécure National Park and Indigenous Territory (TIPNIS). In that decision, the Court ruled as inadmissible the constitutional challenge to Law 180, which suspended the construction of the highway and declared the TIPNIS inviolable. At the same time, it upheld the constitutionality of Law 222, which called for *ad hoc* consultation subsequent to the project's approval.[60]

The high courts of **Brazil** have not issued a significant number of decisions on the content of the right to consultation. There are some decisions from federal trial and appeals courts ordering the suspension of

[57] Constitutional Court. Judgment No. 0045/2006 of June 2, 2006, para. II.5.2.

[58] Constitutional Court. Judgment No. 0045/2006 of June 2, 2006, para. II.5.2.

[59] Constitutional Court. Judgment No. 0045/2006 of June 2, 2006, para. II.5.4.

[60] Plurinational Constitutional Court. Judgment No. 0300/2012 of June 18, 2012.

mega-projects executed without prior consultation.[61] Nevertheless, the current trend in the Superior Court of Justice (STJ) and the Federal Supreme Court (STF) has been to lift such injunctive measures, shifting the debate from the right to consultation to the merits of the case, based on a mechanism provided for in Law 4.348 of June 1964 called "security suspension." Through that mechanism, the Attorney General of the Union and the Ministry of Mines and Energy have been requesting that higher courts lift the precautionary measures granted on behalf of peoples affected by mega-projects.[62]

To date, there are no substantive decisions from the Constitutional Court of Brazil on the right to consultation." Rather, the most relevant judgments of the STJ on the issue have involved the lifting of injunctive orders suspending projects. In general, those decisions have taken a restrictive approach, inconsistent with international standards. One such STJ decision adjudicated a civil class action (*ação civil pública*) in which the Federal Public Ministry sought interim measures to suspend the environmental licensing of the São Luiz do Tapajós hydroelectric plant. In its decision, the STJ underscored that "[…] undertaking mere preliminary studies, related solely to the feasibility of the São Luiz do Tapajós/PA UHE [hydroelectric power plant], does not rise to the level of directly affecting the indigenous communities involved […]."[63] an extremely restrictive interpretation of the timeframe for engaging in prior consultation.

In **Chile**, numerous indigenous peoples have taken legal action asserting procedural and substantive challenges to the regulations on consultation, and the high courts have developed a rich but inconsistent body of case law. The vast majority of cases brought before the courts as actions for the protection of constitutional rights have been to challenge Environmental Assessment Decisions (EAD), an administrative measure that authorizes the execution of investment projects and, therefore, must be subject to consultation. At first, the high courts were not receptive to the need to implement consultation processes with respect to such administrative measures. Eventually, this gained acceptance, and was reflected in judgments from the Courts of Appeal as well as the Supreme Court.[64] Nevertheless, we note with concern that in recent judgments the Supreme Court has held that the lack of consultation on EADs falls within the jurisdiction of the environmental courts and should not be subject to appeals for constitutional protection.[65]

With respect to **Colombia**, there is broad consensus regarding the crucial role of the Constitutional Court (CC) in enforcing the right to prior consultation. It began to develop case law on the subject in the mid-1990s, in view of the approval of measures that directly affected indigenous peoples without observing this right. The CC has handed down some 77 judgments on the right to consultation applied in very diverse contexts, leading to the conviction among social actors—including state and private entities—that the duty to consult is mandatory. Since its judgment in Case No. SU-039 of 1997, the CC has held that consultation involves constitutional mandates, such as the participation of especially vulnerable groups, cultural diversity, and the international commitments

[61] See, for example, *Caso UHE Belo Monte*. Federal Regional Court for the 1st Region. Judicial Section of Pará. Public Civil Action – Absence of Indigenous Consultations. Case Files 2006.39.03.000711-8; 709-88.2006.4.01.3903; *Caso Pólo da Indústria Naval do Amazonas*, Federal Regional Court for the 1st Region. Judicial Section of Amazonas. Case No. 0006962-86.2014.4.01.3200.

[62] See, Justiça Global. (March 11, 2014). *Brasil é denunciado na ONU por violação dos direitos indígenas e uso da Suspensão de Segurança; Justiça Global.* (March 28, 2014). *Estado brasilero é criticado na OEA por ainda usar lei de exceção da ditadura militar.*

[63] Superior Court of Justice. Agravo Regimental na Suspensão de liminar e de Sentença N. 1.745 - PARÁ (2013/0107879-0), June 19, 2013.

[64] The following decisions are of particular note: Court of Appeals of Temuco, Case File 349/2011, *Asociación Indígena Tragun Mapu Maile Allipén c/ Comisión Regional del Medio Ambiente Región Araucanía.* Temuco, January 20, 2012; Supreme Court, Case File 6062/2010, *Faumelisa Manquepillan c/ Comisión Medio Ambiente*, January 4, 2011 (*Caso Lanco*); Supreme Court, Case File 258/2011, *Asociación Indígena Consejo de Pueblos Atacameños c/ Comisión Regional del Medio Ambiente Región Antofagasta*, Santiago, July 13, 2011 (*Caso Plan Regulador San Pedro de Atacama*); Supreme Court, Case File 10.090/2011, *Comunidad Indígena Antu Lafquen de Huentetique c/ Comisión Regional del Medio Ambiente Región Los Lagos*, March 22, 2012 (*Caso Parque Eólico Chiloé*); Supreme Court Case File 11.040/2011, *Marcelo Condore y otros c/ Comisión Regional del Medio Ambiente Región Tarapacá*, March 30, 2012 (*Caso Paguanta*).

[65] Supreme Court, Case File 17120-2013, conclusion of law 5.

assumed by the State with respect to ethnically and culturally diverse peoples.[66] Notably, the CC has held repeatedly that in view of particularly adverse effects on the collective territory of indigenous peoples, the duty to ensure their participation is not exhausted by consultation. Rather, their free, informed, and express consent must be obtained as a precondition for the measure.[67] The CC's role has been particularly relevant in the absence of legislation on the subject.

