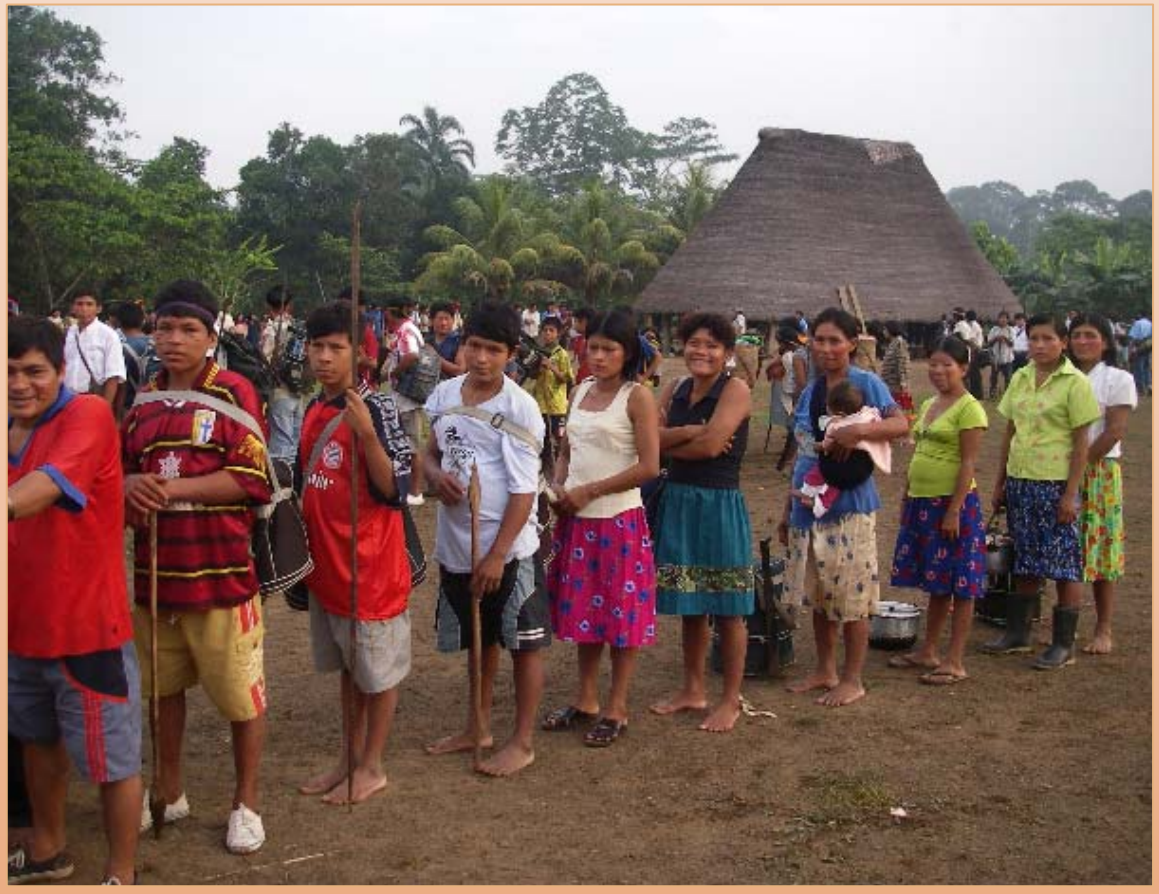
Starting Point: Self-Determination

A Peruvian Case Study



FPIC Working Papers,
Forest Peoples Programme

2007

Starting Point: Self-Determination
A Peruvian Case Study

Julio Davila Puño and Oscar Gutiérrez Laya
Racimos de Ungurahui

2007, Forest Peoples Programme, Moreton-in-Marsh

Starting Point: Self-Determination – A Peruvian Case Study by Julio Davila Puño and Oscar Gutiérrez Laya, Racimos de Ungurahui, was first published in 2007 by Forest Peoples Programme. This is the third in a series of working papers issued by the Forest Peoples Programme which explore the practical experiences of indigenous peoples seeking to exercise their right to Free, Prior and Informed Consent. Others in the series include: *Free Prior and Informed Consent: Two Case Studies from Suriname* by Forest Peoples Programme; *Habis Manis Sepuah di Buang* by Pokja Hutan Kaltim; *Making FPIC Work: Challenges and Prospects for Indigenous Peoples* by Marcus Colchester and Maurizio Farhan Ferrari

We thank SwedBio most warmly for its support for this programme of work.

