

Schilling-Vacaflor, Almut; Flemmer, Riccarda

Working Paper

Why is Prior Consultation Not Yet an Effective Tool for Conflict Resolution? The Case of Peru

GIGA Working Papers, No. 220

Provided in Cooperation with:

GIGA German Institute of Global and Area Studies

Suggested Citation: Schilling-Vacaflor, Almut; Flemmer, Riccarda (2013) : Why is Prior Consultation Not Yet an Effective Tool for Conflict Resolution? The Case of Peru, GIGA Working Papers, No. 220, German Institute of Global and Area Studies (GIGA), Hamburg

This Version is available at:

<https://hdl.handle.net/10419/72462>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

G I G A *Working Papers*

German  Institute of Global and Area Studies
Leibniz-Institut für Globale und Regionale Studien

GIGA Research Programme:
Legitimacy and Efficiency of Political Systems

Why is Prior Consultation Not Yet an
Effective Tool for Conflict Resolution?
The Case of Peru

Almut Schilling-Vacaflor and Riccarda Flemmer

No 220

April 2013

GIGA Working Papers serve to disseminate the research results of work in progress prior to publication to encourage the exchange of ideas and academic debate. Inclusion of a paper in the Working Papers series does not constitute publication and should not limit publication in any other venue. Copyright remains with the authors.

Edited by the
GIGA German Institute of Global and Area Studies
Leibniz-Institut für Globale und Regionale Studien

The GIGA Working Papers series serves to disseminate the research results of work in progress prior to publication in order to encourage the exchange of ideas and academic debate. An objective of the series is to get the findings out quickly, even if the presentations are less than fully polished. Inclusion of a paper in the GIGA Working Papers series does not constitute publication and should not limit publication in any other venue. Copyright remains with the authors. When working papers are eventually accepted by or published in a journal or book, the correct citation reference and, if possible, the corresponding link will then be included on the GIGA Working Papers website at

<www.giga-hamburg.de/workingpapers>.

GIGA Research Programme “Legitimacy and Efficiency of Political Systems”

Copyright for this issue: © Almut Schilling-Vacaflor and Riccarda Flemmer

WP Coordination and English-language Copy Editing: Errol Bailey

Editorial Assistance and Production: Silvia Bücke

All GIGA Working Papers are available online and free of charge on the website

<www.giga-hamburg.de/workingpapers>.

For any requests please contact:

E-mail: <workingpapers@giga-hamburg.de>

The GIGA German Institute of Global and Area Studies cannot be held responsible for errors or any consequences arising from the use of information contained in this Working Paper; the views and opinions expressed are solely those of the author or authors and do not necessarily reflect those of the Institute.

GIGA German Institute of Global and Area Studies

Leibniz-Institut für Globale und Regionale Studien

Neuer Jungfernstieg 21

20354 Hamburg

Germany

E-mail: <info@giga-hamburg.de>

Website: <www.giga-hamburg.de>

Why is Prior Consultation Not Yet an Effective Tool for Conflict Resolution? The Case of Peru

Abstract

Prior consultation is an increasingly accepted instrument internationally for guaranteeing the rights of indigenous peoples. Conceived of theoretically as a means for conflict resolution, in practice it lies at the heart of social conflicts all over Latin America. Using concepts from the “contentious politics” approach, we take a closer look at Peru – where indigenous mobilizations would lead to the only Latin American consultation law enacted to date. We also critically analyze the content and formulation of its regulating norm. We argue that this new legislation will not help to turn such consultations into a tool for conflict resolution as long as the normative framework itself is contested and the necessary basic conditions are not in place. The most important conditions that we identify for implementing effective prior consultation are impartial state institutions capable of justly balancing the diverse interests at stake, measures that reduce power asymmetries within consultations, and joint decision-making processes with binding agreements.

Keywords: prior consultation, Peru, conflict resolution, contentious politics, indigenous peoples, extractive industries

Dr. Almut Schilling-Vacaflor

is a sociologist and anthropologist, and is currently a research fellow at the GIGA Institute of Latin American Studies in Hamburg. Her main research deals with the Andes, indigenous peoples, law and society, participation and resource governance.

Contact: <almut.schilling@giga-hamburg.de>

Website: <<http://staff.en.giga-hamburg.de/schilling>>

Riccarda Flemmer, MA

is a political scientist, a PhD student at the University of Hamburg and an associate researcher at the GIGA Institute of Latin American Studies. Her main areas of study are resource conflicts, the rights of indigenous peoples and prior consultations in the Amazon region.

Contact: <riccarda.flemmer@giga-hamburg.de>

Website: <<http://staff.en.giga-hamburg.de/flemmer>>

Why is Prior Consultation Not Yet an Effective Tool for Conflict Resolution? The Case of Peru

Almut Schilling-Vacaflor and Riccarda Flemmer

Article Outline

- 1 Introduction
 - 2 The Long and Rocky Road towards the Adoption of Peru's Consultation Legislation
 - 3 Contestations over the Content of the New Consultation Legislation
 - 4 Unresolved Tensions and Starting Points for Conflict Resolution
 - 5 Conclusion
- Bibliography

1 Introduction

The participation of indigenous peoples and local communities in the crafting of planned legislative and administrative measures liable to affect them has in the past two decades emerged as a widely accepted principle among organizations and governments around the globe.¹ Many legal norms and guidelines have been adopted on prior consultations in the domains of resource governance and development planning by international finance institutions like the World Bank and the Inter-American Development Bank, by associations of extractive industries and by the United Nations. The right to prior consultation is part of the in-

1 We would like to thank Mariana Llanos and Maria Therese Gustafsson for their very helpful comments on an earlier version of this paper.

ternational human rights instruments that have been created with concern to indigenous peoples (Morris and Rodríguez Garavito 2009). This right is of particular importance in Latin America, a region where to date 15 countries have ratified International Labour Organization Convention 169 (hereafter ILO C169) on the rights of indigenous peoples and tribal populations. One of its core elements is the state's duty to consult with indigenous peoples and communities whenever measures are planned that would impact upon them. The United Nations Declaration on the Rights of Indigenous Peoples (hereafter UNDRIP) has even stipulated that the state should seek their free, prior and informed consent (FPIC).

Prior consultation is frequently understood as being a tool for conflict prevention and resolution. By taking up the fears and needs of local populations, finding joint solutions and complementing expert knowledge with the insights of affected groups, it is expected that more democratic, peaceful and sustainable solutions will come about (see Barstow and Bagrow 2008; Laplante and Spears 2008; United Nations Interagency Framework Team for Preventive Action 2010). Despite the apparently widespread consensus over prior consultation in principle, the concrete definition of the actual procedure itself remains contested. Interpretations of it are thus very heterogeneous, and sometimes even contradictory. They range from the very feeble procedural versions that see prior consultation as the guarantor of due process and of freedom of contract rights, to the strong substantive versions that emphasize the procedure's function in protecting indigenous peoples' rights to self-determination and territorial control (see Rodríguez Garavito 2011; Szablowski 2010). The weak versions focus on the right to be informed, to participate and to be able to freely express one's opinion, but ultimately ascribe decision-making power to the lead state entity or corporation. The strong versions generally use the term "FPIC" rather than "prior consultation" – thus, implying that the consulted groups hold the real decision-making power.

Competing ideas about how to design and implement prior consultations collide in contemporary Latin American politics, particularly in the context of the ongoing expansion of extractive industries in the region. Socioenvironmental conflicts have consequently flourished, and therein the right to prior consultation or to FPIC has frequently played a crucial role (see Bebbington 2012; DPLF 2011; Fulmer, Snodgrass Godoy and Neff 2008; Haarstad 2012; Laplante and Spears 2008). The current struggles reveal that the consultation procedure in Latin America has yet to be satisfactorily institutionalized. Secondary legislation that should regulate how this fundamental right is put into practice is still scarce. The United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, stated that the consultation legislation should itself be the result of meaningful consultation (cited in Alorda 2011: 10). These dialogues about how the right to consultation should be institutionalized can be classified as "meta-consultations," analogous to John Dryzek's concept of "meta-deliberations"² (2010: 12). These participatory processes, as well as the norms resulting from

2 Dryzek defines a meta-deliberation as "deliberation about how the deliberative system itself should be organized" (2010: 12).

them, need to enjoy a high degree of legitimacy for the implementation of effective prior consultations to be made possible. They can only be effective (i.e. successful in preventing or resolving conflicts) when they provide spaces in which disputes can be constructively discussed and peacefully settled.³

The Peruvian government, since the coming into force of ILO C169 in 1995, has been repeatedly criticized by both national and international human rights organizations for the absence of adequate legislation on, and the lack of implementation of, prior consultation with indigenous peoples.⁴ In the past few years this failure has stood at the center of the violent conflicts occurring in the country, especially those concerning land and resource rights – among them the tragic confrontations in Bagua in 2009, which led to the death of 33 people. Against this backdrop, Peru's President Ollanta Humala promulgated the Law on Prior Consultation in September 2011 – the only such legislation enacted in Latin America to date. After the promulgation, a prior consultation on its regulating norm was carried out – a process that can be seen as an example of future consultation practices in the country as per the new law. However, both the law and its regulating norm are highly contested regarding their formulation and content; thus, their legitimacy is currently low.