Given the significant role that the CC has played, it is worrisome to observe that certain regressive decisions have been issued recently. Among others, we can cite Judgment C-253 of 2013, which held that the right to consultation can only be asserted with respect to legislative measures issued after January 2008—the date of Judgment C–030, which developed jurisprudential criteria to apply to consultation on these types of measures—rather than from the date of Colombia's ratification of ILO Convention 169.[68] Another difficulty in the constitutional sphere is the infrequent compliance with the judgments of the CC.[69]

In **Guatemala**, a measure of progress has been made in the recognition of the rights of indigenous peoples in constitutional case law. One of the most relevant judgments is the one in which the Court affirmed that the standards contained in ILO Convention 169 are not inconsistent with the Constitution, but that, on the contrary, they complement the provisions that refer to indigenous peoples.[70] It is similarly notable that the Court has acknowledged that consultation is "a fundamental collective right,"[71] and that "the absence of ad hoc statutes does not nullify the right to which indigenous populations are entitled, which must be respected by the State."[72] Furthermore, the Court has repeatedly urged the Congress of the Republic to implement the necessary domestic provisions on the right to consultation.[73] Nevertheless, there are also some questionable aspects. For example, the Court has not endorsed the presumptions established under international law whereby the States must obtain the consent of indigenous peoples in order to make a decision or authorize a project.[74] The Court has also limited the scope of the right to consultation and has essentially held that, although indigenous peoples are entitled to this right, the outcomes of consultation are not binding upon the State.[75]

With respect to **Peru**, the body of law that regulates the right to consultation is supplemented by the rules established in various judgments of the Constitutional Court (TC) and the Supreme Court. The first precedent is the TC judgment handed down in Case 03343-2007-AA, in which the Court ruled for the first time on this right and held that ILO Convention 169 is a treaty with constitutional status, and supplements the provisions of the Constitution.[76] Judgment 00022-2009-PI is also relevant because, in the absence of specific legislation, the TC developed the content, stages, and rules to enable the effective implementation of the consultation process. Another notable decision is the judgment in Case 05427-2009-AC, which addressed the failure to implement regulations on the right to consultation. There, the TC examined the dispersed and sector-based provisions that—in the opinion of the State—were developing this right,

[66] Constitutional Court. Judgment SU-039 of 1997.
[67] Constitutional Court. Judgment T-376 of 2012, II, legal grounds and conclusions of law, para. 8.
[68] Constitutional Court. Judgment C-253 de 2013, conclusion of law 6.4.8.
[69] See, Rodriguez, G. A. (2014). *De la consulta previa al consentimiento libre, previo e informado a pueblos indígenas en Colombia.* Bogotá: GIZ/ Universidad del Rosario.
[70] Constitutional Court. Case File No. 199-95. Advisory Opinion of May 18, 1995, conclusion.
[71] Constitutional Court. Case File No. 3878-2007. Judgment of December 21, 2009, conclusion of law V.
[72] Constitutional Court. Case File No. 3878-2007. Judgment of December 21, 2009, conclusion of law IV.
[73] Constitutional Court. Case File No. 3878-2007. Judgment of December 21, 2009, Case File No. 1179-2005. Judgment of May 8, 2007; Case File No. 4419-2011. Judgment of February 5, 2013; Case File No. 2376-2007. Judgment of April 9, 2008; Case File No. 1008-2012. Judgment of February 28, 2013.
[74] See, IACHR. *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II.Doc. 56/09, December 30, 2009, p. 125.
[75] Constitutional Court. Case File 3878-2007. Judgment of December 21, 2009, conclusion of law IX.
[76] Constitutional Court. Case File 03343-2007-AA, legal grounds, para. 31.

and concluded that they do not establish consultation processes consistent with the requisite standards.

The progress made by the TC and the undeniable contributions it has made during difficult times must be acknowledged, although the Court has also issued some questionable decisions. In particular, in Judgment 06316-2008-AA, the TC held that consultation is enforceable based on Judgment 00022-2009-PI—that is, since June 2010—rather than from February 2, 1995, when ILO Convention 169 entered into force in Peru. However, after the criticism it received, the TC changed its position in Judgment 00025-2009-PI, and stated that prior consultation has been enforceable since the entry into force of Convention 169.

PART TWO

Implementation of the Right to Consultation: Progress and Challenges

None of the processes undertaken in the region to implement the right to consultation have been exempt from criticism. The challenges noted by by indigenous peoples and civil society organizations are generally related to the restriction of the content of the right to consultation in the domestic laws, the adoption without consultation of legal texts contrary to this right, and the holding of consultation processes that are not effective mechanisms for the guarantee of rights. In this section, we will address the specific aspects that have led to these challenges.

1 Regulation and scope of application: subject of consultation, persons entitled to consultation, and entities responsible for engaging in consultation

1.1 Persons entitled to consultation

Based on a comparative study of the situation in the countries examined in this report, two main problems can be identified in relation to determining who is entitled to consultation: (a) the use of restrictive criteria to identify indigenous peoples; and (b) difficulties in the practical identification of rights-holders related to the institutional or process design.

1.1.1 Restriction of persons entitled to consultation at the regulatory or procedural level

There are a few instances where the laws seem to limit who is entitled to engage in consultation by including additional or stricter requirements. In **Peru**, for example, Article 7 of the **Prior Consultation Law** appears to require a connection to ancestral territory, which in practical terms could exclude peoples who have lost their territory against their will from accessing the right to consultation. In addition, it refers to "direct" descent and omits the last part of Article 1.1.b of ILO Convention 169, which allows for the requirement the people in question they retain some or all of their own institutions and customs.[77] Additional hurdles arose with the issuance of Directive No. 03-2012/MC,[78] which contains additional criteria wholly inconsistent with ILO Convention 169, as well as the Prior Consultation Law and the Regulations thereto.[79]

We can also find provisions in **Chilean** law that could have the effect of restricting access to this right for groups who could be considered indigenous peoples under international law. Indeed, Article 5 of Supreme Decree 66 of 2013 identifies indigenous peoples as "those defined in Article 1 of [ILO] Convention 169 and recognized in Article 1 of Law No. 19.253," that is, the 1993 Law on the Protection, Promotion, and Development of Indigenous People or Indigenous Law. Referring to the Indigenous Law, we observe that it defines "the indigenous people of Chile"—without making reference to the notion of a people—as "descendants of the groups of people who have existed in the national territory since pre-Columbian times, who retain their own ethnic and cultural expressions, and for whom the land is the principal foundation of their existence and culture." It also recognizes as the main ethnic groups "the Mapuche, Aimara, Rapa Nui or Easter Islanders, the Atacameña, Quechua, and Colla communities of northern Chile, and the Kawashkar or Alacalufe and Yámana or Yagán communities of the southern channels." The list excludes ethnic groups such as the Diaguita, subsequently recognized in Law 20.117.