Original: Spanish:	El Punto de Inicio: Libre Determinacion Un estudio de caso de Perú
Cover photograph:	Protest in February 2006 by representatives of 40 Achuar communities against the persistent encroachment of oil extraction concessions onto their territory. For over ten years the Achuar communities have opposed oil exploitation due to its damaging environmental, social and health-related impacts. Despite the clarity of the Achuar's position, the Peruvian State and the oil companies continue to pressure communities, leaders and individuals to accept these extractive activities.
Photographer:	Aliya Ryan

Contents

Acronyms

FONANPE*	National Fund for Natural Areas Protected by the State (Fondo Nacional para las Áreas Naturales Protegidas por el Estado)
ILO	International Labour Organization
INRENA	National Institute of Natural Resources (Instituto Nacional de Recursos Naturales)
KfW	KfW Banking Group, Germany
PIMA	Indigenous Participation in Management of Protected Natural Areas of the Peruvian Amazon (Participación de las Comunidades Nativas en el Manejo de las Áreas Naturales Protegidas de la Amazonía Peruana)
PNA	Protected Natural Area
PROFONANPE*	National Fund for Natural Areas Protected by the State (Fondo Nacional para las Áreas Naturales Protegidas por el Estado)
SINANPE	National Network of Natural Areas Protected by the State (Sistema Nacional de Áreas Naturales Protegidas por el Estado)

I Self-determination

1 Introduction

Self-determination is the basic right of all peoples recognised as dignified, human and equal to others. It is the principal rule of human coexistence: not recognising this right equals not recognising a people as human and dignified, thereby returning to the days when indigenous peoples were not considered human and thought not to have souls. Today people no longer believe that indigenous peoples are not human, and it is therefore time to give them the same rights as any other people: the right to their whole heritage, including the territory they occupy, and to self-determination. This does not mean creating conflict within nations, in fact just the opposite – making them stronger and fairer.

In this document we will examine the right to self-determination as a starting point for any consultation or agreement involving indigenous peoples.

We will show that self-determination means the opportunity to respond to a consultation or request for cooperation with a wide range of possibilities which can be summarized in two categories:

a No desire to enter into any agreement or relationship. In this case, the process of Free, Prior and Informed Consultation (FPIC) is not entered into.
b The desire to find out more about the consultation or request for cooperation with a view to examining whether a partial or total agreement is or is not possible. In this case, the process of Free, Prior and Informed Consent is begun.

This issue will be explored further below.

2 Points to Consider

2.1 First point to consider: the difference between justice and law. in the dictionary, law is defined as a collection of rules regulating something (positive law), or a collection of propositions which attempt to define what is fair or unfair (inherent, natural law). justice is a virtue, and virtue is defined as moral integrity, goodness, correct behaviour, acting correctly independently of the rule of law.

The law has contributed to justice, but it has also established great injustices as being legal, such as the *droit de seigneur*, the law which placed masters above their slaves, or the Nazi law legalized crimes against Jews. Let us recall the Roman saying: 'For my friends, everything; for my enemies, the law'.

Our countries have so-called Ministries of Justice, but they are really Ministries of Law.

I believe it is best to live, view things and make decisions based on truth and justice. I will try to do this in this document; I will be guided by justice rather than the law.

I feel that this issue is very important because a lot of laws have been applied to indigenous peoples but very little justice.

2.2 Second point to consider: It is a fact that the conceptions and cosmovisions of indigenous peoples and the Europeans who came to their shores were very different. Even today the Achuar people view territory as 'the basis of life and the coexistence of the Achuar as human people within a living space which breathes, feeds and teaches the Achuar people how to interact with animals and plants with respect; not the contamination or annihilation of this vital space which forms the basis for the survival for the Achuar people and the rest of humanity'. This view is very different from those of other cultures, particularly European culture.