President Humala announced that the new legislation would give voice to the needs of the indigenous communities of the country and thus contribute to greater social harmony. Yet the current trend actually points in the opposite direction: social conflicts in Peru increased in number from 217 in June 2011 to 247 in June 2012, the majority of which were classified as socioenvironmental conflicts related to the mining sector (Defensoría del Pueblo del Perú 2011, 2012). In 105 (43 percent) of these conflicts, incidents of violence were registered (Defensoría del Pueblo del Perú 2012: 5). This article argues that the new legislation on consultations will neither be able to diffuse existing violent social conflicts nor prevent new ones from occurring as long as the normative framework itself is contested and the necessary basic conditions are not in place. We believe, instead, that the implementation of effective consultations will be hindered by recurring disputes about the procedure itself. Based on our analysis – largely inspired by concepts from Tilly and Tarrow (2007), Tilly (2008) and Tarrow (2011) – of the contentious politics that led to the adoption of the consultation law and the contestations that emerged concerning its regulating norm, we identify the three basic conditions currently lacking that would be crucial for the effective implementation of prior consultations:

- 1) impartial state institutions capable of justly balancing between diverse interest groups,
- 2) measures that reduce power asymmetries within consultations, and
- 3) joint decision-making processes with binding agreements.

3 When speaking about conflict prevention or resolution we are referring specifically to violent conflicts, as we do not perceive conflicts to be negative per se. Rather, we assume that conflicts and contestations also hold the creative potential to make grievances visible and can lead to important societal changes (see Bebbington 2012).

4 In the Peruvian context we use the term “indigenous” in an inclusive manner, comprising Andean, Amazonian peasant and indigenous populations. Besides these groups, the right to prior consultation in Peru also applies to Afro-Peruvian communities.

While our case study on Peru is particularly revealing as regards the exploration of contestations about the design and implementation of prior consultation, we assume that our findings are also of relevance beyond the country's frontiers – as many other countries in the region are currently in the process of crafting legislation concerning such consultation.

We base our analysis on data collected during various field research trips to Peru undertaken between October 2010 and February 2012. The data originates from semi-structured interviews held with state and indigenous representatives, Peruvian scholars and representatives of nongovernmental organizations; participant observation during the consultation process on the regulating norm of the consultation law; the collection of draft proposals for both this law and its regulating norm; and related statements from a wide range of both public and private actors.

2 The Long and Rocky Road towards the Adoption of Peru's Consultation Legislation

In September 2011, Peru's newly elected left-wing and nationalist president, Ollanta Humala, promulgated the consultation law. This act was celebrated in a public ceremony – graced by indigenous representatives and adorned with their symbols – in the city of Bagua, where the aforementioned violent clashes had occurred in 2009. With this spectacle the new government wanted to demonstrate its break with the neoliberal political agenda that had been enhanced by its antecessor, Alan García, whose ideology and practices had been characterized by open disrespect for indigenous peoples' rights. The law had been unanimously passed by Congress, and was initially carried by a wide consensus – including all national indigenous organizations and leading Peruvian nongovernmental organizations.

We argue that for a fuller understanding of the current and future developments concerning the conflicts between indigenous peoples and the Peruvian state, it is not enough to limit one's analysis to the form and content of the new consultation legislation. Rather, we advocate paying attention to both its procedural and substantive dimensions. In order to grasp the social meaning, as well as the reasons for the acceptance of these norms, we look at the history of indigenous participation in the respective contestations. In the following section we will thus summarize this process, beginning from the rising indigenous protests experienced under García's rule (2006–2011) and continuing up to the adoption of the Peruvian legislation on prior consultation in September 2011. According to the Peruvian government, the consultation law and its regulating norm were successfully consulted, whereas most of the indigenous organizations, in contrast, perceive them as being illegitimate.

From Rising Protests...

Indigenous protests emerged shortly after President García took office in 2006. The president implemented neoliberal policies and privatization programs in order to attract foreign investment and so as to promote the further expansion of the extractive and agricultural indus-

tries, especially in the Amazon region.⁵ Many new mining and oil concessions would, as a result, overlap with indigenous territories. In this context, conflicts between local communities/local governments, the central government and corporations flourished. While the monitoring system overseen by the Peruvian ombudsperson registered 80 social conflicts in June 2006 (Defensoría del Pueblo del Perú 2006), five years later 217 conflicts were reported – with 118 of the latter being characterized as socioenvironmental in nature (Defensoría del Pueblo del Perú 2011). Amazonian and Andean communities likewise increasingly mobilized against the environmental pollution experienced as a consequence of the increased presence of extractive industries, as well as to agitate for more effective models of benefit-sharing and for playing a decision-making role in measures that affected them (Arellano Yanguas 2011a; Echave et al. 2009; Bebbington and Humphreys Bebbington 2010).

Massive conflicts arose after President García used temporal legal competences to adapt Peru's legislation to the Free Trade Agreement concluded with the USA (effective from 2007). He passed nearly one hundred legislative decrees in 2008 without prior consultation, some of which included earlier draft laws that had been vetoed in Congress. In August 2008, indigenous organizations and local communities, supported by human rights and environmental organizations, mobilized against the decrees by blockading economically important streets, waterways and oil pipelines throughout the Peruvian Amazon. The main focus of the protesters became the revision and derogation of eleven decrees that directly affected their livelihoods. The government consequently declared a state of emergency in several districts of the Amazon. An escalation of the conflict would only be avoided as a result of the intervention of the Peruvian ombudsperson (Defensoría del Pueblo del Perú 19 August 2008), an important actor throughout the whole process, which led Congress to rescind two of the contested decrees on 22 August 2008.

As a strategy designed to delegitimize his critics, President García accused local media, nongovernmental organizations and “leftist powers” of having instigated the protests. He declared that everyone who opposed the decrees wanted the Peruvian nation to live in poverty (SAIPE 2009: 6). In April 2009 a second nationwide strike began as a result of the government's decision to postpone the revision of the remaining contested decrees, despite a report having been issued by Congress that recommended their derogation (DAR 2009: 6, 12). After a month of blockades, the government again declared a state of emergency in various Amazonian districts. The conflict escalated on 5 June 2009 when the national police force crushed a peaceful street blockade by approximately 3,000 protesters near the city of Bagua. In the days that followed, 23 policemen were killed by furious protesters. In total, the *Baguazo* left at least 33 people dead, 200 injured and 83 under arrest (Defensoría del Pueblo del Perú 2 July 2009).

5 The amount of Peruvian Amazonian territory covered by hydrocarbon blocks increased from 9 percent in 2004 to 59 percent in 2009 (Sevillano Arévalo 2010: 19). Moreover, more than half of all peasant communities in Peru are estimated to currently be affected by mining activities (Bebbington and Williams 2008: 190).

In contrast to his intentions, the aggressive discourse of President García regarding these occurrences actually resulted in increasing public solidarity with the indigenous protests. In June, a new strike announced by the national Amazonian organization AIDSESP⁶ gained widespread support among the Peruvian people. Subsequently, in Lima more than ten thousand protesters demanded the investigation of the events in Bagua and the establishment of political liabilities (Villar Campos 2009). Thus, the mobilizations escalated as a result of the engagement of new actors as well as their increasing geographic range. The ability of the Amazonian indigenous organizations to build alliances and the sustained campaigns against the neoliberal politics of García's government at least temporarily strengthened the historically weak indigenous movement in Peru (see Van Cott 2005; Yashar 2006). Partly due to the alliances formed with the Amazonian organizations, the Andean movements increasingly fuelled their self-recognition as "indigenous"⁷ and thus jointly struggled for the enshrinement of their rights as indigenous peoples. The indigenous organizations were also able to establish new networks with trade unions and the political opposition as well as with both national and international human rights and environmental organizations; this provided them with ample organizational resources as well as expertise in legal matters.

