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## Contestations over Indigenous Participation in Bolivia's Extractive Industry: Ideology, Practices, and Legal Norms

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# **Contestations over Indigenous Participation in Bolivia's Extractive Industry: Ideology, Practices, and Legal Norms**

## **Abstract**

The participatory rights of indigenous peoples have been at the center of conflicts over resource extraction, which have recently increased in number and intensity across Latin America. Using comprehensive empirical data about the Guaraníes' participation in Bolivia's gas sector, this study finds that competing claims regarding territory, property, participation, and decision making provide important explanations for contestations over consultation practices and legal norms in the country. It argues that the main conflicts can be explained by (1) the Bolivian state's focus on directly affected communities and those with formally recognized land titles, something that clashes with the Guaraníes' principle of "territorial integrity"; (2) the state's conviction that it holds a monopoly over subsoil resources, and the limited rights to participation that it is willing to grant as a consequence, which the Guaraníes reject; and (3) the dissonance between state customs and regulations and Guaraní uses and customs.

**Keywords:** participatory rights; free, prior, and informed consent (FPIC); extractive industry; indigenous peoples; legal pluralism; resource governance; Bolivia

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# Contestations over Indigenous Participation in Bolivia's Extractive Industry: Ideology, Practices, and Legal Norms

Almut Schilling-Vacaflor

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## 1 Introduction<sup>1</sup>

The issue of prior consultation and free, prior, and informed consent (FPIC) in the extractive industries has gained increasingly in legal and political importance in the past few years. In the context of a global expansion of oil, gas, mining, and hydroelectric projects that affect indigenous territories, these procedural rights have been conceived of as safeguards for protecting the substantial rights that might be at stake – for example, to cultural identity, self-determination, territory, and water supplies (Anaya 2013). In practice, such participatory

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1 I would like to thank Magaly Barba for inviting me to participate in Takovo Mora's prior consultation, and for sharing her vast knowledge and experience. I also thank Anna Barrera for her insightful comments on a previous version of this article. I gratefully acknowledge the financial support of the German Foundation for Peace Research (DSF) and the Fritz Thyssen Foundation for my field research in Bolivia.

rights have in recent years moved to the center of contentious politics over extraction projects, particularly in Latin America (see Fulmer, Snodgrass and Neff 2008; Laplante and Spears 2008; Rodríguez Garavito 2011; Humphreys Bebbington 2012).

In both public and academic debates alike, consultation processes have generally been compared to international human rights instruments and the domestic legislation of the country in question. The critical observation made by many scholars of legal pluralism that there is a bias towards the state apparatus and its laws and regulations (Griffiths 1986; Benda-Beckmann 2002), as well as towards international norms – such as the International Labour Organization Convention 169 (ILO C169) on the rights of indigenous peoples, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), or the UN Guiding Principles on Business and Human Rights – holds true for research into resource governance as well. In contrast, the ideas, norms, and procedures of the affected populations themselves – along with their own visions of territory, property, participation, and appropriate decision making regarding nonrenewable resources found in their territories – have, meanwhile, been widely neglected. The article's analytical framework draws on Franz and Keebet von Benda-Beckmann's and Wiber's (2006) proposed approach of distinguishing between the ideological, the legal-institutional, and the practice layers when analyzing property regimes and applies it to the participatory rights of Guaraní peoples in Bolivia's gas sector. As a result, it shows that divergences between state and indigenous ideologies in Bolivia explain the current contestations over consultation practices as well as disputes about legal norms there – for example, regarding the adoption of a law on prior consultation.<sup>2</sup> These insights help us to better understand the reasons for the existence of an "implementation gap" vis-à-vis indigenous and participatory rights in Bolivia's extractive industries, a phenomenon that is likely to be of relevance for many other countries as well.<sup>3</sup>

The article argues that the main sources of contestation between the state and the Guaraníes are as follows:

- 1) the state focuses only on directly affected communities with formally recognized land titles, while the Guaraníes are protective of their "territorial integrity";
- 2) the country's indigenous peoples challenge both the state's conviction that it holds a monopoly over subsoil resources and the limited rights to participation that it is willing to grant as a consequence;
- 3) several state norms and practices shaping (and constraining) indigenous participation and decision making compete with indigenous uses and customs (*usos y costumbres*).

Hence, while the Bolivian state has repeatedly framed indigenous claims to participation in and compensation from the extractive industry as being exaggerated, the Guaraníes have

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2 The introduction of such a law is currently being debated in Bolivia. As of April 2014 it had not been promulgated.

3 The "implementation gap" is particularly wide in Latin America, where indigenous (participatory) rights are legally established to the greatest extent of anywhere worldwide (see Sieder 2011).

criticized the fact that their rights to territory, self-government, and self-determined development have been consistently violated. In order to sustain their perspectives and practices, each actor group selectively draws on diverse customary, domestic, and international norms – ones that dynamically coexist in situations of asymmetric “interlegality” (Sousa Santos 1987). The interpretation of which rights Bolivian indigenous peoples possess regarding the extractive industries that affect them is highly political, as the selected perspective determines “who has the right to exercise political control over people and resources, land, forests, water, and minerals; and who can exploit them economically and profit from this exploitation” (Benda-Beckmann 2001:49).