[77] Prior Consultation Law, Article 7.
[78] Ministerial Resolution No. 202-2012-MC, adopting Directive No. 03-2012/MC, Directive regulating the operation of the Official Database of Indigenous and Native Peoples.
[79] Directive No. 03-2012/MC, provisions 7.1.3., 7.1.4. and 7.1.5.

1.1.2 Practical difficulties in the identification of rights-holders

Similarly, there are practical problems in identifying indigenous peoples, and therefore, in determining whether to engage in prior consultation. In **Colombia**, for example, certifying the presence of ethnic communities in a project's area of influence is one of the most problematic issues in the practical implementation of this right. This appears to be related to the fact that the certification process is based primarily on information available in the databases of different State institutions, and field visits are reportedly made on an exceptional basis. In practice, these visits take place only when requested or when there is doubt as to whether the data are current.[80] In the absence of a field visit or the announcement of a consultation process, communities have few opportunities to find out that a project is underway that directly affects them.

In **Peru**, in addition to the aforementioned regulatory inconsistencies, there are practical difficulties in the exercise of the right to consultation by peasant communities on the country's coast and in the highlands, mainly with respect to mining activities. In October 2013, a database was published listing 52 peoples, including four Andean groups, without specifying or identifying communities.[81] Under Peruvian law, each State entity sponsoring the measure will be the one responsible for identifying the indigenous peoples to be consulted, while the Vice Ministry of Intercultural Affairs is authorized to issue an opinion on the matter.[82] To date, consultation has not been used in peasant communities in relation to mining activities. According to the available information, the Ministry of Energy and Mines has requested advisory services in different areas of the Andean region to determine the application of consultation, and in no case has it been considered a matter involving indigenous peoples. The application of criteria inconsistent with international law by this ministry or another sponsoring entity not specializing in the issue could be problematic, considering that the inapplicability of the right to consultation to people other than those living in the jungle has been part of the discourse among the country's highest-ranking authorities, who have rejected the ethnic dimension in the Andean world.[83]

1.2 Subject of consultation

According to Article 6 of ILO Convention 169, "legislative or administrative measures which may affect them directly" must be subject to consultation with indigenous peoples. This provision is crucial when determining the legitimacy of a consultation process. Nevertheless, there are a number of factors that reflect a trend toward restrictive application, as discussed below.

1.2.1 Exclusion *a priori* of certain measures

In the countries that have a specific law or are in the process of enacting one, concern has been expressed over the exclusion of prior consultation measures. Such is the case of **Bolivia**, where the Mining and Metallurgy Law, enacted on May 28, 2014, expressly excludes from prior consultation "mining operations consisting solely of prospecting and exploration."[84] **Chile** provides another troublesome example, as Article 80 of the Ministry of the Environment's Supreme Decree 40, issued in 2013, limits the applicability of indigenous consultation through the express exclusion of several circumstances and the inclusion of an exhaustive list of exceptional situations in which this right is un-enforceable.

[80] Interview with the Directorate of Prior Consultation of the Ministry of Interior, Bogotá, Colombia, September, 2014.

[81] This conflicts with other sources, such as ECLAC, according to which there are 85 indigenous peoples in Peru. See, ECLAC. (2014). *Guaranteeing indigenous people's rights in Latin America. Progress in the past decade and remaining challenges.* Santiago, Chile: ECLAC/UN.

[82] Prior Consultation Law, Articles 10 and 19.d; and Regulations to the Prior Consultation Law, Articles 8 and 28.3.

[83] The President of the Republic, Ollanta Humala, has stated publicly that the indigenous communities with the right to consultation are in the jungle, and not on the coast or in the highlands. He considered only their geographic location, a criterion that is clearly inconsistent with international standards. See, Servindi. (June 13, 2012). *Perú: Ollanta y su particular visión del derecho a la consulta previa*; Servindi. (April 29, 2013). *Ollanta reitera que espíritu de Ley de Consulta es darle voz solo a comunidades nativas.*

[84] Mining and Metallurgy Law, Law No. 535, enacted on May 28, 2014, Article 207.II.

1.2.2 Use of a restrictive definition or approach to "directly affecting"

There are a number of restrictive approaches to the concept of "directly affecting" in determining the application of the right to consultation at the legislative, jurisprudential, and practical level. In **Chile**, for example, with respect to the definition of "directly affecting" contained in Article 7 of Supreme Decree 66 of 2013, we can say that: (i) the wording suggests that it concerns certain impacts ("when they are the direct cause"), whereas ILO Convention 169 refers to measures "that may" directly affect the peoples concerned; (ii) it adds the requirement of the magnitude of the impact, setting a higher threshold of applicability; (iii) it requires that the measure in question cause a "specific [impact] on the indigenous peoples in their capacity as such"; and (iv) it places a qualitative restriction on the type of impact, no longer referring to its magnitude but rather to its quality, as consultation must be held only with respect to measures that cause a direct and specific impact on the "exercise of their ancestral traditions and customs, religious, cultural, or spiritual practices, or relationship to their indigenous lands."

Another example is in **Colombia**. The Constitutional Court has adopted a broad definition of "directly affecting,"[85] but in practice projects are presented without consultation in indigenous areas due to a restrictive application of this concept.[86] This is why the Constitutional Court has evidently urged the Ministries of Interior and the Environment to revise and adjust their protocols for defining the areas of influence of development and natural resource exploitation projects. A second cause for concern is that, in some of its recent judgments, the Constitutional Court seems to have taken a restrictive approach to legislative measures, affirming that the duty to consult arises only with respect to legislative measures that have "direct or specific" effects[87] or when they have a "direct, specific, and particular impact" on a specific indigenous community.[88] A similar situation has arisen in **Guatemala**, where an unconstitutionality action was filed before the Constitutional Court to challenge the Mining Act. The Court ruled that the Act was constitutional because its scope encompasses all of the territory and inhabitants of Guatemala, thus excluding the component of particular impact on indigenous peoples.[89]

1.2.3 Lack of identification of measures that may affect indigenous peoples directly

Another significant limitation concerning the subject of consultation is that the existing system or institutional design does not provide for the identification of measures that may affect indigenous peoples directly. In **Colombia**, for example, the mechanism that makes it possible to demand prior consultation with regard to extractive or investment projects, works, or activities is the certification of the presence of ethnic communities that the interested party must file prior to obtaining environmental licensing.[90] In this way, those projects that do not require an environmental license, but nevertheless directly affect the rights of indigenous peoples, can be implemented without a prior consultation process, as in the case of mining exploration projects. Similarly, the existing system in **Chile** for the approval of projects requiring an environmental license presents difficulties for the identification of measures that may affect indigenous peoples, and the burden is on the affected communities to request consultation, even though they may not be aware of a proposal's existence. In this regard, **Bolivia** and **Guatemala** are of particular concern, given that they have not yet adopted mechanisms to ensure, in all contexts, that consultation processes are held with respect to measures that directly affect indigenous peoples.