On 11 June 2009, the National Coordination Group for the Development of Amazonian peoples (GNCDPA) was created in order to institutionalize a dialogue space, as previously stipulated by the Peruvian ombudsperson and James Anaya. The *Baguazo* had not only drawn national attention to indigenous issues but had also led to severe international criticism from bodies such as the United Nations. In general, at various stages during these contentious episodes, the process of certification – which occurs when a recognized external authority supports the claims of a political actor (Tilly and Tarrow 2007: 75) – played a crucial role in strengthening the indigenous movement's demand for the implementation of the right to prior consultation.

President García would finally admit that the government had committed errors by having adopted the decrees without prior consultation and in its handling of the *Baguazo* (Rosales and Dongo 2009). A day later, on 18 June 2009, Congress revoked two more of the contested decrees – one of them being Decree 1090, which had enacted a contested new forestry and wildlife law. The state of emergency was lifted and blockades ended.

...To Negotiations...

With the end of this acute conflict a dialogue phase between the government and indigenous organizations thus began. The GNCDPA had its first session on 22 June 2009 and formed four thematic working groups. The task of Mesa 3 (Working Group 3) was to elaborate a draft law on prior consultation. Its basis was the law proposal that had been presented by the ombudsperson on 6 July 2009.

6 The Interethnic Association for the Development of the Peruvian Amazon (AIDSESP) was formed in 1980.

7 Tarrow and Tilly define the process of an identity shift as the "formation of new identities within challenging groups whose coordinated action brings them together and reveals their commonalities" (2007: 34).

The law proposal jointly presented by the AIDSESEP and the CONAP⁸ expanded on the original version, increasing from 30 to 42 articles. Although the final document of Mesa 3, adopted on 3 December 2009, included some substantial agreements, it also highlighted 29 issues on which no consent had been reached between indigenous and government representatives (GNCDDPA 3 December 2009: 55). The indigenous organizations opposed the explicit prohibition of their veto right and demanded that the law should clearly stipulate that so-called “national interests” must not be used as a premise for invalidating the right to consultation. They also wanted to adopt more inclusive definitions of indigenous peoples, to define “affectation” in a broader sense (to include indirect effects) and to establish the obligation to revise previous measures in light of the new law.

The final draft document prepared by Mesa 3 was submitted to the various Andean organizations⁹ so as to give them a chance to add their own comments to it. These organizations welcomed the draft proposal. They placed special emphasis on the fact that the term “indigenous peoples” should include peasant communities as well as people living in voluntary isolation. They also stressed the need to make agreements reached during consultation processes legally binding, and that the state institution(s) responsible for carrying out these processes would have to be autonomous and impartial (AIDSESEP et al. 2010). The more detailed draft law was submitted to Congress on 9 April 2010.

After heated discussions between the governing party and the opposition about the right to veto and the obligation to reach consensus in Congress, the consultation law was finally passed on 19 May 2010. However, with its 20 articles it was a much shorter version than the one submitted by Mesa 3. Within the legislative branch, the Commission on Constitutional Issues – dominated by close representatives of the government – led the debates, thereby displacing the role of the Commission for Andean, Amazonian and Afro-Peruvian Peoples, Environment and Ecology (CPAAAAE), which was more sympathetic to the indigenous proposal. The adopted text did not include all of the agreements reached in Mesa 3. Moreover, regarding nearly all of the contested issues, the government’s allies either imposed their own vision or the respective provisions were kept vague and central questions were thus left open to further interpretation. These unresolved disputes reemerged during the meta-consultation on the regulating norm of the consultation law. Despite the limited nature of the law adopted by Congress, at the time the Amazonian and Andean indigenous organizations still advocated for its rapid promulgation (AIDSESEP et al. 21 May 2010).

The Peruvian president, however, vetoed the law and sent it back to Congress on 21 June 2010 with a list of objections. He wanted the law to clearly indicate that “national interests” was the single most important criterion for governmental decisions and argued that the peasant communities of the Andes and the coastal region should not be granted the right to

8 The Confederation of Amazonian Nationalities of Peru (CONAP) split from the AIDSESEP in 1987, and is known for its more government- and business-friendly position.

9 The participating organizations from the Andes were the National Agrarian Confederation (CNA), the Peasant Confederation of Peru (CCP) and the National Coordinator of Communities Affected by Mining (CONACAMI).

prior consultation because he did not consider them to be indigenous. Furthermore, he stated that only communities with registered land titles should be consulted (Presidente de la República del Perú 21 June 2010). These objections caused new protests to erupt in October and December of 2010.¹⁰

The consultation law was not debated again in Congress under President García's government, but it remained a crucial issue in public discourses. This was even more so the case when the first prelegislative consultation process regarding the new forestry law was carried out, which subsequently led to the outbreak of new indigenous protests shortly before the change of government in July 2011.

...Finally Leading to Peru's Consultation Legislation

In September 2011, Peru's new president, Ollanta Humala, promulgated the consultation law (No. 29785). Prior to this, Congress had unanimously adopted the law. The aforementioned indigenous organizations were not invited to review it again. Shortly after the law's promulgation, however, Humala's government carried out a consultation on its regulating norm.

It should be noted that this meta-consultation was designed to signal the government's willingness to enter into discussions with the indigenous and peasant organizations, a step that was positively received by them. It also gave the participating organizations the possibility to offer their views, strengthen alliances and construct shared claims. For example, five of the invited institutions (AIDSESEP, CCP, CNA, CONACAMI and ONAMIAP¹¹) formed the "Unity Pact." With the help of Peruvian experts they formulated a document that included the "minimal principles" that should be the guidelines for the new legislation on prior consultation (Pacto de Unidad 2011). Beyond this issue, they also formulated joint claims – for example, for the reform of state institutions and the convocation of a Constituent Assembly in order to transform indigenous peoples and their rights into an integral part of the state and its constitution. The process was, though, characterized by serious deficiencies and difficulties – ones which are likely to hinder future consultations as well. In particular, the formulation of the regulating norm had a unilateral and asymmetrical character. This became clear from the composition of the participants and the proceedings, both of which had not been jointly established, but rather imposed by the state.

On 22 November 2011 a multisectorial commission was installed with the task of formulating a regulating norm for the consultation law. On the same day, the Vice Ministry of Intercultural Affairs presented a draft version of this norm. The commission was initially comprised of

10 Meanwhile, the disputes also reverberated in the judicial field as the repertoire of the indigenous movement's contentious politics also included lawsuits – the most institutionalized form of contention (Tilly and Tarrow 2007: 18). The constitutional court declared, in a remarkable decision on several of the contested decrees on 9 June 2010, that the nonexistence of a Peruvian consultation law did not justify the nonapplication of prior consultations (Sentencia 022-2009, Tribunal Constitucional 9 June 2010). On 30 June 2010 the court even directly requested that Congress approve the consultation law as soon as possible (Tribunal Constitucional 30 June 2010).

11 National Organization of Andean and Amazonian Women of Peru (ONAMIAP).

a total of 16 vice ministries and six indigenous and peasant organizations possessing national reach. Among the indigenous organizations represented were the two Amazonian indigenous organizations AIDSEP and CONAP, the women's organization ONAMIAP, and the three Andean indigenous and peasant organizations CONACAMI, CNA and CCP. The composition of the multisectorial commission was criticized due to the imbalance between state and indigenous representatives. Moreover, some organizations operating at the regional and local levels raised complaints about their exclusion from the process.¹²

On 9 January 2012 the participating organizations were informed about the future schedule. A process of "internal deliberation" comprised of six regional meetings of two days duration each was to be subsequently held and then followed by a national meeting in Lima during 13–15 February 2012 (see CNDDHH 2012). The information on the consultation law and its regulating norm was only distributed among the participants of the diverse meetings at the beginning of each event; therefore, they did not have prior opportunity to become informed about, and to reflect thoroughly upon, the issues at stake.

The ombudsperson, a representative of the ILO, the National Coordinating Committee for Human Rights (CNDDHH) and a few representatives from nongovernmental organizations as well as some academics (generally allowed to attend with permission from the indigenous organizations) all participated in the meetings as observers. The final negotiations within the multisectorial commission were no longer open for attendance to members of the public. In general, the consultation had a low profile and had almost no national or international press coverage. Additionally, the final national meeting commenced in a cottage far from Lima city center – the exact location of which had not been publicly announced beforehand. After the vehement criticism voiced by the participants regarding the inappropriate choice of location – on the basis of its inaccessibility and the lack of technological equipment and necessary infrastructure available – the site was changed to a school situated closer to the city center.

More subtle mechanisms reinforcing the asymmetrical character of proceedings could also be observed. For example, the predominant language style within the meetings was rather technical and legalistic, ensuring that the conditions for a genuine intercultural dialogue – one characterized by diverse communication repertoires, knowledge forms, values and logics – were definitely not in place. The indigenous and peasant representatives generally harked back to legal arguments in order to validate their points of view. It is questionable whether they would have been taken seriously if they had brought forward radically different perspectives.

