

LAND, MINING, AND PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN PERU

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Abstract

This paper assesses the evolution of prior consultation (*consulta previa*) of indigenous peoples as a conflict prevention mechanism in mining projects in Peru's Andean region. We highlight the challenges that uncertain and unclear property rights, especially those of peasant communities pose to the implementation of prior consultation and its efficacy as a conflict prevention instrument. We also argue that further improvements of this process could help prevent social conflict and promote indigenous rights without delaying the initiation of mining projects worth billions in private investment.

Key Words:

Indigenous peoples, extractive activities, land governance, prior consultation, land rights

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1. Indigenous Peoples, Economic Growth and Mining Activities

Peru is the country with the second largest indigenous population in Latin America (approximately 7.6 million, slightly more than one fourth of the total population), only behind Mexico (World Bank 2015). The Ministry of Culture has identified 55 different indigenous groups who speak 47 different languages. 51 of these groups inhabit the Amazon rainforest, while the remaining four live predominantly in the Andean highlands. Historically, Peru's indigenous peoples have been socially and economically marginalized. They tend to be poorer than non indigenous Peruvians. However, in recent years this gap has decreased significantly and now it is among the smallest in Latin America. Moreover, since in Peru the probability of being poor is higher for rural households, it is likely that a close link exists between indigenous poverty and geography (World Bank 2015).

Since the turn of the XXI century, Peru has experienced a high and sustained GDP growth rate, which has enabled the country to undergo a significant reduction of poverty and inequality. This recent economic prosperity has been driven by the mining sector. In 2015, mining accounted for approximately 15 percent of Peru's GDP and mining exports represented more than 50 percent of the country's total exports in 2014 (US\$ 20.4 billion). Mining activities have been aided by constitutional and legal provisions that create an investment-friendly institutional framework.

According to Peru's Constitution, mineral resources located in the subsoil belong to the nation, not to the owner of the land. Hence, resource exploration and extraction requires an administrative authorization from the State. Large scale mining rights are granted by the Ministry of Energy and Mining (MEM) through the *concesión* process. While mining rights are granted without consulting the local populations, they do not automatically enable their holders to initiate exploration or extraction activities; however, the *concesión* allows them to pursue additional administrative authorizations and to reach an agreement with the owners of the land. Large scale mining activities take place in rural areas, especially in the Andean region. These areas are often inhabited by indigenous peoples organized in peasant communities. The Peruvian

Constitution recognizes the legal existence and autonomy of such communities as well as their right of ownership over their communal lands.

Despite its importance to Peru's economic wellbeing, all too often mining projects have been at the center of social conflicts involving the local peasant communities. According to *Defensoría del Pueblo* (Peru's Ombudsman), in January 2017 there were 144 socio- environmental conflicts, of which almost 4 in 5 were related to mining or hydrocarbon activities (95 and 23 conflicts, respectively) (Defensoría del Pueblo 2017). At the root of these conflicts is the interplay of secure and clearly defined exploration and extraction rights granted by the Peruvian State, on one side, and the precarious and unclear rights over land and the historical marginalization of Amazonian and Andean indigenous communities who inhabit resource-rich areas, on the other.

The promotion of private investment has often been at odds with initiatives to protect the environment and the rights of local populations. Glave (2012) argues that investment promotion policies and land use regulations are the result of two different processes that began in the 1990s. On the one hand, Peru has implemented comprehensive public reforms and structural adjustment policies aimed at promoting the allocation of natural resources according to market principles. On the other hand, the consolidation of a national system of environmental management began as a response to international pressures originated at the 1992 United Conference on Environment and Development in Rio de Janeiro (Glave 2012). The Government has tried different measures to prevent and reduce the occurrence of conflict, seeking to protect the rights of the local populations without discouraging private investment. It has created the Ministry of Environmental Affairs (2008) and established one of the world's strictest environmental protection legal frameworks that apply to extractive activities. Furthermore, in 2010 the Government created the Ministry of Culture. This agency, through the Vice Ministry of *Interculturalidad* (VMI), is the technical agency of the Executive specialized on matters related to indigenous peoples.

Moreover, Peru is a signatory of the International Labor Organization's Convention 169 on indigenous rights, which recognizes the right of indigenous peoples to be consulted on measures that could affect their collective rights. And, in 2011, Peru became the first Latin American country to regulate the right to prior consultation of indigenous peoples by a national law enacted by Congress (World Bank 2016). Law No. 29785 (hereinafter the *Consulta Previa* Law) created the prior consultation process known as *consulta previa*.