As a result of the conceptual differences which exist between European and indigenous cultures, I feel that any documents signed or agreements reached between these two peoples should be considered invalid, because they were generally endorsed by indigenous peoples whose views, or whose understanding of present and future impacts, were very different from those laid out in the documents or agreements. Furthermore, they have often been the result of pressure or coercion. I think the fairest course of action is to regard such documents or agreements as very unreliable reference sources which show that the indigenous peoples agreed with what they signed up to. The fact that documents contain signatures, drawings or pieces of material which appear to endorse an agreement does not make them valid in the eyes of Justice. The only thing that would make them valid would be some proof that there was a real understanding of what was being agreed. I doubt very much that there was, but I accept that these documents, drawings and pieces of material may be used as legal proof.

3 Why consult indigenous peoples?

3.1 Important aspects of indigenous peoples in South America. For the purposes of this document I would like to highlight the following aspects:

a They are original peoples and existed prior to the State.
b They have been robbed of most of their territory.
c They maintain a holistic rather than an economic vision of the natural world.
d Their culture and their views of life and the world are very different from those of the peoples who invaded them.
e European invaders committed crimes against humanity against them.

3.2 Why do other peoples, companies or governments want to obtain their consent? They want to obtain licenses, permits or acceptance in order to access the lands, water, knowledge and natural resources within the territories which indigenous peoples consider theirs, and of which companies and governments believe themselves to be the owners under Justice, even though these things have not been legally granted to them.

3.3 Why is consent required? The basic answer is that governments do not grant them the full rights over the territory, water and natural resources that justice (although not the law) entitles them to. If they had legal recognition of their territory consent processes would not be necessary; there would only by processes between the owners of a property and other people who want access to it.

3.4 What is the real solution to the problems which arise during the request for and/or process of consultation? I think it is time to speak clearly, rather than 'sugaring the pill' or being diplomatic. The real solution is to recognise the right to their territory which justice grants them.

3.5 While their right to their territory is not recognised, what should be done in cases which require their consent? In the meantime we have to continue to work towards obtaining their right to territory. There are some things that can be done, such as:

a Recognising that behind requests for consent lie the interests of groups and companies, and that the main point of conflict occurs not when indigenous peoples say yes, but when they do not want any kind of agreement.

g Recognising indigenous peoples' right to self-determination over their own territories and resources.

4 Starting Point: Self-determination

4.1 Definition. According to the dictionary, *to determine* means to fix the terms of something, to arrange, to set something for a particular purpose.

4.2 What is the basis of self-determination? The basis is not positive laws, it is justice and the inherent right of all peoples considered human, respected and free.

Not recognising the right to self-determination of a people is in practice not recognising them as being as human and as worthy of respect as we are, and not considering them to be free. It means we are treating them as people who are unable to think for themselves.

Simply as legal support for the right to self-determination, below we will quote the Preamble of the International Covenant on Civil and Political Rights, which says that... dignity is inherent to all members of the human family and their rights are equal and inalienable... and also that.... dignity is inherent to the human person.... and finally that... the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***Entry into force:* 23 March 1976, in accordance with Article 49**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognising that these rights derive from the inherent dignity of the human person,

> Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,
>
> Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,
>
> Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

4.3 How should self-determination be applied? It should be applied in the following way – we will use the example of wanting access to the water which lies within an indigenous territory.

The person, company, institution or government (let us them the 'consultant') wanting access to the water will contact the indigenous people and tell them that they will respect their right to self-determination. The indigenous people may then respond in one of two ways:

a The indigenous people can say that they have no interest in establishing communication about their water resources. In this case, the consultant has to withdraw contact and not bother the people again. No FPIC process is initiated.

h The indigenous people can say that they are willing to discuss the issue. In this case, an FPIC process begins. The process can end in one of the following ways:

- The people and the consultant reach an agreement and sign documents.
- The people and the consultant come to the conclusion that conditions are not right for an agreement and decide to postpone dialogue until a later date.
- The people and the consultant do not reach an agreement and decide to terminate the process. The consultant must then withdraw contact and not bother the people again.