[85] See, Constitutional Court. C-030/08 & T-745/10.
[86] Rodríguez, G. A. (2014). *De la consulta previa al consentimiento libre, previo e informado a pueblos indígenas en Colombia.* Bogotá: GIZ/Universidad del Rosario, p. 155.
[87] Constitutional Court. C-196/12.
[88] Constitutional Court. C-317-12.
[89] Constitutional Court. Case File No.1008-2012. Judgment of February 28, 2013, Conclusion of Law V.
[90] See, Decree 2820 of the Ministry of the Environment, Housing, and Territorial Development, Articles 21 and 24.

1.3 Entities responsible for holding consultation processes

A comparison of the countries studied in this report allows us to identify three distinct scenarios: (a) those in which consultation has been assigned to a single specialized government body that conducts the process in coordination with other relevant sectors or entities (e.g., Directorate of Prior Consultation in Colombia); (b) those in which the task is assigned to the State entity that is taking the legislative or administrative measure in question, with the support of the public entity specializing in indigenous affairs (e.g., Peru and Chile); and (c) those in which no specific entity is in charge (e.g., Brazil, Bolivia, and Guatemala).

1.3.1 Centralization of the consultation process in a single government body

Among the countries examined here, **Colombia** is the only one that has assigned the administration of consultation processes to a specific State authority, the Directorate of Prior Consultation of the Ministry of the Interior. In addition, the Ministry's Directorate for Indigenous, Minority, and Roma Affairs is responsible for coordinating and holding consultation processes specifically for national legislative and administrative initiatives. The positive aspect of this arrangement is that it seems to be more conducive to the application of a specialized focus and to accountability. Nevertheless, there are certain challenges. For one, the consultation process is generally initiated at the request of the private party interested in carrying out the project, rather than by the responsible State entities acting on their own initiative. Another concern about the Directorate of Prior Consultation is that it does not play a leadership role in conducting the processes, nor is it responsible for guaranteeing rights. The Directorate is widely perceived among indigenous peoples and civil society organizations as the entity that facilitates dialogue between parties and lays the groundwork for the execution of the project. In addition, institutional weaknesses have been identified, such as the lack of sufficient and properly trained personnel, and inadequate coordination among the State institutions involved.

1.3.2 Consultation processes under the responsibility of the State entity adopting the legislative or administrative measure

Chile and Peru have opted for arrangements in which consultation processes are the responsibility of the State entity that adopts the measure directly affecting indigenous peoples. In **Peru**, pursuant to the Prior Consultation Law, the State entity developing the measure is in charge of carrying out the consultation, while the Vice Ministry of Intercultural Affairs of the Ministry of Culture (VMI) is responsible for determining, articulating, and coordinating the State policy on the implementation of the right to consultation, as well as for providing advance technical assistance and training to the State entities and indigenous peoples, and for other duties established in the Law. Although this model may be advantageous in ensuring compliance with the duty to consult, given the broad range of State sectors, in practice a number of roadblocks have been identified. One of the main challenges is that government employees and authorities are largely unfamiliar with current law, which makes them resistant to engaging in consultation. Similarly, difficulties have arisen in identifying the sponsoring agency and understanding the roles of the different institutions. It is widely perceived that the VMI only provides technical support, but each sponsoring entity decides whether or not to accept the criteria in spite of the fact that the VMI is the governing entity on the matter. Moreover, the coordination of the VMI is needed to guide the consultation process in order for it to be an effective mechanism for guaranteeing rights.

In **Chile**, Article 13 of Supreme Decree 66 of 2013 states that the body responsible for coordinating consultation is the one that proposes the measure, and that the National Indigenous Development Corporation (CONADI)

will serve as the technical assistant in the process.[91] The remarks made with respect to Peru are applicable here as well, although it would appear that these challenges have not been as evident in Chile because the first consultation processes are currently underway. With respect to measures that require the preparation and approval of environmental assessments, Supreme Decree 40 of the Ministry of the Environment stipulates that prior consultation proceedings are the responsibility of the entities in charge of the environmental assessment. In the consultation processes undertaken thus far, issues have arisen because the same number and type of professionals are involved, and the people conducting the prior consultation tend to be the same public servants that are responsible for the citizen participation mechanisms, but they have not undergone any institutional strengthening or training.

1.3.3 Absence of a specific entity responsible for consultation processes

The countries that have not passed specific and comprehensive legislation do not have a specific unit or entity in charge of implementing indigenous consultation processes. **Bolivia** is partly in this category. Although it seems to lean toward a system like those in Peru and Chile, in which each sector and level of government is responsible for consultation, this system has still not been consolidated and several State authorities currently have dispersed and non-specific functions pertaining to prior consultation. They include, most notably, the Social and Environmental Management Division (DGGSA) of the Vice Ministry of Energy Development of the Ministry of Hydrocarbons and Energy, which has been implementing consultation processes pursuant to the Hydrocarbons Law.

In **Brazil**, in the absence of a specific instrument, the few consultation processes have been sponsored by the government sectors responsible for the project. In its draft regulations on consultation, the government has proposed that the federal government body or entity responsible for the project notify the Palmares Cultural Foundation (in the event that *quilombola* communities are directly affected) or the National Indigenous Foundation (FUNAI) (in the event that indigenous communities are directly affected) for the creation of a Prior Consultation Commission that would conduct the process. Given that the dialogue with indigenous organizations has been suspended and the consultation process with the *quilombola* communities is ongoing, it is unclear whether that design will be put into effect.

With respect to **Guatemala**, certain community awareness or participation processes have been carried out, delegated to the corporations responsible for executing the projects. This is the result of current law, which reduces indigenous peoples' right to consultation to the participation of the potentially affected local population in the social and environmental impact studies.[92] Numerous indigenous communities have asked different State authorities to comply with their duty to hold consultations. Nevertheless, Guatemala does not have any authorities that implement consultation processes, as its human rights obligations demand.