At the end of the national meeting in Lima, the AIDSEP, CONACAMI, CNA and ONAMIAP all publicly declared that they were not willing to continue participating in the multisectorial commission as long as the consultation law was not modified or replaced (see

12 For example, the Union of Aymara Communities (UNCA) and the National Federation of Women Farmers, Artisans, Indigenous, Native and Salaried Women from Peru (FEMUCARINAP). These organizations were not invited to the six regional meetings, but they did participate in the final meeting in Lima.

AIDSESEP et al. 2012). This final decision was unsurprising, as this standpoint had already been clearly expressed in all former subnational meetings. Such a position was justified by stating that the consultation law did not fully incorporate the proposals from Mesa 3, that it had not been discussed in an adequate manner with the indigenous peoples and that it would set standards for prior consultation that were below those established by ILO C169 (ibid.). The invited organizations also lost their initial hope that the regulating norm would adjust the deficiencies in the consultation law. Only two organizations decided that they would continue to be part of these negotiations: the CONAP and the CCP.¹³

The multisectorial commission – now composed of 18 vice ministries¹⁴ and 2 indigenous organizations – met six more times, between 17 and 29 February 2012. This meant that the participants of the meeting in Lima only had two days at their disposal in which they could engage in information sharing, dialogue and consultation with their organizational bases. During the meetings of the multisectorial commission some agreements, at least, were established; the government selected a few of the critiques of the consultation law and took them into account in the crafting of the regulating norm.¹⁵

The final version of the norm was, however, only partly characterized by reached agreements and compromises. At the end of the multisectorial meetings, 28 points of disagreement remained unresolved. On 24 of these points the executive ultimately imposed its own vision. Among them were those disagreements that had already emerged regarding the consultation law, as outlined above. However, worse was to come: In violation of the consultation law that stipulated that agreements achieved as a result of these consultations were legally binding, the various ministries did not incorporate all of the reached agreements of the multisectorial commission into the regulating norm. Moreover, after the disbanding of the multisectorial commission, 13 new provisions were introduced into the regulating norm that had not been previously discussed with the participating organizations (CNDDHH 2012). In fact, some of these openly contradicted the demands of the consulted organizations – such as a few of the Unity Pact’s “minimal principles.”

13 The CONAP’s representative expressed the organization’s consensus that the consultation law was not perfect, but that they would still try to craft a regulating norm to enrich and further develop it. The CCP’s decision was taken to support the formulation of the regulating norm and, subsequently, to strive for some modifications of the consultation law.

14 Two additional vice ministries had subsequently decided to join the process.

15 For example, the regulating norm not only refers to ILO C169, but also to UNDRIP – it contains articles that address the protection of indigenous peoples living in voluntary isolation and paragraphs about benefit sharing. In addition, more provisions on the protection of the collective rights of indigenous peoples were introduced into the regulating norm than into the consultation law itself. While the consultation law did not recognize the right to FPIC, the regulating norm at least established the obligation to reach consent with local populations in cases where the resettlement or disposal of hazardous waste on indigenous territories was planned.

3 Contestations over the Content of the New Consultation Legislation

The consultation law (No. 29785) was almost identical to the bill that had been rejected one year previously by President García. It contained 20 articles and four final complementary dispositions. Its regulating norm was published on 3 April 2012, containing 30 articles and 16 complementary, transitory and final dispositions. In contrast to the former situation, wherein prior consultations were never implemented, the new consultation legislation might potentially lead to certain improvements. It has, at least, clarified responsibilities, specified the procedures to be followed and defined some minimal standards that these proceedings should fulfill. Previously, prior consultations were either entirely absent or information-only events were held (frequently arranged by the companies themselves); these did not ensure that the expressed indigenous perspectives were taken into account, nor has the documentation from these events been made publicly accessible. Nevertheless, comprehensive critiques of the specific content of the new consultation legislation have been expressed by the indigenous and peasant organizations, which will be briefly summarized here.

The consulted organizations repudiated in particular the following articles of the consultation law, and advocated their modification: Articles 1, 2, 4, 5, 6, 7, 15 and 19, as well as the first and second final complementary dispositions. We will not deal with each of these items individually, but rather discuss them in the context of the most contested topics concerning the new consultation legislation.

Regarding the consultation subject – namely, the peasant or Andean communities and the native or Amazonian communities – subjective and objective identification criteria were established in Article 7 of the consultation law. The indigenous organizations opposed the list of objective criteria¹⁶ defined by national law, as these criteria were more stringent than the ones established in ILO C169. They feared that this definition could be used to deprive certain groups of the right to prior consultation. Despite the fact that the regulating norm attenuated this risk by stating¹⁷ that Article 7 of the law should be interpreted according to ILO C169, the indigenous organizations have insisted on its modification.

Regarding the consultation objects, Article 2 of the Prior Consultation Law stated that all measures that directly affect indigenous peoples must be subject to prior consultation. The regulating norm affirmed this interpretation of “affectation” in its Article 3b. The indigenous organizations claimed that the consultation objects should be expanded to include those measures that indirectly affect indigenous peoples as well. While this distinction seems to be only a formal one, its practical meaning can only be understood when taking into account the fact that many previous legal and political contestations over the deprivation of the right to consultation were related to the very narrow definitions of the term “affectation.” Thereby, groups that were affected by specific measures were excluded, while other groups – often

16 Descent from original populations, close ties to their historical territory, own institutions, customs and cultural patterns and ways of life that are distinct from those of the “national population.”

17 In Article 3k.

those with a more sympathetic view about the planned measures – were invited to participate in dialogues (see Alayza Moncloa 2007; Gustafsson 2012). The argument that a specific legislative or administrative measure would not affect indigenous communities has also repeatedly been posited by state entities and companies as a way to avoid their consultation obligation. Moreover, much to the discontent of the indigenous organizations, the consultation law (second final disposition) declared that those measures adopted prior to its promulgation would not be revised in light of the new legal norm.

The state institutions responsible for carrying out prior consultation are the ones that are in charge of each respective measure (e.g., the Ministry of Energy and Mines and new mining projects). Additionally, the specialized institution of the executive branch on indigenous issues is supposed to support all consultations by coordinating state policies, assisting the responsible institutions and the indigenous peoples, creating a database on indigenous peoples and their representative institutions, providing a register of official facilitators and translators, and registering the results of the procedures (Article 19 of the Prior Consultation Law). In its first final disposition, the law declares the Vice Ministry of Intercultural Affairs as the specialized state institution on indigenous peoples. The indigenous organizations have opposed this solution because, first, they demand that the responsible entity for indigenous issues should have the rank of a ministry, and, second, because this entity currently does not employ any representatives from indigenous communities.¹⁸ Furthermore, the consultation legislation only explicitly mentioned the obligation of the executive branch to consult; it did not regulate consultation on legislative issues.

According to Article 8 of the Prior Consultation Law, the phases of a consultation procedure should be the identification of the measures and the peoples to be consulted, the announcement of the planned measures and the dissemination of relevant information, internal evaluation within indigenous organizations and institutions, intercultural dialogue between the state and indigenous representatives, and the final decision to be taken. The law established that the indigenous peoples should participate through their representative institutions and organizations, elected in accordance with their own customs (*usos y costumbres*). If necessary, registered translators should be involved in the procedure. The regulating norm further stipulated that problems of accessibility should be taken into account. Moreover, it is worth mentioning that the Peruvian regulating norm is the first one in Latin America to date that maintains a focus on gender equality throughout the entire document. However, to the great dismay of the indigenous organizations, the established proceedings within the new consultation legislation were characterized by many unilateral elements, which are likely to contribute to further asymmetrical consultation constellations in future. For example, no pre-consultative phase for the joint planning of the consultation procedure – as foreseen within the proposal of Mesa 3 – was made obligatory. Instead of a joint planning process, the regu-

18 See *Acta del Encuentro Nacional de Evaluación Interna del Borrador del Reglamento de la Ley de Consulta Previa*, online: <<http://servindi.org/actualidad/59610>> (10 December 2012).

lating norm stipulated that the entity in charge should pass the consultation plan over to the communities engaged. Essentially, the entity in charge can thus design the process unilaterally because there are no provisions for the indigenous representatives to criticize the consultation plan or for the Vice Ministry of Intercultural Affairs to revise it. In addition, it is the state that not only decides which measures affect indigenous peoples, but also maintains a database on indigenous populations and their organizations.