Self-Determination, not FPIC, is the starting point for the consultation process. FPIC is just a derivative of the right to self-determination.

4.4 Critical aspects in the way FPIC is often described.

4.4.1 First critical aspect. Free, prior and informed consent is presented as a series of processes, elements, etc. which always lead to acceptance, with the important thing being that the process is good enough to reach good agreements. The possibility of saying no is not taken into account.

The dictionary defines the noun *consent* as the action and effect of assenting, and the verb *to consent* as allowing something or giving permission for something to happen or for someone to do something.

Legal dictionaries give us the following definition:

- Modern Legal Dictionary, Raúl Chamamé: *Consent*. Accept consciously the execution of an act. The act of agreeing with a deal or matter proposed by another or

the concurrence of the will of the parties regarding an act of which they approve with full knowledge of the facts.

- Legal Dictionary, D. Ramírez Gronda: *Consent*: Manifestation of willingness – express or tacit – by which a person lends their approval to the realization of an act by another. Manifestation of willingness by which a person agrees with one or more others and commits themselves to a contract.

From the definitions in both general and legal dictionaries, it would seem that in all cases consent means accepting, that is, an agreement will always be reached and we will accept what is being proposed.

My criticism is that the usage of terminology which leads us to think and behave in such a way that we have no option but to accept what is proposed to us should not be permitted. As such, the processes between consultants and indigenous peoples should not be described as FPIC processes, but as self-determination, thus making it clear that the options of saying yes or no are possible and valid.

4.4.2 Second critical aspect. In our countries, conflicts and injustices against indigenous peoples continue to occur, and tensions between consultants and peoples remain. In this delicate situation we must be very careful to use very precise language which indicates exactly what we mean to say. The use of the word *Consent* means without doubt in my country that whatever indigenous people do, in the end they will have to agree. This situation gives consultants the advantage.

In my opinion, terms which give one of the parties the advantage should not be used. As such, it is more precise and closer to the truth to say clearly that Self-Determination will be respected or that a process of self-determination will be initiated. The term *FPIC* is misleading, unless the real intention is actually to recognise that the only option indigenous peoples have is to say yes.

4.4.3 Third critical aspect. Language has been created which defines alternatives to problems based on consequences rather than causes and origins. A part of the truth is presented as the whole truth and is used to justify injustices against indigenous peoples.

4.4.3.1 Defining alternatives to problems based on consequences rather than causes and origins. In Peru, we live in poverty, but this poverty is the consequence of corruption and injustice rather than natural causes.

Explaining our poverty problem. Our country has the third highest biodiversity in the world. It has provided humanity with more domesticated plants than any other country. It has one of the most varied climates in the world. The question is, why, in such a rich country, is 53% of the population poor? The answer is not poverty; it is that Peru's riches are appropriated by a national and international elite which has installed a system whereby the country's riches may not be exploited for the development of Peru. Poverty in our country is not the explanation of our situation, it is the consequence of an unjust and corrupt system. Explaining Peru's problems through poverty only serves to obscure the truth and allow the system which creates it to continue. Discussing injustice and corruption, on the other hand, allows for an analysis of the true causes and the identification of those responsible and the elements of the system which need to be changed, and paves the way for the transformation of society.

4.4.3.2 Explaining the problem based on one part of the truth and not the whole truth.

Explaining the situation of indigenous peoples as a consequence of Exclusion. It is argued that original peoples live in a precarious situation because they are excluded from the system. However, the system is not to blame. The truth is that the system has always both included and excluded indigenous peoples: they have been excluded from participating in the State and having decision-making powers, but have been included when it comes to wealth and taxation.

The severe contamination affecting the Achuar people in Río Corrientes is a consequence of their inclusion in a system of oil extraction. One of Peru's main sources of income during the first 35 years after independence was the Indian Tax, paid by indigenous people simply for being indigenous. This tax financed 20% of the national budget.

The situation of indigenous peoples cannot be explained solely through exclusion; it must take into account both exclusions and inclusions. Presenting only exclusion reinforces the idea that indigenous peoples have never contributed anything to the country and does nothing to analyse the causes of their situation.