2. Main Features of the *Consulta Previa* Process

The *consulta previa* process is governed by the *Consulta Previa* Law and its regulations approved by Supreme Decree N° 001-2012-MC. The goal of this process is to reach an agreement or consent between the State and indigenous peoples regarding a legal or administrative measure that directly affects the latter, through an intercultural dialogue that guarantees its inclusion in the Government's decision making process and the adoption of measures that respect their collective rights.¹ *Consulta previa* is implemented by the Ministry or Government agency responsible of the legal or administrative measure that directly affects the collective rights of indigenous peoples ("the promoting agency"). In turn, VMI is responsible for concerting, articulating and coordinating the implementation of the *consulta previa* policy (World Bank 2016).

The international treaties signed by Peru, such as the United Nations' Declaration on the Rights of Indigenous Peoples and Convention N° 169 as well the Constitution provide the legal basis for the collective rights of indigenous peoples (Ministry of Culture 2016). Collective rights are defined as those that do not correspond to a person but to a collective or social group, such as the indigenous and original peoples. These rights seek to protect the interests, history and identity of indigenous and original peoples as collectives with its own characteristics that differentiates them from those of the general society.² According to the abovementioned framework, Peru's indigenous peoples have the following collective rights:

- Right to self determination or autonomy
- Right to cultural identity
- Right to participation
- Right to consultation
- Right to decide/choose their development priorities
- Right to preserve its customs and institutions
- Right to special jurisdiction
- Right to land and territory
- Right to natural resources
- Right to inter-cultural health
- Right to intercultural education and tongue/language (Ministry of Culture 2016)

¹ Article 3° of the *Consulta Previa* Law.

² Translated and adapted from <http://bdpi.cultura.gob.pe/glosario>.

The measures that are subject to *consulta previa* are laws and administrative measures that can directly affect the collective rights of indigenous peoples. The promoting agency should identify the measures that could directly affect the collective rights of indigenous peoples. A direct affectation takes place when a change in the legal situation or in the exercise of collective rights of indigenous peoples occurs. The direct affectation can be either positive or negative (Ministerio de Cultura 2016).

The *consulta previa* process consists of seven stages:

1. Identification of the measure to be consulted
2. Identification of the indigenous peoples to be consulted
3. Publication of the measure
4. Provision of information about the measure to the identified indigenous peoples
5. Assessment of the measure by indigenous peoples
6. Dialogue between representatives of the State and the indigenous peoples
7. Decision

The process ends once each of its seven stages is concluded and an “*acta de consulta*” (signed minutes of the process) is published. By June 2016, 24 *consulta previa* processes had been implemented. These processes were about the consultation of national laws, infrastructure projects, the creation of protected natural areas, oil and gas extraction projects, and mining projects (Sanborn et al 2016). The implementation of *consulta previa* on a variety of areas constitutes an auspicious development. Nevertheless, Sanborn et al (2016) point out that the agreements reached were implemented in only four of these cases and that this situation led the *Defensoría del Pueblo* and national indigenous leaders to call on the national government to implement the indigenous agenda.

In a recent assessment of the implementation of *consulta previa* in Peru, the World Bank (2016) highlighted that each of the prior processes implemented until 2016 in the mining subsector have resulted in an agreement between the State and the community. Moreover, the Bank stressed that *consulta previa* should not be perceived as an additional administrative procedure for the approval of a project, but “...as an opportunity to engage in a genuine dialogue with indigenous peoples that allows for the integration of their visions of development to the national agenda” (World Bank 2016; p. 15).

3. *Consulta Previa* in the Mining Sector: From Initial Opposition to Implementation

Initially, *consulta previa* was implemented in the Amazon rainforest region, specifically regarding oil and gas extraction projects. The applicability of this mechanism in these contexts has never been questioned, since the condition of “indigenous” of the native communities that inhabit this region is widely accepted. However, its implementation in the Andes, where most of Peru’s mining activities take place, initially confronted staunch opposition, especially from representatives of mining companies, who questioned the applicability of this mechanism in the Andean region (Sanborn et al 2016). Moreover, MEM initially identified measures that had to be consulted only in the hydrocarbons and electricity sectors,³ However, these regulations did not address the application of *consulta previa* in the mining sector.

Recently, there are signs of a change in how *consulta previa* is perceived in the mining sector. Mining executives have gone from open opposition to the admission that the process may serve as a dialogue and conflict prevention tool (Sanborn et al 2016). Notwithstanding, some believe that this change of attitude is motivated less by a recognition of *consulta previa* as a right of the indigenous peoples, than by its acceptance as a practicality that can reduce the time lapse between investment and economic reward in mining activities (Sanborn et al 2016).