Time limits were among the provisions introduced as part of the regulating norm, after the disbanding of the multisectorial commission. The whole consultation process can last for up to a maximum of 120 days (30–60 days information phase, 30 days internal deliberation, and 30 days dialogue phase). The indigenous organizations would have preferred a more flexible scheme, one designed according to the circumstances of each locality and particular to each planned measure. Moreover, without prior discussion within the multisectorial commission, the regulating norm introduced new provisions that emphasized the role of the representatives of the indigenous peoples at the expense of their representative institutions. This change was contrary to the proposal made by the Unity Pact, which emphasized in its document on the claimed minimal principles of the consultation legislation process that “decisions will only be valid when taken by assemblies that guarantee broad, free and informed participation” (Pacto de Unidad 2011: 2). In the same vein and without prior discussion, the executive introduced Article 27.3, which stipulated that only the representative organizations within the geographic area affected by the planned measure were to be consulted. In a situation where the communities engaged appealed against an ongoing consultation process, the multisectorial commission had originally agreed that the consultation would be suspended until the dispute had been resolved. However, this agreement was nullified by the executive, and the adopted regulating norm stipulated the opposite in Article 9.2: “The appeal [...] does not have a suspensory effect.”

Concerning the final decision, the law (Article 15) and its regulating norm (Article 1.5) established that reached agreements were binding. The credibility of this stipulation is questionable, though, particularly since it had already been violated during the process of consultation on the regulating norm. The legislation also established that each consultation case would be registered in a public document listing both the agreements and disagreements. It should be signed both by the promoting entity as well as the representatives of the consulted indigenous peoples. The guarantee of public accessibility to these reports promises to be an important advance beyond the current situation, which is characterized by a lack of transparency about the implemented consultation procedures and their results. In case no agreement on the planned measure can be reached within the consultation process, the consultation law and its regulating norm both established that the lead state entity would take the final decision. This decision should be sufficiently justified in order to guarantee the protection of the human rights of the people involved and balance the diverse interests at stake (Article 15 of the Prior Consultation Law and Article 23 of the regulating norm). The indigenous organizations have, though, understandable doubts about whether this will actually

happen. These suspicions are related to their perception of hostile state institutions and to many of their previous experiences that were contrary to such promises.

The document on the “minimal principles” of the Unity Pact underscored that prior consultations must not take place when the planned measure would undermine the rights of the affected groups or persons. It also hypothesized situations in which not only the prior consultation but also the FPIC of the consulted groups should be made obligatory, among them military activities and projects that would negatively affect sources of subsistence or indigenous property rights. The indigenous vision shines through this document, demonstrating that they see consultations as mechanisms not only for enabling them to participate and be heard, but also for achieving actual material improvements under the ambit of securing their human rights and of guaranteeing their share of the benefits of planned projects. As yet, not many of these “minimal principles” have been incorporated into the new regulating norm – only some extenuated fragments of them. This was one of the main reasons for its ultimate rejection by the Unity Pact, and thus might represent a major obstacle to its future implementation.

Table 1: Consultation Legislation and its Main Critiques

	<i>Consultation Subject</i>	<i>Consultation Object</i>	<i>Responsible State Institutions</i>	<i>Consultation Procedure</i>	<i>Final Decision</i>
Prior Consultation Law No. 29785	<p>Art. 7: Andean or peasant and Amazon or native communities; objective criteria: direct descent from aboriginal populations, close connections with traditional territory, own institutions and customs, different culture and ways of life; subjective criteria: self-identification</p> <p>Art. 20: database to be created by Vice Ministry of Intercultural Affairs</p>	<p>Art. 2: legislative and administrative measures as well as plans, programs and projects for national and regional development that directly affect collective rights</p> <p>Final Disposition 2: The law does not change or abrogate previous measures.</p>	<p>Art. 17: promoting entity of planned measure in charge of implementing consultations</p> <p>Art. 19: The technical organ specializing in indigenous issues assists consultations.</p> <p>Final disposition 1: The Vice Ministry of Intercultural Affairs is the specialized organ on indigenous issues.</p>	<p>Arts. 8–16: identify measures and affected groups, complete information, internal evaluation of affected populations, dialogue with state entities, decision-making, support of registered translators</p>	<p>Art. 15: Reached agreements are binding. When no agreement is reached, the final decision will be taken by the competent authority; it must be properly justified and include an evaluation of expected impacts on collective human rights.</p>
Regulating Norm of Prior Consultation Law	<p>Art. 3k: Established criteria in Art. 7 of the law should be interpreted according to Art. 1 of the ILO C169.</p> <p>Art. 5c: consultations with representatives of directly affected indigenous peoples</p> <p>Art. 3i: Representative organizations from the geographic area affected by planned measure will be consulted.</p>	<p>Art. 2.1: administrative measures from executive</p> <p>Art. 3b: measures that would change the legal situation or exercising of collective indigenous rights</p>	<p>Article 3g: The promoting entity of the planned measure is responsible for consultations (in the case of legislative decrees, the Presidency of Ministerial Council; in the case of administrative measures, ministries, regional and local governments).</p>	<p>Arts. 14–26: The promoting entity: can organize the preparatory meeting and must hand over the consultation plan. The maximum consultation duration is 120 days.</p>	<p>Arts. 5e and 23: When no agreement or consensus can be reached, the promoting entities are entitled to adopt the measure; they should assume all necessary measures for protecting indigenous rights.</p>
Main Critique from Indigenous and Peasant Organizations	<p>The objective criteria from the consultation law are too stringent. The database was created without indigenous participation. The representative institutions should be consulted, not only the representatives themselves. Representative institutions from national, regional and local levels should be invited.</p>	<p>Consultations should also be carried out on measures that have indirect effects. Previous measures should be revised.</p>	<p>Responsible entity for implementing consultations should be the specialized entity on indigenous issues, with ministerial rank and indigenous representatives therein. Provisions on how the legislative branch should enact consultation are missing.</p>	<p>A preconsultative phase should be obligatory. The time frame for it should be more flexible. The design of the consultation process should be less unilateral.</p>	<p>There are doubts that the responsible state institutions will protect human rights and justly balance diverse interests. The consultation legislation should list situations in which the FPIC of the affected communities is necessary.</p>

Source: Author's compilation.

4 Unresolved Tensions and Starting Points for Conflict Resolution

The analyses of both the formulation and the content of the new consultation legislation, as well as the respective contestations of it, reveal divergent views regarding state–indigenous relations, desired development paths and legitimate forms of participation and decision making. Despite some steps having been taken towards the institutionalization of the right to prior consultation, important unresolved tensions remain. The legal-institutional design of prior consultation is still highly contested, and the absence of a consensus on the ground rules will further exacerbate social conflicts in the future. Consequently, prior consultation will probably not be a tool for conflict resolution but will instead increasingly harbor the potential to fuel conflicts. It is, therefore, to be expected that in future consultations, disputes about their design and implementation will hinder deliberations on the planned measures – despite them being the actual objects of consultation.

A first step for implementing effective prior consultations should be to set up a widely accepted framework for their institutionalization. Based on our case study, we argue that the legal framework should prepare the ground for the enablement of at least three interdependent necessary conditions. The first one focuses on the institutional dimension, the second on the procedural and social practice dimensions and, finally, the third on the final decision-making and substantive dimensions (the outcomes) of prior consultations. We are aware that the existence of these conditions is not only reliant on appropriate legislation; yet, their creation will of course be more unlikely if legislation is in place that undermines them.

Accepted instruments of conflict prevention and resolution are especially needed in the context of resource extraction. As in neighboring Bolivia and Ecuador, it can be expected that the Peruvian government will continue to prioritize extractive industries over alternative or local development pathways. Even if Humala’s government were to move towards a model of neoextractivism in future – which would be characterized by greater state control of extractive industries, nationalization and the proliferation of social policies (see Gudynas 2010; Hogenboom 2012) – this would not necessarily reduce the existing tensions between extractive industries on the one hand and environmental concerns and indigenous aspirations for control of their territories on the other. Thus, whether and to what extent it will be possible for prior consultation to open the door to the formulation of joint development visions and practices – implying power-sharing and open outcomes – will not least depend on the processes and impacts of future contestations.

4.1 Impartial Responsible State Institutions

During the episodes of contentious politics that finally led to the adoption of the new consultation, legislation critiques of current state institutions – perceived as biased toward corporation interests and hostile to indigenous ones – came to light. The demand for the reform of state institutions so as to enhance their representativeness concerning indigenous peoples and their perspectives was a core issue within Mesa 3 as well as during the meta-consultation on

the regulating norm of the consultation law. As prior consultations should not only provide protection for the human rights of those that might be affected by the planned measure(s) but also justly balance the diverse interests involved, it was a key priority for indigenous organizations in Peru that the entity in charge of implementing them should be impartial.