4.4.3.3 FPIC. In Peru, the concept of FPIC is developed within this context of false explanations. In practice, FPIC is presented as the initial stage of a consultation relationship, when it is really only a variant of self-determination: its true origin is self-determination. Despite the good intentions of many of its proponents, FPIC becomes an instrument which obscures its own origins and causes indigenous peoples to make mistakes.

II Free, Prior and Informed Consultation

1 Prior consultation: What does it mean? Legal considerations

Prior consultation entails the application of self-determination in cases where the people consulted wish to enter into a series of processes with a consultant.

Its legal nature is laid out in a number of sources, as detailed below.

ILO Convention 169 was ratified by Peru through Legislative Resolution 26253 on 5 December 1993. As a legal instrument, its provisions are compulsory in those countries which ratify it. The Convention seeks to promote respect for the cultures, ways of life, traditions and customary rights of indigenous and tribal peoples. It assumes that such peoples will continue to form part of national societies while maintaining their own identities, structures and traditions. It is founded on the principle that these structures and ways of life have an intrinsic value which must be safeguarded[1].

Through this legal instrument, the ILO seeks to ensure that indigenous peoples are able to represent themselves and make decisions about matters affecting them whilst making a positive contribution to their country.

This international instrument introduces the concept of prior consultation for indigenous or original peoples. It is a *sui generis* concept because although it is similar to the concept of referendum laid out in the Constitution of Peru, it does not have the same binding nature.

A referendum is the legal process by which laws or acts are submitted to the popular vote for ratification[2]. Article 37 of Citizen Participation Law 26300 defines a Referendum as 'the right of citizens, in accordance with the Constitution, to declare themselves regarding legal matters on which they are consulted'.

A referendum is carried out, as laid out in Article 38 of Law 26300, when not less than 10% of the citizens on the national electoral roll turn out, under the terms of Article 39 of the Law[3].

Article 42 of Law 26300 states that the result of the referendum leads to either the entry into force of a law which has been approved, or the repeal of one which has not been approved, when 50% +1 of votes are in favour, not counting void or blank votes. Consultation is valid only if approved by no less than 30% of the total number of votes, and takes effect the day after the official results are published by the National Jury of Elections.

---

[1] International Labour Organisation: *Guide to the Application of ILO Convention 169*. 1996.

[2] Royal Spanish Academy. *Diccionario de la Lengua Española (h/z)*. 21st Edition. 2001.

3 Article 39 of Law 26300.- A Referendum shall be called in the following cases:
a) Partial or total reform of the Constitution, in accordance with Article 206 of the same.
b) To approve laws, general regional legislation and municipal bylaws.
c) To repeal laws, legislative decrees, emergency decrees and the regulations referred to in the previous paragraph.
d) Matters referred to in Article 190 of the Constitution, according to special laws.

It must be pointed out that in this article the legislation on referenda refers to consultation, by which the latter should be understood as a general form of citizen participation, while a referendum is a specific form which is mentioned in the political constitution of Peru[4] and regulated by the law on citizen participation.

This type of consultation, known as a referendum, is therefore binding, in contrast to that laid out in ILO Convention 169.

What must be understood is that for the domestic legislation of States who have ratified it, ILO Convention 169 constitutes merely a guideline, it does not establish limits. It can be used as a baseline from which to develop the rights recognised within it and even to go so far as to identify and recognise new rights relating to indigenous peoples.

2 Consultation in an international context

ILO Convention 169

In contrast to the concept of referendum, 'Prior Consultation for Indigenous Peoples' finds its legal basis in ILO Convention 169, which in Article 6, paragraph 1, section a) establishes that Governments have an obligation to apply the concept of Consultation, through pluri- and intercultural procedures, whenever legislative or administrative measures which may affect them directly are under consideration.

ILO Convention 169 is an 'international compendium of laws regarding human rights' –first generation (legal and political freedoms), second generation (social and economic rights) and third generation (environment, economic development, artistic and cultural heritage, etc.) - whose target population is of a *sui generis* nature. The main characteristics of indigenous, original and tribal persons, as the Convention calls them, are that they belong to peoples with their own traditions, cultures and languages, and above all their own territories where their ancestors have developed their continuing evolution, and that they identify themselves as being members of these peoples.