As we have seen, there is no single or ideal institutional system that can be applied to all the countries. The existing systems have some positive aspects and, at the same time, problems that must be overcome. Given the challenges identified in the various countries, the State institutions responsible for consultation processes should do the following:

- Assign the role of "rights guarantor" and active leader of the prior consultation process to the responsible authority, which presumably enjoys autonomy and decision-making authority;
- Grant the responsible authority the necessary empowerment within the State apparatus and in its relationships with other sectors;

[91] Supreme Decree 66 of 2013, Article 14.

[92] Regulations on Environmental Assessment, Control, and Monitoring, Government Order 431-2007, Article 74.

- Guarantee the decentralized presence of the entity;
- Provide the necessary capacity to channel demands, requests, or claims that arise during the consultation process to the competent State institutions;
- Have sufficient and appropriate human and financial resources;
- Have a multidisciplinary team, preferably one that includes indigenous persons;
- Provide for the active participation of entities that will observe the process and ensure respect for rights, such as the Ombudsman of the People or the Public Ministry;
- Make the greatest possible efforts to train public servants in key positions to effectively implement the right to consultation.

2 Inter-sectoral conflicts, gaps in jurisdiction, budgetary shortfalls, and other limitations affecting consultation processes

Effective compliance with the guarantees of the right to consultation is affected by multiple practical limitations in the countries of the region. These seriously affect the exercise of a fundamental right, and are associated with issues such as the failure to implement consultation processes; noncompliance with the guarantees required for a consultation process that meets international human rights standards; gaps in current law; inadequate funding; and the absence of guarantees in the social and environmental assessments. We discuss the principal concerns raised by each one of these issues below.

2.1 Failure to implement consultation processes

The clearest limitation on the implementation of this right is the adoption without consultation of legislative and administrative measures that affect indigenous peoples directly. In all of the countries discussed in this study, without exception, there have been complaints about the failure to implement consultation processes when needed. In **Bolivia**, although such processes have been in place for several years in matters concerning oil and gas, the same is not true of administrative measures that directly affect indigenous peoples in other spheres, such as mining and infrastructure. Similarly, although prior consultations have been conducted in **Colombia** since the mid-1990s, cases still arise where measures are adopted without observing this right. As for **Peru**, the first consultation processes began with the entry into force of the Prior Consultation Law on December 7, 2011. Nevertheless, numerous legal and administrative measures have subsequently been adopted without consultation.[93] The situation in **Guatemala** is of particular concern. In spite of the heightened social conflicts throughout the country, extractive, development, and infrastructure plans and projects have been approved without observing the right to consultation. For years, indigenous peoples in Guatemala have asked the State to enforce their right to be consulted; the State's response has been either inaction or refusal to comply with this duty.

[93] For example, Law 30230 was published on July 12, 2014, adopting a set of tax measures designed to simplify procedures and permits in order to promote and expedite investment in the country. As stated by the national indigenous organizations of Pacto de Unidad, this law included several measures affecting indigenous peoples without consulting them. See, Pacto de Unidad. (September 2014). *Atentado contra los derechos territoriales de los pueblos indígenas y originarios del Perú*. Lima. Available at: http://www.muqui.org/nosotros/donde-estamos/90-ultimas-noticias/ultimas-noticias/6073-pronunciamiento-del-pacto-de-unidad-ley-30230

2.2 Noncompliance with the guarantees required for a consultation process that meets international human rights standards

In order to be compatible with international human rights standards, consultation with indigenous peoples must comply with certain guarantees: it must be prior, free, informed, culturally appropriate, and conducted in good faith and with the purpose of obtaining consent. Many of the limitations of consultation processes are related to the breach of one or more of these guarantees.

- **Complete and culturally appropriate information about the measure.** This guarantee requires that, from the outset and throughout the process, full and accurate information is provided about the nature, effects, and consequences of the measure on the communities or peoples consulted.[94] Indigenous peoples and communities tend to face difficulties because of the inaccessibility of information about the project, insufficient time to file an appeal, geographical distance, and a lack of economic resources and technical assistance. Another main concern is the quality, quantity, and cultural appropriateness of the information provided during the consultation process by State authorities or public servants.

- **Cultural suitability.** This assumes, in general terms, that the process is consistent with and respectful of the cultural aspects specific to the indigenous people or community consulted. The appropriateness of the consultation is determined by multiple considerations, such as the participation of indigenous peoples through their representative institutions. In some countries such participation has been mandated by law.[95] Nevertheless, difficulties can arise in identifying those institutions, and there have been cases where consultation is conducted by communities and not by peoples, creating divisions and disregarding indigenous peoples' own forms of organization.[96] In these scenarios, it is especially relevant to take the necessary time and use culturally appropriate methods to identify in advance the representative organizations of each community and/or people to be consulted.

The cultural adaptation of the consultation process is also related to the amount of time allowed in order for the consulted people or community to obtain information and ascertain the scope of the measure, decide or deliberate on their position internally, as well as to engage in dialogue with the other participants in the process, without time pressures. Nevertheless, there is an observable trend to establish fixed deadlines and progressively reduce the duration of the processes in countries like **Bolivia,**[97] **Colombia,**[98] **Chile,**[99] and **Peru.**[100] This is despite the fact that the geographic and sociocultural context would seem to evidence the need for longer periods. Although setting deadlines in advance tends to make processes more predictable, it is preferable for them to be considered as guidelines that can be extended if necessary, bearing in mind the principle of flexibility,[101] and with a view to ensuring the cultural appropriateness of the consultation and avoiding merely procedural approaches.

[94] I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador.* Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 208.

[95] See, Bolivia. Hydrocarbons Law, Article 118; Chile. Supreme Decree 66 of 2013, Article 6; Peru. Prior Consultation Law, Article 6.

[96] Interview with the Office of the High Commissioner for Human Rights in Colombia, Bogotá, Colombia, September, 2014.

[97] Supreme Decree No. 29574, issued on May 21, 2008, Article 2.III. Similarly, Article 212 of the Mining and Metallurgy Law provides for a maximum duration of four months for consultation processes; Article 22 of the Draft Consultation Law establishes that, as a general rule, consultation processes must be concluded within a maximum of 180 calendar days.