Empirically, the article is based on a total of eight months of fieldwork about prior consultation and socioenvironmental conflicts carried out during several different research stays in Bolivia between November 2011 and February 2014. Therein, I participated in one prior consultation and in several local, zonal, and national Guaraní assemblies; conducted more than 60 semistructured interviews with representatives from state ministries, Guaraní community members and representatives, staff from private and public hydrocarbon corporations, and NGO representatives; and collected 28 reports from the Ministry of Hydrocarbons and Energy (MHE) on prior consultation processes and their outcomes, over five hundred Bolivian newspaper articles about prior consultation, and indigenous and state proposals for a law on prior consultation. I analyzed the data collected with the support of ATLAS.ti. After a short outline of the theoretical framework applied herein, the article provides an overview of Bolivia's gas sector, the Guaraníes, and participatory rights. It subsequently analyzes contestations about participatory rights within the ideological, the social practice, and the legal-institutional layers. The article's conclusions then follow.

## **2 Theoretical-Analytical Framework: The Ideological, Practical, and Legal-Institutional Layers**

The article takes into account the embedded nature of participatory rights and scrutinizes how competing understandings manifest on the ground in each of the three aforementioned (interrelated) analytical layers. Divergent ideologies, practices, and normative orders are, however, not just different but are also embedded within – often asymmetric – power relations that create hierarchies between them. The article thus focuses on the relations between the state and indigenous peoples (Guaraníes), but it does not conceive of either of them as being a homogeneous group.<sup>4</sup>

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4 I thus selected my interview partners from within the local communities according to criteria such as gender, age, class, and education. Similarly, I carried out interviews with state actors from different ministries and from diverse public and private corporations.

The definition of “ideology” that underlies this study distances itself from the widespread pejorative usage of this term, sharing instead Hall’s understanding of it as “the mental frameworks – the language, concepts, categories, imagery of thought and system of representation – which different classes and social groups deploy in order to make sense of, define, figure out and render intelligible the way society works” (1996: 26). Such ideologies often diverge sharply from the reality they purport to represent, and usually contain incoherencies and contradictions (Benda-Beckmann, Benda-Beckmann and Wiber 2006: 22). In particular, this article discusses competing concepts of territory and related rights to property, participation, and decision making. As I show below, these diverse ideological expressions shape consultation practices on the ground. They also help explain the main controversies about the new consultation law that have arisen in Bolivia, between the state on the one side and indigenous peoples on the other.

The social practices – or concretized social relationships – analyzed in this article refer to consultation practices. Consultation processes are understood as “everyday politics,” encounters wherein the relations between the state and indigenous groups with respect to natural resources are negotiated and challenged. Such “everyday statist encounters not only shape people’s imagination of what the state is and how it is demarcated, but also enable people to devise strategies of resistance to this imagined state” (Sharma and Gupta 2006: 17). The analysis of these practices is particularly rich, as it reveals important information about the procedural and substantial contestations between indigenous peoples and the state related to what the desirable and “just” development paths are. These consultation practices are shaped by the ideologies of the actors involved and by the legal norms they refer to – norms drawn from state, customary, and international law. When analyzing consultation practices, I take into account not only isolated formal events but also the informal processes and context conditions that mold the formal processes.

The article conceives of law as the “way in which the exclusive connection to the state organization is given up, and other organizational structures and sources of validity, such as old or invented traditions or religion, can match the analytical properties of the concept” (Benda-Beckmann 2001: 48). Diverse, coexisting legal orders within one social field are referred to as “legal pluralism,” but they are not conceived of as static, self-contained, or separate phenomena. Rather, I share Sousa Santos’s observation that more often than not in practice we find situations of “interlegality,” which is “the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions” (1987: 297–298). Based on this understanding, the article shows that diverse and partly contradictory norms coexist within Bolivian state law, and that different actors use them selectively and strategically. Similarly, at the local level we find a mixture of several normative orders based on long-standing historical traditions: customary law, new forms of self-regulation, elements of state law, and international law (Meinzen-Dick and Pradhan 2001: 11).



### 3 Gas Extraction, the Guaraníes, and Prior Consultation in Bolivia

The gas sector has become the most important source of revenue for Bolivia's economy in the past few decades. It has also continued to be at the center of contentious politics, among them the events of the so-called "Gas War" in 2003, wherein social movements initially demanded that Bolivia's gas not be exported to the United States via a Chilean port. As the movement grew in number and strength, its demands became increasingly radical, including the nationalization of the gas sector, the convocation of a constituent assembly, and the resignation of President Gonzalo Sánchez de Lozada (Assies 2004). All of these propositions were subsequently put into practice, though it should be noted that the nationalization process carried out since 2005 has been more moderate than the one many protesters originally aspired to. Due to the nationalization of this strategic resource – combined with the relatively high prices for gas on the international market – the country has managed to significantly increase its income from this sector, revenue which has been used to enhance public corporations and to expand social policies (Kohl and Farthing 2012). However, it is not just the benefits that have been growing; projects to explore, exploit, and transport gas have themselves also expanded, producing manifold direct and indirect socioenvironmental impacts.<sup>5</sup> A large majority (an estimated 83 percent) of these activities have taken place in Guaraní territories (Perreault 2008: 9).