The Convention starts from the premise that all of these peoples, despite the fact that some remain almost intact, have more often than not been the victims of a series of negative experiences such as the looting of territories, genocide, forced displacements, religious indoctrinations, confinement to settlements for Christian converts, exposure to conditions of extreme hardship, etc. Signing the Convention means that governments must recognise all the acts committed by their respective ancestors at different moments in history, and commit to adopting corrective measures which will avoid repeated violations of human rights against the Convention's beneficiary populations.

The measures to be adopted by governments towards the Convention's beneficiary populations must be considered by the said populations to be the most appropriate measures to guarantee their normal development as beneficiaries. This is where the concept of 'prior consultation' arises as a means by which government proposals and indigenous peoples' decisions can come together to seek full understanding and mutual acceptance.

[4] Article 31 of the Political Constitution of Peru: Citizens have the right to participate in public matters through referenda, legislative initiatives, or removal or revocation of authorities and demand for public accountability. They also have the right to be elected and to elect freely their own representatives, in accordance with the conditions and procedures established by organic law.

Article 6 of the Convention states that governments have an obligation to consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever legislative or administrative measures which may affect them directly are under consideration.

In accordance with the Convention, consultation should be undertaken in the following cases:

The identification of the lands which the peoples concerned traditionally occupy to guarantee effective protection of their rights of ownership and possession (Article 14, paragraph 2).

Before undertaking or permitting any exploration or exploitation of the resources pertaining to their lands (Article 15, paragraph 2).

According to Article 6, paragraph 2 of the Convention, consultation should be carried out in a form appropriate to the circumstances. This may include the language of the peoples being consulted, physical distances in relation to the place in which the indigenous people choose to carry out the consultation, and the fact that the peoples concerned may be spread over a large area. This means the government needs to make provision in annual budgets for the necessary resources to meet these requirements as many times as required.

Another requirement set out in the article mentioned in the previous paragraph is that of 'good faith'. The absence of good faith would invalidate the whole process, thus nullifying any agreements reached **(see theory of legal acts)**.

Good faith means full and appropriate information in the following aspects:

1 The objectives to be achieved through the approval of the legal or administrative measure being put to consultation.

2 The positive and negative consequences (benefits and disadvantages for the Indigenous People) in the short, medium and long term of the rejection of the legal or administrative measure being put to consultation.

As well as being complete, the information provided by the government to the indigenous peoples must be intercultural, that is, it must be easily understood by both parties.

In conclusion, any agreement or consent obtained through a consultation process which does not fulfil this requirement allows the affected party the right to challenge any resolutions or regulations which have been approved below the rank of law. This would also be the case where no consultation process was carried out.

3 The non-binding effect of consultation

In all of the cases mentioned above, consultation has no binding effect, that is, in this procedure the peoples affected have no ability to veto[5] or prevent the Government from applying a legislative or administrative measure which has been put to consultation. As a consequence of prior consultation, the government assumes full responsibility for any negative consequences arising from activities or

[5] This interpretation is taken from the *Guide to ILO Convention 169*.

effects relating to administrative or legal measures in force, in the case where the indigenous people have not reached an agreement with the Government or have not given their consent.

ILO Convention 169, in Article 16, paragraph 2, regarding 'removal and necessary relocation', does however establish the obligation of governments to obtain the consent of the indigenous peoples affected by such measures. The Paragraph states that their consent should be obtained via a consultation process, that is, it has a binding effect. The government may nevertheless go against such consent in exceptional or serious circumstances.

In this respect the Convention allows for a dual response in situations which may be equally threatening or dangerous for the indigenous people involved themselves.

4 Consultation in Peruvian legislation

Consultation should above all be 'prior', whether the measures which may affect indigenous peoples are legislative or administrative. Where a law is approved and subsequently comes into force, it is understood that the consultation process should have taken place prior to its approval.

According to Article 73 of the regulations of the Peruvian Congress, in order for a law to enter into force, the following steps must generally be followed:

a Legislative initiative;
b Examination by committees;
c Publication of rulings;
d Floor debate;
e Approval; and
f Enactment.