[98] One of the determining factors in the success of consultation processes is their duration, which has decreased significantly in recent years, with some processes lasting only one or two months. Interview with the Directorate of Prior Consultation of the Ministry of Interior. Bogotá, Colombia, September, 2014. Interview with staff members of the Office of the Deputy Ombudsman for Indigenous People and Ethnic Minorities. Bogotá, Colombia, September, 2014. Interview with the OHCHR Office. Bogotá, Colombia, September, 2014.

[99] Supreme Decree 66 of 2013, Article 17.

[100] Regulations to the Prior Consultation Law, Article 24.

[101] See, Peru. Prior Consultation Law, Article 4(d) & (e); Chile. Supreme Decree 66 of 2013, Article 10.

- **Absence of guarantees to ensure a free consultation process.** This requires that the process be free of any type of coercion from the State or third parties acting with its authorization or acquiescence.[102] It is possible to identify cases of intense pressure on and intimidation of the communities consulted, especially on their leaders. In **Colombia**, the persistence of armed conflict is a central factor, as it limits the free decision-making capacity of indigenous peoples. At times, consultations are accompanied by threats, intimidation, dispossession, or eviction.[103] Similarly, in **Guatemala**, some dialogue or awareness processes have been marked by threats and the criminalization of community leaders.[104] In **Brazil**, there have been cases where members of indigenous communities have been arrested in the middle of meetings convened by high-ranking officials from the federal, state, and municipal governments.[105]

- **Absence of measures to accomplish the objective of consultation: the consent of the people or community consulted.** Under Article 6 of ILO Convention 169, consultations must be "undertaken with the objective of achieving agreement or consent to the proposed measures." While this objective seems clear, there are very different understandings of it. In **Bolivia**, for example, given the laws in effect and the institutional design, consultation processes regarding oil and gas projects have largely focused on negotiating compensation for the harms identified, rather than on obtaining consent before decisions are made. Similarly, in **Colombia**, according to some indigenous organizations, consultation centers on determining how to implement the project in a way that least affects indigenous peoples, through mitigation measures and the payment of restitution and/or compensation.[106] This happens because the current system does not allow for the actual determination of whether or not to implement the project, and disregards the fact that the purpose of consultation is to guarantee the physical and cultural survival of indigenous peoples in the face of measures that affect their collective rights. Consultation should therefore be oriented toward protecting those rights and avoiding the social welfare negotiation model.

- **Failure to observe the principle of good faith.** The principle of good faith must be an inherent part of every consultation with indigenous peoples, as established in Article 6 of ILO Convention 169 and Article 19 of the UN Declaration on the Rights of Indigenous Peoples. The main concern with respect to the implementation of this principle is that it could be designed in such a way as to prevent indigenous peoples from opposing a specific project. Under **Chilean** law, for example, good faith has been defined in a way that acts preventing the achievement of consent are identified as contrary acts.[107] It bears recalling that indigenous peoples are fully entitled to oppose a proposed measure—a point that with the proposed understanding of good faith in the Chilean law could be subject to debate.[108]

[102] I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador.* Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 186.

[103] See, ONIC. Consejería de Derechos de los Pueblos Indígenas, Derechos Humanos, Derecho Internacional Humanitario y Paz. *2013 Annual Report*; ONIC. Consejería de Derechos de los Pueblos Indígenas, Derechos Humanos, Derecho Internacional Humanitario y Paz. *2014 Annual Report.*

[104] See, *inter alia*, UDEFEGUA. (2013). *El Silencio es historia. Informe sobre situación de Defensoras y Defensores de Derechos Humanos. Enero a Diciembre de 2013*, p. 11. OHCHR. Report of the High Commissioner for Human Rights on the activities of her Office in Guatemala, 2012. A/HRC/22/17/Add.1, January 7, 2013, paras. 47-50. OHCHR. Report of the High Commissioner for Human Rights on the activities of her Office in Guatemala, 2011. A/HRC/19/21/Add.1, January 27, 2012, para. 40. IACHR. (August 24, 2013). *IACHR Condemns Attack against Maya Q'eqchi' Children in Guatemala.* IACHR Press Release 61/13. Cobán, Alta Verapaz, Guatemala.

[105] See, Conselho Indigenista Missionário. (October 2014). *Sem provas, Polícia Federal e governo transformam cinco líderes Kaingang em presos políticos e criminalizam a luta pela terra.*

[106] Interview with OPIAC, Bogotá, Colombia, September 2014.

[107] Supreme Decree 66 of 2013, Article 9.

[108] See, UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. *Extractive industries and indigenous peoples.* A/HRC/24/41, July 1, 2013, § III. A.

2.3 Gaps in the law

Another limitation concerns the gaps in the law that make it difficult to carry out consultation. Those legal systems that lack provisions to implement this right fall within this sphere, but there are also more specific gaps that are evident in each country. In **Bolivia**, for example, in the application of the regulatory framework on prior consultation in the oil and gas context, the absence of guidelines by which the effects can be measured "objectively" has been considered a legal lacuna.[109] A gap identified in **Colombian** law is the absence of legal provisions that allow for consultation processes to be initiated with respect to projects, works, or activities that do not require environmental licensing yet directly affect the collective rights of indigenous peoples.[110] In the **Chilean** legal system, the consultation processes recently initiated pursuant to Supreme Decree 40 of 2013 reflect the fact that the wording used is very generic and some central aspects of the process are unclear.[111] Similarly, the implementation of the Prior Consultation Law in **Peru** has revealed situations about which the law is silent, such as determining which entity should take charge of the consultation process when the authority to take measures is shared by various State bodies.[112]

[109] Cox, R. (Coord.). (2013). *Estado de la gestión socio-ambiental del sector hidrocarburos en pueblos indígenas del Chaco y Norte de La Paz, Bolivia.* Cochabamba: Centro de Estudios Aplicados a los Derechos Económicos, Sociales y Culturales (CEADESC), p. 32.

[110] What makes prior consultation enforceable is the fact that the certification of the presence of ethnic communities—which triggers, if appropriate, the consultation process—is one of the requirements that the interested party must meet in order to obtain an environmental license. The situation described above occurs, for example, with mining exploration projects, because they do not require an environmental license. See, Article 24 of Decree 2820 of the Ministry of the Environment, Housing, and Territorial Development.