The government has also taken critical steps towards the implementation of *consulta previa* in the mining sector. In 2014, MEM finally identified, through Supreme Decree No. 038-2014-EM, the administrative measures pertaining the mining process on which indigenous peoples had to be consulted:

- The granting of the permit to extract or concentrate the value of the mineral resources (*concesión de beneficio*).
- The granting of the permit to initiate exploration activities.
- The granting of the permit to initiate extraction activities.⁴

According to the General Mining Law (Supreme Decree N° 014-92-EM), the mining process comprises the following stages: search, prospection, exploration, extraction, transportation, processing, and marketing. Search and prospection are free and do not require an administrative authorization. On the contrary, the initiation of the exploration stage requires, in addition to the *concesión*, the compliance with several

³ Ministerial Resolution N° 350-2012-MEM/DM, later replaced by Ministerial Resolution N° 209-2015-MEM/DM

⁴ Recently, MEM, through, Resolution N° 044-2016-MEM/DM included the administrative procedure for the granting of a permit for mining transportation (*concesión de transporte minero*) and of general labor (*concesión de labor general*).

requirements, such as the performance and approval of an environmental impact assessment. It also requires obtaining the temporary or permanent cession of the rights over the land where the mining project will take place.

MEM has identified administrative measures that should be consulted. Therefore, there can be several consultation processes occurring during the life of one mining project. To date, all but one of the 10 processes implemented in the mining sector have consulted the administrative permit to initiate exploration activities.

One positive development towards the institutionalization of *consulta previa* in the mining sector was the signing of an agreement between MEM and the Ministry of Culture by which the latter committed to provide technical assistance to the former. This technical assistance includes the identification of indigenous peoples that could be affected by mining projects. Additionally, the Ministry of Culture have implemented other measures that have helped establish *consulta previa* in the mining sector. It has built a database of 55 indigenous peoples—51 in the Amazon and 4 in the Andes—, living in 5,479 peasant and native communities (2,939 peasant communities, present mostly in the Andes, and 2540 native communities who inhabit the Amazon region). Although this database is merely declarative and referential, it constitutes a step forward towards the identification of Peru’s indigenous peoples, and a first official recognition of their presence in the Andean highlands. In this region, the Ministry identified 4 indigenous ethnic groups: the Quechua, the Aymara, the Jaqaru and the Uru. Moreover, the Ministry produced several technical instruments to facilitate the implementation of the process, such as the methodological guidelines for the identification of indigenous peoples and the implementation of the right to petition, and the National Registry of Interpreters and Translators of Indigenous Languages (Supreme Decree N° 0002-2015-MC).

4. Land Governance-Related Challenges to the Implementation of *Consulta Previa* in the mining sector

Extractive activities will unavoidably entail the temporary or permanent transfer of the land use or ownership rights from the community to the mining companies. Therefore, the problems affecting the governance of communal organizations and their lands can affect the development of the mining project as well as its outcome for the indigenous populations. Unfortunately, the governance of communal land faces multiple shortcomings. A significant number of peasant communities are not legally recognized, lack title over their land, or such titles are not recorded in the land registry. This situation is partially caused by the

combination of several factors:

- **There is no single administrative record that centralizes all information on peasant and native communities and their territories.** On the contrary, different government agencies and even a civil society organization manage their own databases and all of them contain different figures on these communities. This multiplicity of registries and databases not only makes it impossible to know with certainty the quantity, location, borders, and legal status of communal organizations, but also complicates the design and implementation of public policies that seek to protect the rights of these entities and their members. For example, in the event of *consulta previa*, the lack of complete and up to date information can complicate the identification of peasant communities and the participation of their members of these organizations, or create doubts regarding the legitimacy of their representatives. In turn, these problems could hinder the outcome of the dialogue and the conclusion—and implementation—of eventual agreements.
- **Lack of coordination mechanisms among the different agencies and actors involved in the legal recognition of peasant communities and the titling and registration of their lands.** The responsibility for the regularization of peasant communities and their lands have been allocated on the regional governments. The Ministry of Agriculture remains the governing body in charge of issuing the standards and technical guidelines that the regional government should follow. However, the Ministry of Agriculture lacks the institutional tools to enforce such standards and guidelines. This situation is aggravated by the disparity in technical capacities and resources among the different regional governments. Furthermore, organizations that represent indigenous populations generally do not participate in the design of public policies related to the legal recognition of peasant communities and the titling and registration of their lands.
- **Most communal land titles are not supported by geo-referenced maps.** This situation hinders the delimitation of their lands and invites boundary disputes among communities.
- **Costs and barriers in administrative procedures.** Peasant communities located in rural areas often face barriers related to long distances and an inadequate transportation infrastructure, which complicates their access to public agencies involved in the recognition and land titling processes. These agencies are generally only present in urban areas. Therefore, the completion

of these administrative procedures can result in a significant investment of time and money by peasant communities.