According to the Bolivian census from 2012, the Guaraní peoples only account for approximately 1 percent of Bolivia's total population and their communities are spread over the departments of Chuquisaca, Santa Cruz, and Tarija.<sup>6</sup> The Guaraníes have played an important role in the organization Central de Pueblos y Comunidades Indígenas del Oriente Boliviano (CIDOB), which has represented Bolivia's indigenous lowland peoples since its founding in 1982. In 1987 they founded their own national organization, Asamblea del Pueblo Guaraní (APG), which represents the Guaraníes – composed of Ava-Guaraníes, Simbas, and "Isoseños" (see Albó 1990: 30) – from all three departments and all 28 *capitanías* (zones).<sup>7</sup> At each level – national, zonal, and community – there is one main president, a vice president, and staff who are responsible for issues of production (for example, agriculture, cattle-breeding), infrastructure, health, education, land and territory, communication, gender, and natural resources.<sup>8</sup> Despite this separation of tasks, according to Guaraní *usos y costumbres* important decisions are usually taken in assemblies convened at the respective levels.

5 According to data from the MHE, the production of natural gas in Bolivia increased from 8.92 million m<sup>3</sup> a day in 2000 to 37.93 m<sup>3</sup> a day in 2007 (Radhuber 2010:112) to 65.16 million m<sup>3</sup> a day in April 2014 (MHE 13 April 2014).

6 See online: <<http://datos.censosbolivia.bo>> (29 April 2014). This low number has been challenged by the APG, which argues that many more Guaraníes actually live in Bolivia.

7 Each *capitanía* normally consists of 10 to 30 communities. As of April 2014 there were 12 *capitanías* located in Santa Cruz, 9 in Chuquisaca, and 7 in Tarija.

8 This self-governing structure is called PISET, which stands for *producción, infraestructura, salud, educación, territorio*.

In spite of their relatively small number, the Guaraníes have left their footprint on the governance of Bolivia's gas resources. Even before any domestic legislation on indigenous rights in this sector was in place, the affected communities and their representative organizations mobilized and negotiated with transnational corporations on several occasions regarding compensation payments, mitigation measures for the anticipated negative socioenvironmental impacts, and the employment of indigenous supervisors for gas-related activities occurring in their territories. During these struggles, the Guaraníes referred to indigenous rights as established in the former Bolivian constitution's Article 171, the ILO C169 (ratified in Bolivia in 1991), and their own customary law (Interview with Magaly Barba, advisor of the capitanía Takovo Mora, 7 December 2013). Actually, even the adoption of the ILO C169 was due largely to the indigenous lowland peoples' prior protest march – organized by the CIDOB – for “territory, life, and dignity” in 1990.

In the past few years, indigenous rights – among them the rights to prior consultation and to FPIC – have been given comprehensive recognition in Bolivia. Indeed, since the beginning of Evo Morales's presidency Bolivia has become the country that recognizes the broadest indigenous de jure rights of anywhere in the world. In October 2007 Bolivia was the first, and to date the only, state to promulgate the UNDRIP as domestic law. The new 2009 constitution declares Bolivia a plurinational state and identified indigenous rights as a transversal issue. Due to Guaraní lobbying and to diverse protest activities, indigenous rights have also expanded within sector-specific domestic legislation: Hydrocarbon Law No. 3058 of 2005 incorporated the indigenous rights to prior consultation, compensation, and indemnization, and in 2007 two complementary Supreme Decrees were adopted (SD 29033 on prior consultation and SD 29103 on indigenous socioenvironmental monitoring). As the APG was involved in the formulation of these decrees, this legislation enjoys a high level of acceptance among the Guaraníes: “[The Supreme Decrees] are ours, we proposed them, we wrote them. As they are ours, they are good” (Interview with Fernando Baray, APG representative, 7 November 2013).<sup>9</sup>

As important economic and political interests are connected to the hydrocarbon sector, these legal reforms did not go uncontested. For example, representatives of transnational and domestic corporations lobbied against the adoption of indigenous rights within the aforementioned Hydrocarbon Law.<sup>10</sup> In a similar vein, the more recent indigenous demand to incorporate the right to FPIC in the new Bolivian constitution has met with strong resistance – not only from businessmen but also from both government and opposition political parties, as well as from peasant unions. As a result of this widespread resistance, the latest constitution does not stipulate a stronger right to FPIC but only to prior consultation.<sup>11</sup> Since then,

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9 All interviews have been translated by the author.

10 Article “Para los empresarios, es inaceptable la consulta indígena que prevé la Ley de Hidrocarburos,” in: *Opinión*, 20 March 2005.

11 As the right to FPIC explicitly contains the state's obligation to seek consent, it implies the larger decision-making powers of the consulted group rather than the right to meaningful consultation.

several other legal regulations that constrain indigenous rights have been passed by the Bolivian state (these are discussed in greater detail later in the article).