[111] For example, it is unclear whether the memorandums of understanding obtained through consultation would have to be included in the Environmental Assessment Decision to monitor the project owner's compliance, or whether once the memorandum of understanding is reached, an additional step would have to be taken in order for the project owner who is not a party to the consultation process to indicate how to take the agreed measures, in order to see whether and how it can be undertaken.

[112] See, GIZ. (2014). *La consulta previa al área de conservación regional Maijuna Kichwa. Lecciones de la primera experiencia de consulta previa en el Perú.* Lima: GIZ/Project Promoting the Implementation of the Right to Prior Consultation, p. 23.

2.4 Adequate funding of consultation processes

Implementing the consultation process requires sufficient financial resources to ensure, among other things, the presence of the indigenous peoples' representatives, technical assistants to advise them as necessary, and the presence of government representatives. The way in which the costs associated with consultation processes are funded varies among the countries, and in some cases the laws do not address this aspect. In **Bolivia**, for example, the Hydrocarbons Law provides that "the consultation process must be financed by the Executive Branch, and charged to the oil and gas project, work, or activity in question."[113] Subsequently enacted provisions allow for the oil and gas companies to recover the cost of the consultation process, compensation, and restitution payments, in which case the State assumes the cost of the consultation and other related costs through Yacimientos Petrolíferos Fiscales (YPFB).[114]

In **Colombia**, the cost of the consultation process is assumed in most cases by the corporations backing the project, by directly funding the indigenous organizations so they can obtain the technical services of their choosing.[115] In **Peru**, the Prior Consultation Law provides that the "State entities must guarantee the funds required for the consultation process in order to ensure the effective participation of the native or indigenous peoples,"[116] while the Regulations to the Prior Consultation Law establish different funding sources according to the type of measure[117] and establish that in the case of extractive projects, the costs will be borne by the interested corporation. Chilean law, for its part, does not specify who will be responsible

[113] Hydrocarbons Law, Article 7.

[114] The Law for the Sustainable Development of the Hydrocarbons Sector, Law 3740, introduced the concept of "recoverable costs," regulated by Supreme Decree 29504, which establishes the conditions and parameters for the return by YPFB of the costs considered recoverable within the framework of current operations contracts.

[115] Rodríguez, G.A. (2014). *De la consulta previa al consentimiento libre, previo e informado a pueblos indígenas en Colombia.* Bogotá: GIZ/Universidad del Rosario, p. 133. Interview with the Office of Environmental and Social Affairs of the Ministry of Energy and Mines, Bogotá, Colombia, September, 2014.

[116] Prior Consultation Law, Article 18.

[117] Regulations to the Prior Consultation Law, Article 26.

for funding consultation processes and, in practice, they are being funded by each State entity in charge of the process, without a specific budgetary allocation. Although there is no single formula, the most relevant point with respect to funding is that it must guarantee the full participation of indigenous peoples under equal conditions. It also has to provide the guarantees of independence and impartiality that must govern the State's actions in the process, and prevent corrupt practices or the cooption of interests.

2.5 Absence of guarantees in the social and environmental assessment

The performance of prior social and environmental impact studies is one of the fundamental guarantees that the States must comply with before authorizing extractive development and investment projects on indigenous lands and territories, and is essential for conducting a properly informed consultation process. In the countries examined in this report, various critical points are identified with respect to compliance with the guarantees required in the international sphere for socio-environmental assessments.

One such point is that the environmental impact studies (EIS) are prepared by the project's proponent, or by hired consultants on its behalf, with little or no supervision by the State authority. Issues may arise with respect to the State's failure to comply with its duty to supervise during the drafting of the EIS, as well as in relation to the subsequent verification and confirmation of the information submitted prior to the approval of the study and authorization of the project. In general terms, there are few means of verifying the information submitted by the corporation, and the responsible institutions often lack the resources or willingness to do so. The systems are oriented toward the approval of projects, guided by criteria of celerity and expeditious licensing. Challenges are also raised with respect to the weakness of the technical criteria used and the diminished stringency of the social and environmental requirements in comparison with the international standards, including those on the collective rights of indigenous peoples. It is also common for communities to not take part in the processes, so that the impacts are defined by the project owner, or by the public servants involved in the process.

3 Overlapping regulatory frameworks and ambiguity with respect to the timing of consultation

3.1 Overlapping regulatory frameworks

In some countries, the way in which the right to consultation is implemented has meant that the relevant legal provisions are not completely harmonized. This creates issues of overlapping regulatory and coordination frameworks among State authorities. That is the case in **Bolivia**, where consultation is being implemented gradually and by sector, and the sector-based legislation notably contradicts the Draft Consultation Law on issues of time periods and institutional culture.[118]

Another very common overlap occurs in the laws on social participation in environmental matters. In recent decades, the vast majority of countries in the region have incorporated mechanisms that allow for the participation of the population in the environmental management of projects or activities. The laws provide for a variety of participation mechanisms, including the provision of information to the affected population, the obligation on the authorities to publish administrative decisions, and participation in processes for the adoption of measures through public or citizen consultations. Although citizen participation is a valuable mechanism, it does not replace

[118] For example, while the Mining and Metallurgy Law provides that the consultation process "may not be of a duration of more than four months," the Draft Consultation Law establishes as a general rule that consultation processes shall be conducted "within a maximum time period of 180 calendar days." See, Article 212 of the Mining and Metallurgy Law and Article 22 of the Draft Prior, Free, and Informed Consultation Law.

the obligation to have specific mechanisms that enable indigenous and tribal peoples to take part in the preparation of the EIS. This situation is of particular concern in **Guatemala**, which still lacks specific mechanisms for indigenous peoples to be able to exercise their right to consultation, and where the only mechanisms available are for citizen participation.[119]

3.2 Ambiguity regarding the initiation of consultation

One of the guarantees of the right to consultation concerns the time at which it is held, and requires that it take place "from the initial phases of the drafting or planning of the proposed measure, in order for indigenous peoples truly to be able to take part in and influence the decision-making process."[120] Although the exact time at which consultation is initiated may vary according to the type of measure, activity, and/or sector in question or the steps required for approval, the international standards provide the clear guideline that the timing of consultation must ensure that indigenous peoples can have an effective impact on decision-making. It is evident that there are difficulties in complying with this guarantee at the domestic level.