5. Opportunities for Further Enhancing *Consulta Previa* in the Mining Sector

The difficulties posed by problems related to governance of communal lands can also point out to opportunities to improve the delivery and impact of *consulta previa* in the mining sector.

a) **Promoting communal legal recognition and land regularization.** One of the legal responsibilities of the Ministry of Culture is to coordinate actions to culminate the regularization of the lands of the Andean, Amazonian, and Afro Peruvian peoples.⁵ Therefore, the involvement of the Ministry of Culture in the *consulta previa* processes in the mining sector opens a window of opportunity for this agency to participate in the regularization of communal lands. This participation can occur through different channels:

- Coordinating with the Ministry of Agriculture in the production of technical guidelines for the regularization of communal lands and in the integration of a unique official database of peasant communities.
- Celebrating agreements with regional governments to provide them with technical assistance for the regularization of the lands of the communities involved in *consulta previa* processes.
- Providing technical assistance to strengthen the capabilities of peasant communities and indigenous organizations on legal recognition and land regularization procedures.

In all of the described scenarios, the Ministry of Culture is placed in a unique position to promote an intercultural approach that takes into account the vision and needs of indigenous peoples. Nonetheless, it will need additional human, material and financial resources to undertake any of the roles proposed above.

b) **Assessing the opportunity for the *consulta previa* process in the mining sector.** While all six

⁵ Article 7° I) of Law N° 29565 (Law that creates the Ministry of Culture).

finished *consulta previa* processes related to mining activities have resulted in the consent of the indigenous communities to the implementation of the mining project, only in two of them the process has reached the dialogue stage. In the remaining cases, the process ended in the information provision stage. This can be partially explained by the fact *consulta previa* takes place right before the issuing of the exploration permit. At this stage, the local population has already negotiated with the mining company and usually has reached an agreement for the transfer of their lands. Opening a new discussion on this topics –even if the company does not participate in the *consulta previa* process, which is usually the case—could plausibly generate delays and tensions between the different actors.

In a report that assesses the *consulta previa* process implemented in the La Merced exploration project, the *Defensoría del Pueblo* recommended that in future opportunities the process takes place during the preparation of the environmental impact assessment instrument and not after this instrument is approved. This recommendation seeks to ensure that the proposals of indigenous peoples are included in the decision making process of MEM (*Defensoría del Pueblo* 2016).

In this context, it is worth assessing whether *consulta previa* in the mining sector is achieving the goal of promoting an intercultural dialogue and incorporating the indigenous populations' vision in the discussion about the country's development, and not becoming an administrative redundancy that represents a delay for the company, a waste of resources for the State, and a misuse of everybody's time. Therefore, the *consulta previa* process should, on the one hand, be harmonized with the other citizen participation spaces contemplated in the legal framework for both indigenous and nonindigenous populations and, on the other hand, generate a space that allows for the discussion of the collective rights that could be impacted by the mining project—including the indigenous peoples' right to land.

6. Final Considerations

The implementation of *consulta previa* in the mining sector constitutes a significant step towards the inclusion of indigenous peoples in Peru's national development dialogue. In the few *consulta previa* processes in the mining sector carried out to date, peasant communities have granted their consent to the development of the mining projects, countering the fear shared by some public and private actors that this instrument could become a barrier to private investment. However, the shortcomings affecting the

governance of communal lands can both create obstacles to the sound implementation of the process and hinder its outcomes. It is thus crucial to address such flaws. Moreover, it is critical to identify the areas in which *consulta previa* can be improved so as to make it an effective instrument of intercultural dialogue and a sound mechanism for the protection of the collective rights of indigenous peoples.

7. References

Defensoría del Pueblo (2016). Informe N° 003-2016-DP/AMASPPI-PPI sobre el Proceso de Consulta Previa del Proyecto de Exploración Minera La Merced.

Defensoría del Pueblo (2017). Reporte de Conflictos Sociales N° 155. January 2017.

Glave, Manuel (2012). Ordenamiento territorial y desarrollo en el Perú: Notas conceptuales y balance de logros y limitaciones. En: *Desarrollo rural y recursos naturales*. Lima: GRADE. p. 123-165.

Ministerio de Cultura (2014). La implementación del derecho a la Consulta Previa en el Sector Hidrocarburos. La experiencia de los Lotes 169 y 195.

Ministerio de Cultura (2016). Derechos Colectivos de los Pueblos Indígenas u Originarios. Primera edición, Lima, junio de 2016.

Sanborn, Cynthia A., Verónica Hurtado y Tania Ramírez (2016). La consulta previa en el Perú: avances y retos / 1a edición versión e-book. Lima : Universidad del Pacífico, 2016. 80 p. (Documento de investigación ; 6).

The World Bank (2015). *Indigenous Latin America in the Twenty-First Century*. Washington, DC: World Bank. License: Creative Commons Attribution CC BY 3.0 IGO.

The World Bank (2016). *La consulta previa en el Perú: aprendizajes y desafíos*. Washington, D.C.: World Bank. Licencia: Creative Commons de Reconocimiento CC BY 3.0 IGO.