Since the adoption of SD 29033, more than 40 prior consultations organized by the MHE have been concluded in Bolivia, with 34 of these processes having been carried out with the APG (MHE reports and interviews).<sup>12</sup> The procedural steps commonly taken for consultations – which have often been characterized in practice by irregularities, deficiencies, and contestations – have been as follows:

- 4) the MHE has invited the representative organizations of the affected communities to participate;
- 5) the indigenous organization(s) have presented a consultation plan;
- 6) the MHE has offered a counterproposal;
- 7) both sides have signed an agreement about the consultation plan;
- 8) during an initial meeting the MHE has explained the legal framework and given details about the planned project;
- 9) the Guaránies have organized field inspections to predict what socioenvironmental impacts could be expected on the ground;
- 10) the MHE has met again with a Guaraní assembly to discuss all identified impacts and respective mitigation measures; and, finally,
- 11) the records – including identified impacts, mitigation measures, and observations – have been signed by the state and the indigenous groups.

These final agreements are then incorporated into an Environmental Impact Assessment (EIA), which is financed by the extracting company itself and which the corporation is (formally) obliged to comply with. The corporation must provide compensation for those impacts classified as long-term, direct, and irreversible – with the concrete sums involved being established during negotiations between the indigenous organizations and the corporation in question.

#### **4 Divergent Ideologies: Territory, Property, Participation, and Decision Making**

There is a close connection between how the territory affected by extractive projects is perceived and the conceptualization of what its inhabitants' participatory rights are. Divergent state and indigenous visions of territory and decision making have a cultural component, but they also have a strategic character, as each actor group tends to reproduce ideologies that are supportive of its own political and economic interests. The Bolivian state, and the gas companies that prepare the information about their planned projects, primarily include any directly affected local communities, as well as those with official collective land titles, in con-

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<sup>12</sup> This information dates from January 2014.

sultation processes. Moreover, state representatives all share the conviction, backed by domestic laws like the Hydrocarbon Law and the 2009 constitution, that the state has a monopoly over subsoil resources within Bolivia and, thus, over the decisions regarding their use and administration. These views have clashed with the Guaraní peoples' wish to protect their territorial integrity.

Territorial integrity includes, first, the principle that the Guaraníes should be understood as "peoples" with their own self-governing structures who should be invited to consultations and negotiations over compensations and benefits – rather than just a few directly affected communities being asked. Second, Guaraní members challenge the practice of only taking into account titled collective lands, formally recognized in Bolivia as *Tierras Comunitarias de Origen* (TCOs) or *Territorio Indígena Originario Campesino* (TIOCs), and emphasize that it is not the legal status of their lands that should define what their territories are, but rather their own perceptions of the lands and territories they own. Third, Guaraní peoples generally express a holistic view of the territory they inhabit, thereby challenging the state's claim that it has a monopoly over subsoil resources and related decision-making processes. The Guaraníes frequently express the view that they do not see themselves as being the owners only of their lands (a surface depth of 30 centimeters according to the agrarian law INRA), but rather of the whole space that they inhabit, including all resources both above and below the soil.<sup>13</sup> Within Bolivia's constitutional change process (2006–2008), a proposal forwarded by the APG consequently included the following stipulation on land and territory:

[Tentaguasu: Land and Territory] This is the physical and jurisdictional territory of the Guaraní Nation, well defined to consolidate indigenous autonomy, self-determination, self-government, and self-administration. It is related to elements like language, culture, history, economy, justice, political unity, human, and natural resources. This principle gives us the right to administrate the soil, subsoil, and everything above ground.

(APG, n.d.)

Similar claims regarding customary property rights are often expressed within the contestations over gas extraction in Guaraní territories. For example, one elderly person from the *capitanía* of Parapitiguasu narrated his encounter with the transnational corporation Transierra in 2001 as follows:

At 4 p.m. some community members informed me that the corporation was working in our territory. As I was the local authority back then, they asked me to talk to them. We

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13 This is nothing exceptional. Indeed, James Anaya (2013), UN Special Rapporteur on the Rights of Indigenous Peoples, stated, "Characteristically, indigenous peoples have strong cultural attachments to the territories they inhabit [...]. Very often indigenous peoples lay claim to all the resources, including subsurface resources, within their territories, under their own customs or laws – notwithstanding the laws of the State, and very often, those claims have not been adequately resolved."

found a few engineers that had done drilling on our riverbank. I said to one of them "Listen, engineer, you did not consult with the community about the activities you are carrying out [...] we are the authorities of this community and you did not consult with us." He responded with "What are we supposed to consult? The river is from the state." But I argued, "No, this is impossible. We are the owners, for this reason we live here close to the river. The river is ours, we have our fields here, we fish here and we use the water of the river. Your activities will affect us a lot [...] If you do not obey, we will have to react and exercise pressure on your corporation."

(Interview with Adrian Sánchez, Tarenda community member, 23 October 2013)

In the past few decades, the Guaraníes have been struggling to establish the standard that not only those communities directly affected and formally recognized as TCOs but also the whole political entity, the *capitanía*, must be taken into account in negotiations (Interview with Magaly Barba, 7 December 2013). However, this standard has continuously been disrespected, in recent consultations as well (see MHE consultation reports). The state's reluctance to respect the principle of territorial integrity has caused discontent, anger, and, often, internal conflicts within Guaraní *capitanías* and communities.<sup>14</sup> Indeed, competing claims to territory and property explain some of the most intense Guaraní protests against proposed gas projects in the past few years.