Thus, they claimed that the state entity specializing in indigenous issues should be responsible for prior consultations and not – as was foreseen by the new consultation legislation – the promoting entity. With good cause, they expect the latter to be liable to simply press ahead with the planned measure. Moreover, according to these indigenous organizations, the specialized entity should be upgraded to a ministry and incorporate their representatives into its team. The government has, however, not taken this claim into account and has instead continued to insist that the promoting entity is to be the responsible state institution.

Moreover, regarding future consultations on planned extractive projects, it is not only the entity in charge of implementing consultations that is perceived as being biased, but also the obligatory environmental impact assessments (EIAs) that are carried – these are ordered and paid for by the corporations themselves; furthermore, it is the Ministry of Mines and Energy that oversees them and not the Environment Ministry. So long as it exists, this inapt constellation will probably continue to reinforce the widespread perception that corporate and state interests are intermingled in Peru – and that the influence of corporations on state institutions is extremely high (see Arellano Yanguas 2011b; Gustafsson 2012).

Evidently, the unaltered, widespread indigenous perception of adversarial state institutions will not be helpful for the implementation of effective consultations in future. It is to be expected that the absence of an impartial responsible institution will cause greater suspicion, mistrust and feelings of exclusion on the part of the communities consulted. These perceptions also go hand-in-hand with serious (violent) conflict potential. This finding is supported by the research that has been hitherto undertaken on deliberative processes. Many such theorists argue that one basic condition for enabling just deliberative processes is the existence of a mediating entity, one which is perceived as legitimate, impartial and accepted by all of the actors involved (e.g., Bohman 1996). Peru's institutional design concerning prior consultation is, as it stands, certainly not the most appropriate for the fulfillment of this requirement.

When arguing for the need for impartial institutions to be put in charge of implementing prior consultations, we do not, however, have the creation of a homogenous, neutral state in mind. Rather, we prefer a disaggregated view of the state so as to understand the complex relations of power at play within and between the various state actors and institutions that shape policies and decision-making processes. According to this perspective, our case study has shown that within the Peruvian state there has been, until now, considerable diversity among individual actors and groups more or less sympathetic towards indigenous claims – for example, in the different commissions within the legislative branch, within the different political parties and within different ministries. Thus, instead of aiming to eliminate such varieties and power relations, we believe that the aim should rather be to correct the existing imbalances in the consultation process.

Without advocating institutional transplants from one context to another – as we believe that institutional designs should be context-sensitive – it is nevertheless worth mentioning that an interdisciplinary team located within the Colombian Ministry of the Interior has been created that is responsible for implementing prior consultations. In contrast to the current situation in Peru, this institution is definitely more likely to be perceived as impartial and, hence, to enjoy greater legitimacy.

4.2 Measures Reducing Power Asymmetries

In our case study on indigenous participation in the formulation of Peruvian prior consultation legislation, we have shown that one of the main reasons for the discontent of the participants is its unilateral and asymmetrical character. The participants were selected by the executive and the proceedings were not conducted in a way that the Peruvian indigenous and peasant organizations agreed with. The procedure was characterized by time pressure, the relevant information was handed over to the participants only shortly before the meetings began and the whole process neither allowed for comprehensive internal deliberations within the participating organizations nor for genuine intercultural dialogue. It is likely that future consultations will proceed in a similar manner, and thereby cause anger, discontent and exacerbated conflicts between the state and the local populations – as well as within the affected groups themselves.

With regard to consultations about planned extractive projects at the local level, we can expect that the unilateral and asymmetrical character will be even more accentuated. In contrast to the analyzed style of consultation at the national level, the involved representative institutions in these localized cases will tend to be weaker – for instance, even less access to information, communication media and national and international allies as well as even more limited financial resources. Moreover, critical observers who could countervail the existing power asymmetries and help to create greater procedural transparency (such as the ombuds-person, personnel from the ILO, academics and representatives from nongovernmental organizations) will not be present during most of these processes.

We have also shown that the new consultation legislation itself contains many provisions that endorse asymmetrical consultation constellations rather than mitigate them (e.g., the decree that the responsible state institutions decide who and how to consult). In a similar vein, the provision that the representatives of the affected populations and not their representative institutions will be consulted, and that only those organizations within the affected area will be taken into account, have also contributed to this imbalance. This latter stipulation might leave weak local populations unprotected as they will not negotiate in tandem with the regional or national organizations with which they are affiliated. It is likely that stronger and more unified organizations would be able to better use future consultations to achieve their objectives, while the ones that are weaker and/or more fragmented will be worse-off. This is particularly relevant when taking into account the logic behind prior consultations and FPIC,

which argues that it is especially those groups in society who are marginalized and underrepresented in politics who should have a say with regard to the decisions that affect them.

The challenge to create more egalitarian deliberation arenas between markedly unequal actors (at least with regard to their economic and political power) as a basic necessary condition for meaningful consultation is not unique to Peru either; it has also been identified by several other scholars working on indigenous participation elsewhere in Latin America (Rodríguez Garavito 2010; Rodríguez Garavito and Orduz Salinas 2012; Szablowski 2010). As Arellano-Yanguas explains, the conflict risk is particularly accentuated when biased state institutions intersect with great power asymmetries:

Why do communities choose contentious politics as a strategy? The short answer is that they perceive this as the only means left open to them if they are to negotiate on a more or less equal footing with companies. This perception is fostered by the clear asymmetry of power between communities and companies, and the widespread public suspicion of collusion between the state and the mining companies.

(Arellano-Yanguas 2012: 100)

To do justice to the new consultation legislation, we want to again mention that some of the articles enclosed in the new regulating norm are indeed likely to actually improve the consultation process. They include some important measures that counterweight power asymmetries, such as the inclusion of facilitators and translators in the consultation process, logistical support for internal deliberations about the planned measures, the stipulation that official reports about the consultations and their outcomes will be openly accessible, and the explicit ambition to support the participation of vulnerable groups from within local populations (e.g., women, elderly persons, children and persons with disabilities). These provisions will not, though, be sufficient for the creation of the necessary conditions for dialogue to take place on an equal footing.

In several case studies additional mechanisms have shown to be helpful for reducing any power asymmetries within consultations. Among them are the participation of regional or national indigenous organizations aside from the local ones, specialized consultants and experts selected by the affected groups, sufficient economic resources and time for making internal deliberation processes possible, the circulation of complete and fully comprehensible relevant information, the strengthening of the intercultural character of the dialogue, cooperation with researchers and nongovernmental organizations, and access to media coverage (Rodríguez Garavito and Orduz Salinas 2012; Schilling-Vacaflor 2012; Bascopé Sanjines 2010). With this in mind, we believe that it is urgently important to systematically foster – by legal and sociopolitical means – a wide variety of such practices so as to make consultations more equitable and transparent.

4.3 Joint and Binding Decisions

In our analysis of the elaboration of the new Peruvian prior consultation legislation we found that the actual influence exerted by the consulted groups on the outcome (the content of the law and the regulating norm) was very limited. The fact that many of their claims and interests were excluded from the texts caused anger and disappointment as well as the rejection of the legal norms, which were perceived as being imposed by the state. What was definitely missing was any attempt on the part of the state to find genuine compromises and mutually acceptable solutions to the disagreements that came to light. This way of proceeding is inherently risky; as our case study has shown, unresolved conflicts are consequently only postponed and thus certainly not resolved. Furthermore, the government has gravely violated the consultations law's stipulation that agreements reached during a consultation process are legally binding. Not all agreements from Mesa 3 were incorporated into the consultation law, while at the end of the meta-consultation on the regulating norm some of the agreements reached were even changed so as to have a contrary meaning.

A stark illustration of the fatal consequences arising from the government's lack of will with regard to dialogue and to finding compromises is the *Baguazo*, a conflict that only escalated in such a brutal fashion after a long period during which García's government failed to address the causes behind the protests and even mocked and repressed the dissidents. Hence, it is doubtful whether the reluctance of Humala's government to revise the concessions and extractive projects already in place with regard to their socioenvironmental impacts and to remedy the lack of prior consultation will be favorable for promoting peace in the long term.

In fact, the final decision – and, thus, the effect of consultation – is the most contested issue as regards prior consultation. This reality already became clear during the discussions that occurred within the United Nations General Assembly on the UNDRIP, when several states strongly opposed indigenous rights to self-determination and to FPIC. The issue at stake here is whether the affected groups must only be consulted, without them actually having any real decision-making power, or whether the consultations should be consequential – meaning that they play a decisive role in shaping state policies and legislation. The vetoing states generally emphasize their sovereign role in governance, which they do not want to see threatened by any external or internal actors. As a consequence, indigenous aspirations to self-determined development are frequently trumped by so-called “national interests.” In contrast, indigenous groups and local communities tend to argue that their rights are non-negotiable and that a just process in which diverse interests within the state are balanced should be the basis for defining of what constitutes “national interests.” They state that this important decision should not simply be transferred to the government.