In **Bolivia**, given the absence of a prior consultation mechanism for measures affecting indigenous peoples, there have been cases where consultation processes occurred after such measures were taken.[121] One point to underscore is that the Hydrocarbons Law stipulates that consultation must be held both prior to the bidding, authorization, contracting, announcement, and approval of the oil and gas measures, works, or projects and to the approval of the EISs.[122] In practice, consultation is applied only in the second instance: even though Bolivia has a positive body of law, the failure to implement it effectively curtails the influence of indigenous peoples, and limits it to environmental and compensatory matters.

The **Peruvian**[123] and **Chilean**[124] laws provide certain safeguards to ensure that consultation with indigenous peoples takes place prior to any measures. However, they leave a margin of discretion for State entities to apply this guarantee to the specific decision-making procedures in each sector. In **Colombia**, the Consultation Directorate acts upon the request for a certification of the presence of ethnic communities, which enables it to determine whether it is appropriate to initiate a consultation process. With respect to the timeliness of the request, for each sector Decree 2613 of 2013 provides specific time periods in which the government agencies or project executing entities must evaluate the request. That legal provision does not guarantee the prior nature of the consultation in all cases.[125]

In the case of **Brazil**, the absence of a centralized law and the fact that the authority to conduct consultation is dispersed among government ministries and sectors leads to significant ambiguity with regard to when consultation should be held. A similar situation exists in **Guatemala**, where this guarantee is not met because there are no specific mechanisms for the effective exercise of this right.

[119] See, Regulations on Environmental Assessment, Control, and Monitoring, Government Order 431-2007, Title VIII.

[120] I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador.* Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paras. 167 & 180-182; I/A Court H.R., *Case of the Saramaka People. v. Suriname.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 133.

[121] The best example is the TIPNIS highway project, for which a consultation process was held—not without being called into question—when the project was already underway. See, FIDH/APDHB. (2013). Bolivia: informe de verificación de la consulta realizada en el territorio indígena Parque Nacional Isiboro-Sécure. April, 609e.

[122] Hydrocarbons Law, Article 115.

[123] This is asserted based on the definition of the purpose of consultation as "guaranteeing their inclusion in the State's decision-making processes" in Article 3 of the Prior Consultation Law; the inclusion of the principle of timeliness in Article 4(a) of the Prior Consultation Law; and the mandate identified by the State entities for the measures subject to consultation, which triggers the process contained in Article 9 of the Law. It bears mentioning that in the application of these provisions in Peru, consultations in the oil and gas sector have been taking place prior to competitive bidding for oil blocks.

[124] Although Supreme Decree 66 does not establish a specific time, it emphasizes that "The responsible body will always hold prior consultation before the administrative measure is ordered," and that in the case of legislative measures, it will be held before the presidential address is sent to the National Congress. Supreme Decree 66 of 2013, Article 11.

[125] For example, in oil and gas matters, it provides that "The certification will be requested once the oil and gas contracts offered in competitive bidding processes or by direct allocation have been awarded and executed." Decree 2613 of 2013, Article 5.

Recommendations

Based on the analysis of the situation in six countries of the region, this report illustrates the challenges involved in making the right to prior, free, and informed consultation and consent a mechanism that safeguards the human rights of indigenous peoples in respect of extractive and infrastructure projects, as well as other decisions that affect their interests. Although certain advances have been noted, the various actors involved in the implementation process need to take a set of actions if their intent is to consolidate prior consultation as a right that enables government and corporate interests to be compatible with human rights. Based on our analysis, the following recommendations are made to the governments of Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru:

1. Enhance efforts to protect the effective enjoyment by indigenous peoples of their right to land and territory, and ensure their right to collective property and other related rights in light of the applicable international standards.
2. Take the necessary measures to identify, through effective consultation with indigenous peoples, how to incorporate the international standards on the right to prior, free, and informed consultation and consent into the domestic legal system. This may be through general laws and regulations, or through specific protocols applicable to different indigenous peoples, bearing in mind ILO Convention 169, the UN Declaration on Indigenous Peoples, and the decisions of international human rights bodies.
3. Amend or eliminate the legislative, administrative, or other measures identified in this report that prevent the full exercise of the right to prior, free, and informed consultation, to ensure the participation of indigenous peoples.
4. Abstain from authorizing and adopting measures that affect the lands and territories of indigenous peoples and prevent third parties from doing so without observing the guarantees of the right to consultation and consent. This includes extractive concessions, development or investment plans, or projects that restrict indigenous peoples' enjoyment of natural resources or affect their territory.
5. Ensure that all legislative or administrative measures that may affect indigenous peoples directly are submitted to consultation and, if appropriate, to prior, free, and informed consultation.
6. Ensure that the identification of persons entitled to consultation is consistent with international standards by taking the necessary time to ascertain, together with the communities or peoples consulted, which representative entities should participate in the consultation processes.
7. Strengthen and, if necessary, create State institutions responsible for consulting with indigenous peoples, taking account of the following guidelines:
   - Assign the role of "rights guarantor" and active leader of the entire consultation process to the competent authority. This entails autonomy, decision-making authority, and the necessary empowerment within the State apparatus and in relation to other sectors;
   - Grant the necessary capacity to channel demands, requests, or claims that arise during the consultation process to the competent State institutions;
   - Provide sufficient and appropriate human and financial resources;
   - Guarantee the decentralized presence of the entity;
   - Provide a multidisciplinary team, preferably one that includes indigenous persons;
   - Provide for the active participation of entities that will observe the process and ensure respect for rights, such as the Public Ministry, the Ombudsman of the People, or other equivalent national human rights institutions;

- ❖ Make the greatest possible efforts to train public servants in key positions to effectively implement the right to consultation.

8. Ensure that the social and environmental impact studies have consultation and licensing mechanisms that are designed to the highest standards. This process must have the full participation of indigenous peoples and must be conducted by the competent State institutions, or by independent and technically trained entities under strict State supervision.
9. Ensure that indigenous peoples and communities that have been affected by development projects without the proper prior consultation have access to effective reparation mechanisms that will prevent and mitigate the violation of their rights.
10. Take actions to systematize the consultations that have been and will be conducted, and make this information available to the public.
11. Identify and establish publicly accessible indicators and monitoring systems on the implementation of the laws and policies designed to enforce the right to prior, free, and informed consultation and consent.

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1779 Massachusetts Ave. NW, Suite 710
Washington, D.C. 20036
T: 202-462-7701 | F: 202-462-7703
info@dplf.org | www.dplf.org

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