The MHE classifies as "Category 1" only those projects that will have a considerable impact on indigenous territories – according to its own understanding of territory – or on protected areas. Only these types of project have to involve prior consultation. In several cases the planned project has been located within territory claimed by the Guaraníes but legally owned by the state, the corporation, or a private person, and the project has therefore not been assigned Category 1 status. In most of these cases the corporation has simply carried out its activities without consultation. Only in a few such cases has the APG protested and achieved either a change in the classification of the project (and therefore ensured the organization of consultation) or the payment of compensation for expected irreparable damages to the claimants.<sup>15</sup>

Different ideas of territory and property also help explain why the Guaraníes claim comprehensive participatory rights, while the state interprets such demands as exaggerated.<sup>16</sup>

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14 The Guaraníes themselves also have a hard time maintaining this principle, especially when it comes to the internal distribution of benefits and compensation payments from the gas industry. Some *capitanías* and communities have even split in the past few years, with directly affected communities having decided to negotiate alone with the state or the extraction companies in order to achieve greater benefits.

15 See the example from Takovo Mora in the text, and also note the conflict in July and August 2012 about the construction of a large gas plant in the *capitanía* of Yaku Igua.

16 For example, in newspaper articles: "MAS problemas en hidrocarburos," in: *Los Tiempos*, 29 September 2009; "Morales dice que los guaraníes chantajejan," in: *La Razón*, 23 January 2012; or "La consulta ahora es un dolor de cabeza," in: *La Prensa*, 11 August 2011.

There is also general disagreement between the state and corporations on the one side and the Guaraníes on the other about the compensation and benefits to be paid. The latter perceive the sums they get from extractive projects to be too low and therefore unjust, whereas the state and corporation staff emphasize that the demands of these groups are disproportionately high. While the Guaraníes believe that a project's socioenvironmental impacts – including a loss of territory and livelihood as well as profound cultural changes within their communities and organization – will harm them seriously both now and in the long term, the state and gas corporations generally believe the expected impacts to be minor and reparable.

The primary aim of the Guaraníes in honing their agency vis-à-vis gas projects is to gain greater control over their territories and community development. Within this group, though, there are different strategies about how to get there – ones that are apparently contradictory, but that in practice can actually be expressed simultaneously. There is one strand of thought that perceives extractive projects primarily as an undesirable threat and, thus, emphasizes that the Guaraníes must try to protect themselves as best they can. A second strand stresses the importance of Guaraní efforts to increasingly participate in extractive undertakings, with the aim being the creation of their own corporations for prior consultation, for socioenvironmental monitoring, and for carrying out gas projects. While the first view is found predominantly among elderly and rural lower-class Guaraníes, the second one tends to be more popular among the APG's leadership and the younger generation. For example, representing the second strand, Fernando Baray from the national APG has argued, "We are preparing human resources to become a hydrocarbon company and business partners of the state. This is the biggest dream of the Guaraní nation" (Interview, 7 November 2013). However, both strategies are seriously constrained, not only because of the Guaraníes' lack of political and economic power but also because of domestic legal norms and state and corporate ideologies and practices.

## 5 Consultation Practices: Whose Norms and Procedures?

The APG has played a prominent role in Bolivia's consultation processes and their outcomes since 2007. However, my ethnographic field notes on one consultation process in November 2013 in the capitanía of Takovo Mora show – as do many of my interviews regarding other recent consultations – that the disputes about who directs consultation processes and according to which norms and procedures are hot topics in practice.

Takovo Mora is a mixed capitanía (Guaraní and peasant population) composed of 11 communities. There are several important gas projects in its territories,<sup>17</sup> and the capitanía has witnessed serious conflicts about its respective participatory rights. The most severe of

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17 Among them the gas fields Rio Grande, Rio Seco, and El Dorado and the pipelines GASYRG and YABOG, operated by corporations such as YPFB Andina, Pluspetrol, YPFB Transporte, Chaco SA, and Transierra.

these again exemplifies the close relationship between property and participatory rights: On 15 July 2011, the MHE initiated a prior consultation about the construction of a huge gas plant by the public corporation Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) on lands claimed by the *capitanía*. However, following a decision by the Ministry of Rural Development and Lands in August 2011 (Resolución Suprema 05788, subsequently backed by the Agroenvironmental Tribunal), the affected area was declared fiscal land not available to the indigenous peoples and the respective property rights were granted to YPFB instead. Subsequently, the state shut down the consultation. It only reactivated it after several weeks of protests by Takovo Mora. This case exemplifies the unequal power relations that exist between diverging visions of territory and property, and the resulting unequal legal protection of different forms of property. This example is part of Takovo Mora's wider struggle for land rights: the *capitanía* originally claimed its collective ownership of 337,592 hectares in 1996, but as of May 2013 only 8,514 hectares had been granted to it (a mere 2.5 percent of the original area demanded).<sup>18</sup>

The consultation I participated in was about the construction of a gas pipeline by YPFB Transporte. Before it took place, the MHE had already met four times with Takovo Mora's assembly because the two sides could not agree on a joint consultation plan. In a first meeting, the MHE accepted the consultation plan presented by the Guaraníes and signed a related agreement. Afterwards, however, the MHE invalidated the agreement and argued that the projected costs were too high.<sup>19</sup> As a consequence, Takovo Mora's representatives had to negotiate a new consultation plan, which resulted in a shorter, less inclusive, and cheaper consultation than the one originally proposed by the Guaraníes. The actual consultation began on 11 November 2013:

It is a cold and rainy day when we meet at 8 a.m. with members of the *capitanía* of Takovo Mora in front of the Yateirenda community's local school. We make some small talk, until three representatives from the ministry arrive and the consultation begins in a nearby community church. About one hundred community members participate, among them women with young children. Some of them sit on plastic chairs; others stand at the back of the hall. A local authority inaugurates the meeting and critically remarks: "We already had five consultations before, but it seems that each time we regress. There are not enough seats; the Ministry is late, and did not bring the materials we requested." Then the MHE staff present themselves. Rodrigo,<sup>20</sup> the leader of the consultation team, exhorts the local authority that any grievances should be submitted in a formal way and not here within the assembly. Then he adds that "Everything can

18 See online: <<http://territorios.ftierra.org/OBS/tioc/>> and <[www.notiboliviarural.com/index.php?option=com\\_content&view=article&id=6265:en-santa-cruz-pueblo-guarani-de-takovo-mora-reciben-15-titulos-comunitarios&catid=303:actualidad&Itemid=555](http://www.notiboliviarural.com/index.php?option=com_content&view=article&id=6265:en-santa-cruz-pueblo-guarani-de-takovo-mora-reciben-15-titulos-comunitarios&catid=303:actualidad&Itemid=555)>.

19 In Bolivia, the consulted groups can choose their own advisors for consultations.

20 Name changed by the author for reasons of anonymity.

be fixed in life, with the help of God.” Afterwards, one of Takovo Mora’s advisors picks up a thick book. I first thought that it was the Bible, but the man explains, “Here we will use difficult words, therefore I brought a dictionary.” At lunchtime some women bring huge pots with food. But before we can eat, the MHE staff explain that they can only provide food for adults as the Ministry is not allowed to invite children. The participants vehemently reject this limitation by stating that it is part of their *usos y costumbres* to bring children to their assemblies.

In the afternoon the MHE lawyer explains the consultation procedure. She states that the consultations must not be too costly as, “We Bolivians pay for them from our taxes, therefore we must use each cent very carefully and according to the regulations for the use of state budget.” Several community members complain that the consultation budget is too low and that this shows the state’s disrespect for their *usos y costumbres*. One of the participants says, “The way it is, we cannot even call this a prior consultation. We apply the *usos y costumbres* of the ministry and not our own. We always have consultations within our assembly, that’s how we coordinate ourselves.” A woman participating adds, “In this process there is little participation, ten participants per community is not enough.” Other community members criticize the information that they have received, stating that some affected communities have been left out of the presented documents. The MHE staff respond that they will include such observations in the final report, but that it is not possible to correct the information before the consultation concludes. Intending to ease the tense situation, Rodrigo repeats that the participants should not forget that “What is really important will come after the consultation concludes; namely, the negotiations with the corporation over the compensation payments.”

The next day the MHE engineer presents the information about the planned gas pipeline. It turns out that he is not aware of the project details and, thus, is not able to answer many participants’ questions. For example, it is not clear where the water that the company is supposed to use will come from, or where the company will dispose of the wastewater. Even basic information like whether the new pipeline is supposed to be constructed to the left- or the right-hand side of the existing one is not available. The engineer responds in a harsh tone to the unanswered questions: “Listen to me, our task is to give you a resume of the project; after the consultation concludes you can speak with the corporation and they will explain the details to you.” The lack of information is a hurdle for the commission, which is due to depart the next day for the field inspection. Twenty community members with extensive local knowledge, divided into four groups, have the task of listing all the plants, animals, and water sources that will be affected by the planned duct. But when the group that I accompany starts the inspection, we are not sure where exactly it will be constructed. Despite such limitations, all groups



do their best to list the trees, medicinal plants, animals, and water sources that are likely to be affected. Takovo Mora's advisors then systematize the information collected.

A few days later the assembly meets again with the MHE consultation team to discuss the expected impacts. At the beginning one participant remarks that he hopes that this consultation will not proceed like the last one did, wherein they identified many impacts but the ministry technicians challenged their tables. The MHE staff respond that within the legal framework there are parameters for classifying the impacts, and that the community's observations must concur with the Environmental Law and the *Reglamento Ambiental para el Sector Hidrocarburos* (RASH). The participant counters, "But these are your norms. We have our own norms and many of our observations are drawn from our daily experiences [...] We are not crazy; we just observe the reality."

The next day the final agreement is to be signed. It consists of a "matrix" with the expected impacts on water, soil, air, flora, fauna, alongside the sociocultural ramifications and the respective mitigation measures. The emphasis is on the classification of these impacts, though, according to the following criteria drawn from Bolivia's environmental legislation: direct or indirect; short, medium, or long term; and, reversible or irreversible. Until late in the night the advisors argue with the MHE staff about the classification of impacts. Many participants have become tired of these rather technical debates and sit outside the hall. The classification of impacts according to "the matrix" is used by the Guaraní organizations because only direct, long-term, and irreversible impacts will be compensated for. But, undoubtedly, this methodology limits the possibilities for holding intercultural dialogue. Finally, at 1 a.m., when everybody is exhausted, the agreement is signed (Author's field notes, November 2013, Takovo Mora).