We believe that three prerequisites in particular are necessary for improving consultation practices:

- 1) the enshrinement of the principle that established agreements are legally binding (which has been violated in the investigated cases);
- 2) that it is not enough only to uncover and highlight existing agreements and disagreements, but that there should be a real effort made to find viable solutions to the most conflictive issues (e.g., by recurring to mediation and deliberation); and
- 3) that human rights are not negotiable and as such the unlimited expansion of extractive industries should be restricted so as to protect these rights.

We feel that compliance with these standards would not only be fruitful for the state's enhanced legitimacy and governability, but could also help to prevent the outbreak of future conflicts.

Furthermore, it is worth mentioning that in the various socioenvironmental conflicts that have occurred around the globe the demand for the implementation of prior consultations has, in general, not been expressed only for its own sake. Rather, it has been conceived of as a channel for resolving significant underlying problems – for example with regard to environmental pollution or benefit sharing. Thus, it is clear that in contexts that are characterized by great social inequality and in which human rights and environmental standards are not firmly set in place – the violation of which are exacerbated by the almost unlimited expansion of extractive industries – the consultation procedure alone will not be able to transform or prevent social conflicts. Rather, these deeply entrenched problems must also be simultaneously addressed. Indeed, the demand for prior consultation can be helpful as a way to bring these underlying issues to the surface and to create the possibility of finding nonviolent, joint solutions to them.

5 Conclusion

The adoption of a new consultation law in Peru in September 2011 – without precedent in Latin America – was the result of the contentious politics of the past few years and the change of government that occurred in 2011. The Peruvian indigenous movement – previously thought of internationally as being weak – was strengthened by processes of collective mobilization and transformed into an important political actor, albeit only temporarily. Indigenous mobilizations were successful in many respects. In particular, they achieved the promulgation of the desired consultation law and they brought the issue of indigenous peoples' rights (e.g., the right to prior consultation and to FPIC) and an array of related grievances to the political agenda as well as the public and media spheres. Nevertheless, the participatory formulation of the new prior consultation legislation was subject to harsh criticism by indigenous groups, whose influence on the resulting norms has, in reality, remained limited. This is due to a political context that has in many ways continued to be unfavorable to indigenous peoples. Particularly significant in this regard has been the ongoing orientation of the Peruvian government toward extractive industries, its conceptualization of a weak version of the right to prior

consultation and the lack of strong state institutions that defend environmental and human rights. The new consultation legislation in Peru, despite being passed, is still highly contested by the various indigenous organizations who perceive it as being both deficient and imposed by the state.

In accordance with the findings of Arellano-Yanguas, our case study has shown that “the institutional change induced by conflict is neither necessarily successful nor always conducive to the further improvement of policy” (2012: 104). We argue that the nonacceptance of the normative framework and the lack of important basic conditions are the reasons why prior consultations cannot – at least as yet – be an effective tool for conflict prevention or resolution in Peru. While the core claims of the indigenous and peasant organizations can be temporarily displaced, they cannot be permanently silenced. Rather, the unresolved tensions about the design and implementation of the consultation process are likely to reemerge in future consultations and will probably even contribute to a growing number of violent conflicts. Based on our Peruvian case study, we have both identified the core tensions and suggested three premises for conflict resolution:

- 1) the creation of impartial responsible state institutions,
- 2) the implementation of measures to countervail power asymmetries, and
- 3) joint decision-making processes that result in legally binding agreements.

We are convinced that solutions promoted solely through legal channels will fall short of guaranteeing meaningful prior consultation in practice, thus meaning that it will fail to live up to its potential to function as a tool for conflict resolution. In reality, the institutional dimension, the procedural/social practice dimension and the substantive dimension must all be simultaneously addressed in order for sustainable and lasting solutions to be provided.

Future investigations on prior consultation and FPIC will have to keep all of these aspects in mind. We hope that our study will inspire prospective research agendas and also enhance their ability to deliver new insights and to jointly elaborate innovative approaches to the common problems that exist throughout Latin America. That said, the goal should not be to devise universal and formulaic recipes for designing and implementing consultation procedures, as a wide range of context- and culture-sensitive legal and practical solutions that guarantee the right to prior consultation and to FPIC must be sought.

Socioenvironmental and sociolegal conflicts over prior consultations and FPIC are not likely to disappear in the near future. Instead, recent developments suggest that they will actually further grow in both number and intensity. In the context of the urgent need to democratically address these conflicts, the proper implementation of meaningful consultation represents a powerful tool for conflict resolution. Prior consultation can result in significant benefits; it also bears serious risks, particularly when carried out in a substandard manner. We hope that our study contributes to a better understanding of these potential risks as well as to the creation of impetus for more sustainable conflict resolution strategies – which might just be the beginning of genuine intercultural dialogue.

Bibliography

- AIDSESEP, CCP, CNA, CONACAMI and CONAP (2010), *Carta al Presidente del Congreso de la República Luis Alva Castro. Acta de consenso sobre la Ley Marco de Consulta. Propuesta consensuada entre organizaciones amazónicas y andinas*, online: <www.servindi.org/pdf/Peru_Org-Ind_PyConsulta2010.pdf> (15 January 2013).
- AIDSESEP, CCP, CNA, CONACAMI and CONAP (2010), *Carta a la Defensoría del Pueblo. Promulgación de Ley de Consulta, necesidad impostergable. Solicitamos exprese opinión institucional*, Lima.
- AIDSESEP, CNA, CONACAMI, FEMUCARINAP and ONAMIAP (2012), *Acta del Encuentro Nacional de evaluación interna del borrador del reglamento de la Ley de Consulta Previa*, online: <www.conacami.pe/2012_02_01_archive.html> (15 September 2012).
- Alayza Moncloa, Alejandra (2007), *No pero Sí. Comunidades y minería. Consulta y consentimiento previo, libre e informado en el Perú*, Lima: Cooperación.
- Alorda, Rocío (2011), *Chile. Decreto limita consulta previa*, in: *Noticias aliadas, informe especial "Consulta previa: derecho fundamental de los pueblos indígenas"*, Lima: Comunicaciones Aliadas, 10–11.
- Arellano Yanguas, Javier (2011a), *Aggravating the Resource Curse: Decentralization, Mining and Conflict in Peru*, in: *Journal of Development Studies*, 47, 4, 617–638.
- Arellano Yanguas, Javier (2011b), *Minería sin fronteras? Conflicto y desarrollo en regiones mineras del Perú*, in: *Investigaciones Geográficas*, 77, 142–144.
- Arellano Yanguas, Javier (2012), *Mining and Conflict in Peru*, in: Anthony Bebbington (ed.), *Social Conflict, Economic Development and Extractive Industry. Evidence from South America*, New York: Routledge, 89–111.
- Barstow, Daniel, and Lauren Baker (2008), *Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent*, in: *Denver Journal of International Law and Policy*, 35, 4, 413–428.
- Bascopé Sanjines, Iván (ed.) (2010), *Lecciones aprendidas sobre consulta previa*, La Paz: CEJIS.
- Bebbington, Anthony, and Denise Humphreys Bebbington (2010), *An Andean Avatar: Post-neoliberal and neoliberal strategies for promoting extractive industries*, BWPI Working Paper, 117.
- Bebbington, Anthony, and Mark Williams (2008), *Water and Mining Conflicts in Peru*, in: *Mountain Research and Development*, 28, 3/4, 190–195.
- Bebbington, Anthony (ed.) (2012), *Social Conflict, Economic Development and Extractive Industry. Evidence from South America*, New York: Routledge.
- Bohman, James (1996), *Public Deliberation: Pluralism, Complexity, and Democracy*, Cambridge: MIT Press.