Prior to the publication of the committee rulings, that is, during the formulation of the project, the indigenous peoples affected should be given the opportunity to present their comments and proposals with regard to the project in progress. The project should be put to consultation as laid out in the Convention once the committee rulings have been published.

However, Peruvian legislation states that once a bill has been passed, it must be submitted to the Executive, where the President of the Republic can either enact it or issue observations. In the latter scenario, the bill then returns to Congress for reconsideration, meaning that it may potentially contain points which were not considered during the consultation process.

It should be remembered that Convention 169 establishes that 'consultation' should be undertaken in good faith, that is, it is unacceptable that observations from the Executive and the changes the legislature may make to the bill might differ from what was put to consultation. We believe that the observations of the Executive ought to be submitted to the indigenous organisations involved for consideration and evaluation, and, where necessary, they should be able to comment on the changes.

In this regard we feel that, in accordance with ILO Convention 169, the enactment procedure should not allow changes to the points or aspects raised by indigenous peoples during the consultation process, as in doing so the consultation process would be rendered invalid.

Article 108 of the Constitution of Peru states that:

> **Enactment**
>
> **Article 108-** A bill which has been passed according to the Constitution shall be sent to the President of the Republic for approval within fifteen days. If the President of the Republic does not approve it, it shall be approved by the Leader of Congress or of the Permanent Commission as appropriate. If the President of the Republic wishes to make observations on all or part of the bill passed, these must be presented within the fifteen-day timeframe.
> Once the bill has been reconsidered by Congress, the Leader of Congress shall enact it, where more than half the legal number of members of Congress vote in favour.

In the case of administrative measures, however, the field becomes more crowded, due to the number of sectors involved in aspects relating to indigenous peoples: agriculture, education, energy and mining, the Home Office, justice, health, fishing and the Cabinet, among other central government bodies. State institutions and companies such as the National Institute of Natural Resources (INRENA) and PERU PETRO are also involved.

Regional and Local Governments also issue legal regulations within their jurisdictions which may affect the rights of indigenous peoples.

For the purposes of this report we shall focus solely on those legal and administrative regulations regarding Protected Natural Areas.

5 The consultation process in Protected Natural Areas

Paragraph 2 of Article 6 of ILO Convention 169 states that consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

The following laws should therefore have been submitted to the indigenous peoples of Peru for consultation prior to being passed:

Law 26821, Organic Law on sustainable use of natural resources (25/06/1997).

Law 26834, Law on protected natural areas (30/06/1997) and Supreme Decree 038-2001-AG (22/06/2001).

Law 26839, Law on conservation and sustainable use of biological diversity and Supreme Decree 068-2001-PCM (20/06/2001).

Law 27308, Law on forestry and wildlife (15/07/2000) and Supreme Decree 014-2001-AG (06/04/2001).

These laws regulate aspects which concern traditional indigenous territory and the natural resources which exist within them.

All of these laws and decrees should have been subject to a consultation process with Peru's indigenous peoples through appropriate procedures and valid negotiators. However, despite ILO Convention 169 being in force, the Peruvian government did not fulfil its obligations as laid out in the international convention.

Meanwhile, INRENA has set up a series of Protected Natural Areas under the auspices of Law 26834 and Supreme Decree 038-2001-AG. The following reserves have been established:

> Santiago Comainas Reserve, through Supreme Decree 055-99-AG.
> Gueppi Reserve, through Supreme Decree 003-97-AG, and
> Alto Purus Reserve, through Supreme Decree 030-2000-AG.

Article 13 of Law 26834 states that:

> The Ministry of Agriculture may establish Reserves in areas which satisfy all the conditions for being designated a Protected Natural Area and require supplementary studies to be undertaken to determine, among other things, the category and physical area to be considered.
>
> Reserves form part of the National Network of Natural Areas Protected by the State (SINANPE), and as such are subject to the dispositions governing protected natural areas, in accordance with this law and its regulations, with the exception of the provisions in Article 3.