The consultation agreement includes provisions about appropriate behavior on the part of company staff, measures for preventing and repairing damage, the principle that indigenous socioenvironmental supervisors will oversee the companies' activities, and the objective that local labor forces shall be given preference for employment. Despite the fact that such agreements should be binding, their implementation has been deficient. This is because the corporations and their subcontracted partners often disregard such agreements, the Environment Ministry monitors gas activities only sporadically, and the indigenous supervisors are paid by the extraction companies themselves – which leads to their co-optation and their fear that they will lose their job if they are too critical (Interviews).

## 6 Contested Legal Norms and the Law on Prior Consultation

Divergent ideologies and contested social practices shape the diverse actors' perceptions about and selective use of domestic, international, and customary norms. They also inform these individual's proposals for new domestic norms, like the planned Law on Prior Consul-

tation. There are divergent norms within Bolivian domestic law that enable or limit participation in extractive industries. While the 2009 constitution, the laws that recognize ILO C169 and UNDRIP as domestic laws, and SDs 29033 and 29103 guarantee ample participatory rights, other regulations such as the Environmental Law, the Hydrocarbon Law, and the RASH tend to restrict the possibilities for indigenous participation. Therefore, the Guaraníes tend to make reference in their dealings to the first group of laws, while the state and corporate representatives more often base their arguments on the second group. It is common practice for actors to seek the support of existing official legal systems, which carry enhanced institutionalized weight and symbolic authority, to lend legitimacy, resources, and persuasiveness to their cause (Tamanaha 2008: 406).

The legal reforms of the past few years in Bolivia could, at first sight, be seen as a success story for the Guaraníes. The Guaraníes' knowledge of and sensitization about their rights, as prescribed in both international and domestic law, has also substantially increased. However, the trend of progressive legal reforms has seemingly been reversed in the more recent past. Legislation passed since the adoption of the new constitution has in fact tended to restrict indigenous rights. For example, Article 39 of the new Electoral Law (No. 26, 30 June 2010) explicitly states that the "conclusions, agreements, or adopted decisions during prior consultation are not binding," thereby limiting indigenous decision-making powers. In January 2010 it became public that the government was preparing a new hydrocarbon law that would limit environmental and indigenous rights, a fact that was subsequently criticized by many environmental and human rights organizations.<sup>21</sup> An APG advisor stated,

Now we have more rights according to the constitution and many laws that support us, but they are violated. In addition, every day new decrees that restrict our rights are passed without consultation; they are just imposed. Therefore, our frustration as indigenous peoples grows, because of the loss of our rights and the disrespect for our *usos y costumbres*.

(Interview with Judith Sánchez, advisor from capitanía Takovo Mora, 12 November 2013)

Conflicts regarding participatory rights in the extractive industry have in the recent past been concentrated around efforts to formulate a law on prior consultation. A government commission developed a draft law after vehement criticism about the lack of consultation over the construction of a road through the Territorio Indígena y Parque Nacional Isiboro Securé (TIPNIS) (McNeish 2013). Many corporate and state representatives have lobbied for the promulgation of such a law because they hope that some "grey areas" could be eliminated by the clearer regulation of consultation processes (Interviews). Drawing on their previous practical experience with prior consultation, and with the support of national and international organizations, in the past few years the Guaraníes themselves have also formulated a

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21 Newspaper article "Para explotar hidrocarburos. Alertan que planean flexibilizar normas medioambientales," in: *Los Tiempos*, 8 February 2010.

draft law on prior consultation (APG 2013). The original plan, established in an agreement between the APG and the government commission, was that both draft laws should eventually be amalgamated.

However, after several meetings between the APG and the government commission in February and March of 2013, a national APG assembly decided that the Guaraníes would abstain from any further such meetings, arguing that the state was not willing to make compromises on controversial issues (see below and Table 1). Consequently, when the government commission invited the national indigenous and peasant organizations to participate in a two-day dialogue about the draft consultation law in Cochabamba in August 2013, the APG did not participate. Only the peasant unions sympathetic to the government and the government-friendly wings of the other indigenous organizations generally more critical of the government<sup>22</sup> participated.

The original government proposal was changed only slightly during this event. Afterwards the APG sent the government a document that summarized the remaining points of disagreement:

- 1) that consultations should secure the consent of the consulted groups;
- 2) that financial support should be provided for the establishment of indigenous institutions to help exercise the right to prior consultation;
- 3) that groups should have the right to abstain from consultation when the consultation process in question was considered an imposition or to have not been carried out in good faith; and,
- 4) that groups should have the right to benefit from any projects carried out in indigenous territories.

The government commission met once again in December 2013, this time with the APG's ex-president Faustino Flores – who had been dismissed a few weeks before in a national APG assembly – in attendance. Despite his dismissal, Flores gave his consent in the name of the APG to the revised government draft consultation law (VII Comisión Nacional 2013). This draft still contradicts important APG claims or adopts a vague formulation on many controversial topics (for an overview of these, see Table 1).