- CNDDHH (2012), *Informe de observación del proceso de consulta previa del Reglamento de la Ley del Derecho a la Consulta Previa a los pueblos indígenas u originarios*, online: <<http://servindi.org/actualidad/60910>> (15 September 2012).
- DAR – Derecho, Ambiente y Recursos Naturales (2009), *Informe. Hechos y aspectos vulneratorios de los Decretos Legislativos 1090 y 1064*, Lima: DAR.
- Defensoría del Pueblo del Perú (2006), *Conflictos sociales conocidos por la Defensoría del Pueblo. Al 30 de Junio de 2006*, Reporte, 28, online: <www.defensoria.gob.pe/temas.php?des=3#r> (27 July 2012).
- Defensoría del Pueblo del Perú (2011), *Reporte de conflictos sociales*, 88, online: <www.defensoria.gob.pe/temas.php?des=3#r> (27 July 2012).
- Defensoría del Pueblo del Perú (2012), *Reporte de conflictos sociales*, 100, online: <www.defensoria.gob.pe/temas.php?des=3#r> (2 August 2012).
- Defensoría del Pueblo del Perú (2008), *Pronunciamiento ante los acontecimientos que están ocurriendo en distintas zonas de la Amazonía peruana*, online: <www.defensoria.gob.pe/modules/Downloads/documentos/Pronunciamiento-Pueblos-indigenas.pdf> (15 January 2013).
- Defensoría del Pueblo del Perú (2009), *Informe de Adjuntía N° 006-2009-DP/ADHPD. Actuaciones humanitarias realizadas por la Defensoría del Pueblo con ocasión de los hechos ocurridos el 5 de Junio del 2009*, Lima: Defensoría del Pueblo.
- DPLF (2011), *El derecho a la consulta previa, libre e informada de los pueblos indígenas. La situación de Bolivia, Colombia, Ecuador y Perú*, Washington: DPLF/OXFAM.
- Dryzek, John (2010), *Foundations and Frontiers of Deliberative Governance*, Oxford: Oxford University Press.
- Echave, José de et al. (2009), *Minería y conflicto social*, Lima: CBC/CIPCA/CIES/IEP.
- Fulmer, Amanda, Angelina Snodgrass Godoy, and Philip Neff (2008), *Indigenous Rights, Resistance and the Law: Lessons from a Guatemalan Mine*, in: *Latin American Politics and Society*, 50, 4, 91–121.
- GNCDPA – Grupo Nacional de Coordinación para el Desarrollo de los Pueblos Amazónicos (2009), *Informe final de la Mesa 3. Sobre el derecho a la consulta*, online: <http://servindi.org/pdf/Mesa_Dialogo_3.pdf> (15 January 2013).
- Gudynas, Eduardo (2010), *Si eres tan progresista por qué destruyes la naturaleza?*, in: *Ecuador Debate*, 79, 61–82.
- Gustafsson, Maria Therese (2012), *From a Corporatist to a Corporate Citizenship Regime – Interest Representation and Influence in the Peruvian Mining Sector*, Stockholm: University of Stockholm (unpublished).
- Haarstad, Havard (ed.) (2012), *New Political Spaces in Latin American Natural Resource Governance*, New York: Palgrave.

- Hogenboom, Barbara (2012), Depoliticized and Repoliticized Minerals in Latin America, in: *Journal of Developing Societies*, 28, 2, 133–158.
- Laplante, Lisa, and Suzanne Spears (2008), Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector, in: *Yale Human Rights and Development*, 11, 69–116.
- Morris, Meghan, and César Rodríguez Garavito et al. (2009), *La consulta previa a pueblos indígenas: los estándares del derecho internacional*, Bogotá: Universidad de los Andes.
- Pacto de Unidad (2011), *Principios mínimos no negociables para la aplicación de los derechos de participación, consulta previa y consentimiento previo, libre e informado*, online: <<http://servindi.org/pdf/ComunicadoPactodeunidad2.pdf>> (18 December 2012).
- Presidente de la República del Perú (2010), *Oficio N° 142-2010-DP/SCM. Observaciones a la Autógrafa de la “Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio Num. 169 de la Organización Internacional del Trabajo”*, online: <http://servindi.org/pdf/Observaciones_LeyConsulta.pdf> (15 January 2013).
- Rodríguez Garavito, César (2011), Ethnicity.gov: Global Governance, Indigenous Peoples and the Right to Prior Consultation in Social Minefields, in: *Indiana Journal of Global Legal Studies*, 18, 1, 263–305.
- Rodríguez Garavito, César, and Natalia Orduz Salinas (2012), *La consulta previa: dilemas y soluciones*, Bogotá: DeJuSticia.
- Rosales, Cecilia, and Déborah Dongo (2009), Mejor rectificar que obstinarse, in: *El Comercio*, 18 June, 2.
- SAIPE (2009), *Boletín de Noticias del SAIPE*, 35, Enero 2009, Peru: Jaén.
- Sevillano Arévalo, Maria del Rosario (2010), *El derecho a la consulta de los pueblos indígenas en el Perú*, Lima: DAR.
- Szablowski, David (2010), Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice, in: *Canadian Journal of Development Studies*, 30, 1–2, 111–130.
- Tarrow, Sidney (2011), *Power in Movement. Social Movements and Contentious Politics*, Cambridge: Cambridge University Press.
- Tilly, Charles, and Sidney Tarrow (2007), *Contentious Politics*, Cambridge: Cambridge University Press.
- Tilly, Charles (2008), *Contentious Performances*, Cambridge: Cambridge University Press.
- Tribunal Constitucional del Perú (2010), *Sentencia 0022-2009-PI-TC. Demanda de Inconstitucionalidad interpuesta por Gonzalo Tuanama Tuanama, en representación de más de 5000 ciudadanos contra el Decreto Legislativo N.° 1089*, Peru: Arequipa.
- Tribunal Constitucional del Perú (2010), *Sentencia del Tribunal Constitucional. EXP. N° 05427-2009-PC/TC Recurso de agravio constitucional interpuesto por la Asociación Interétnica de Desarrollo de la Selva (AIDSESP)*, Peru: Arequipa.

United Nations Interagency Framework for Coordination on Preventive Action (2010), *Extractive Industries and Conflict*, New York: United Nations.

Van Cott, Donna Lee (2005), *From Movements to Parties in Latin America. The Evolution of Ethnic Politics*, Cambridge: Cambridge University Press.

Villar Campos, Alberto (2009), Tensa marcha bloqueó el Cercado, in: *El Comercio*, 12 June, 4.

Yashar, Deborah (2005), *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge*, Cambridge: Cambridge University Press.

Legal Sources

International Labour Organization Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989; enforced starting 1991).

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (adopted 13 September 2007).

Consultation Law (No. 29785) "Ley del derecho a la consulta previa" (adopted 7 September 2011).

Regulating Norm (Decreto Supremo 001-2012-MC) "Reglamento de la Ley No. 29785" (adopted 3 April 2012).

Recent Issues

- No 219 Hanspeter Mattes: Politische Transformation und Gewalt in Tunesien, Ägypten und Libyen seit 2011: Ein Forschungsaufriß, April 2013
- No 218 Claire Wright and Ana Soliz Landivar: From Military Instruments of Dictatorship to Political Instruments of Democracy: Regimes of Exception in Bolivia 2000–2010, March 2013
- No 217 Birte Pohl and Peter Mulder: Explaining the Diffusion of Renewable Energy Technology in Developing Countries, March 2013
- No 216 Joachim Betz: The Reform of China's Energy Policies, February 2013
- No 215 André Bank, Thomas Richter and Anna Sunik: Long-Term Monarchical Survival in the Middle East: A Configurational Comparison, 1945–2012, February 2013
- No 214 Nele Noesselt: Microblogs in China: Bringing the State Back In, February 2013
- No 213 Pascal Abb: China's Foreign Policy Think Tanks: Changing Roles and Structural Conditions, January 2013
- No 212 Christian von Soest and Michael Wahman: Sanctions and Democratization in the Post-Cold War Era, January 2013
- No 211 Alexander De Juan: Mapping Political Violence – The Approaches and Conceptual Challenges of Subnational Geospatial Analyses of Intrastate Conflict, December 2012
- No 210 Lena Giesbert: Subjective Risk and Participation in Micro Life Insurance in Ghana, December 2012
- No 209 Georg Strüver: What Friends Are Made Of: Bilateral Linkages and Domestic Drivers of Foreign Policy Alignment with China, November 2012
- No 208 Jörg Balsiger, Miriam Prys and Niko Steinhoff: The Nature and Role of Regional Agreements in International Environmental Politics: Mapping Agreements, Outlining Future Research, October 2012
- No 207 Daniel Flemes and Leslie Wehner: Drivers of Strategic Contestation in South America, October 2012
- No 206 Hannes Ebert, Daniel Flemes and Georg Strüver: The Politics of Contestation in Asia: How Japan and Pakistan Deal with their Rising Neighbors, September 2012
- No 205 Carlo Koos and Matthias Basedau: Does Uranium Mining Increase Civil Conflict Risk? Evidence from a Spatiotemporal Analysis of Africa from 1945 to 2010, September 2012

All GIGA Working Papers are available free of charge at <www.giga-hamburg.de/workingpapers>. For any requests please contact: <workingpapers@giga-hamburg.de>.

WP Coordinator: Errol Bailey