The remaining disagreements from the indigenous perspective are, in sum, that the consulted groups should have greater decision-making power (including the right to abstain from consultation) and should receive financial resources for their own institutions and for the enforcement of compliance with the agreements, and that the right to prior consultation should be exclusively for indigenous peoples (and not for the peasant and intercultural communities with whom they frequently compete for territory and resources). The state's proposal is still characterized by the desire for smooth, depoliticized, and narrow consultations, which are to be achieved by prohibiting attempts to impede (obstaculizar) consulta-

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22 The CIDOB and the *Consejo Nacional de Ayllus y Markas del Qullasuyu* (CONAMAQ).

tions, disregarding the possibility that affected groups could withhold their consent, reserving the final decision for the state, and by stating that the consultation budget will depend on the current availability of resources. Several elements of the government proposal negate international human rights instruments regarding indigenous peoples' participatory rights, while some elements of the Guaraní proposal go beyond them.

**Table 1: Comparison of the APG's and the Government's Proposals for a Law on Prior Consultation**

<i>Topic</i>	<i>APG Proposal (2013)</i>	<i>Government Proposal (VII Comisión Nacional, 5 February 2013)</i>
Reference to international norms	ILO C169, UNDRIP, Inter-American Convention of Human Rights, and national and international jurisprudence	ILO C169 and UNDRIP
Principles	[Consultation] shall guarantee indigenous peoples' right to self-determination; "good faith" defined exclusively as state obligation	[Consultation] shall achieve a balance between the interests of the Bolivians and the consultation subjects; definition of "good faith" includes the prohibition of third parties and advisors to avoid complicating consultations, and the prohibition of introducing topics not directly related to the measures at stake
Rights concern	Indigenous peoples and original nations ( <i>naciones originarias</i> )	Indigenous peoples and original nations, peasant communities, intercultural communities, and Afrobolivian peoples
Role of indigenous peoples within consultation	Activities: produce the initial information, design and execute hydrocarbon policies, control and monitor activities, establish informative documents, and constitute indigenous corporations	Activities: solicit the realization of prior consultation, propose criteria and instruments for identifying affected groups and impacts, support the consulted groups, monitor the compliance with agreements, establish technical reports, and coordinate with state entities
Consultation budget	State guarantees necessary consultation budget, including economic support for indigenous institutions and for the monitoring of compliance with the agreements	State guarantees necessary resources, according to their availability, for consultation processes
Objective of consultation	Achieve the FPIC; decisions taken within the consultation are binding	Achieve agreement or consent <i>before the final decision is taken</i> ; agreements are binding; due to their strategic character and public interest, the execution and continuity of extractive activities will be guaranteed
Voluntary nature of participation	The indigenous organizations can decide to abstain from the consultation when it is considered that the planned measure would represent a risk to their continued physical, cultural, and spiritual existence	The indigenous organizations have the responsibility to participate in the consultation
Nullity of consultation	When the requirements and conditions for prior consultations are violated (for instance, false information given, a lack of good faith), the nullity of the process will be declared	Nonexistent

Source: Author's own compilation.

## 7 Conclusion

I argue that examining the contestations over participatory rights within the ideological, the social practice, and the legal-institutional layers helps us to better understand conflicts between indigenous groups affected by gas projects and the Bolivian state. In particular, competing conceptions – articulated in asymmetrical power relations – of territory, property, adequate participation, and decision making have proved to be of crucial importance in current disputes. The study's findings thus contribute to current academic debates about socioenvironmental conflicts in Bolivia, and are moreover likely to also be of relevance for many other places around the world where similar constellations exist.

The article has shown that divergent visions of territory and property play an important role in justifying demands for more comprehensive (indigenous) and more narrow (state) interpretations of participatory rights in both consultation about and compensation for resource extraction. It finds that many conflicts over indigenous participation can be traced back to the state's and corporations' practice of only concerning themselves with directly affected local communities or those with official land titles – in disregard of the Guaraníes' demand that their own principle of "territorial integrity" be respected. Although the Guaraníes have often exerted pressure in participatory processes regarding the upholding of this principle, the state continues to violate it as its own practices are shaped by competing mental frameworks. Besides divergent ideologies, state customs and regulations also jostle with Guaraní usos y costumbres in the course of consultation practices – which in turn leads to friction concerning procedural issues such as the consultation budget, the inclusiveness and ideal duration of consultations, and the classification of any anticipated socioenvironmental impacts. Taken together, the diverging state and indigenous ideologies and competing usos y costumbres provide rich insights into the reasons behind the implementation gap related to indigenous and participatory rights in Bolivia's gas sector.

State and indigenous actors refer selectively and differently to plural and competing legal norms – drawn from international, domestic, and local or customary law – so as to support their own ideologies and practices. Such legal systems coexist in a constellation of interlegality and, depending on the concrete sociopolitical context, they have in the Bolivian case either converged or drifted apart. While at the beginning of Morales's presidency Bolivian domestic legislation incorporated many indigenous demands regarding the state's formal recognition of comprehensive indigenous and participatory rights, since the adoption of the 2009 constitution a reverse process has been observed: there has been a drifting apart of state and indigenous positions in their respective discourses and concerning newer domestic legislation. The formulation process for the new Law on Prior Consultation exemplifies how Guaraní claims were only rudimentarily incorporated into the government's draft law. This particular context also revealed the diverging underlying ideologies about appropriate participation and decision-making processes, and showed that, due to unequal power relations, the state's vision continues to predominate over alternative indigenous proposals.

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