Article 13, quoted above, specifically gives INRENA the legal authority to establish reserves in areas which possess the necessary characteristics to become PNAs. For this to happen supplementary studies must be carried out. When the Government establishes a reserve in a particular area, it is sending out the message that the area will be subject to regulations on protecting nature and natural resources, thus becoming a PNA (Protected Natural Area).

Article 59.2 of Supreme Decree 038-2001-AG defines reserves as SINANPE Protected Natural Areas.

When a reserve is established on ancestral indigenous territory, the rights of people living in that territory are affected. The consultation process laid out in Article 6 of ILO Convention 169 should therefore be initiated.

INRENA has nevertheless shown itself to be of a different opinion by indicating that public consultation is not necessary for establishing a reserve and only need be carried out during the participatory process of defining it as a Protected Natural Area.

However, Article 43.2 of Supreme Decree 038-2001-AG governing the law on Protected Natural Areas states that:

> 43.2 Protected Natural Areas can be established or categorized as such on communally-held lands where the free, prior and fully-informed consent of the owners has been obtained and whose fundamental rights are explicitly recognised in the creation mechanism. In all cases Article II of the Preliminary Title of the Code on the Environment and Natural Resources, Legislative Decree 613, is applicable.

The consultation process mentioned in this legislation is binding, and establishes that its objective should be to obtain the consent of landholders, that is, in indigenous territories the indigenous peoples themselves are considered the owners.

This, together with Articles 13 onwards of ILO Convention 169, leads us to conclude that before establishing reserves and protected natural areas, the government must determine and formally recognise, through title deeds, indigenous territories in the Amazon, and then, where necessary, carry out consultation processes and seek the consent of the documented landholders under the auspices of Law 26834 and its regulations.

6 The impact of establishing a PNA on indigenous territory

The creation of a PNA on indigenous territory in the Amazon may have the following effects:

a PNAs, in accordance with Article 1 of Law 26834, are considered 'national heritage', and in accordance with Article 66 of the Constitution, the State has sovereign rights over their use, that is, the State decides how best to use their resources. Indigenous peoples have no rights in decision-making processes relating to land designated as PNAs.

b According to Article 3 of Law 26834, the establishment of Protected Natural Areas, with the exception of Private Conservation Areas, is definitive, that is, once they are established, no new 'native communities'[6] may be created within them.

c Communities bordering a PNA may not expand their territory if such an expansion would encroach on the PNA.

d Article 5 of the Law on PNAs states that the exercise of property and other rights acquired prior to the establishment of a Protected Natural Area must be carried out in harmony with the ends and objectives for which such areas were created. The State will in each case evaluate the need to impose other limitations on the exercise of these rights. Native communities within a PNA must limit their traditional and non-traditional activities to those laid out in the management plan for the natural area concerned.

These limitations also affect neighbouring native communities' use of territories adjacent to PNAs.

The government, through INRENA, in accordance with Article 27 of the Law on PNAs, authorises the use of natural resources in Protected Natural Areas if it is compatible with the area's category, zoning and Master Plan.

7 International interests and PNAs: FONANPE (National Fund for Natural Areas Protected by the State)

Existing protected natural areas and those about to be created in the Peruvian Amazon arouse great interest not only from conservationists. The main *raison d'être* of these conservation areas is economic, not just for the flora and fauna or landscapes and monuments, but for traditional natural resources such as timber, and particularly strategic non-traditional resources such as water or genetic biodiversity.

[6] In Peruvian law the indigenous peoples of the Amazon are referred to as *comunidades nativas* (native communities). We thus use the term 'native peoples' in this report to signal this legal situation.

The government, large environmental NGOs and the companies who finance conservation projects create, develop and provide financial assistance for PNAs, while the people living in these areas, particularly indigenous Amazonian peoples, have no possibility of making decisions on the future of their territories and the natural resources within them.

If today large areas of forest still exist which house flora and fauna and make up the great biological biodiversity of which we are so proud, it is because the peoples living in these areas have developed techniques which allow them to use these resources without overexploiting them, a process which has surely involved thousands of years of knowledge about such diversity. Now, through environmental NGOs, Western 'knowledge' wants to impose its own rules, as if it can show indigenous peoples the right way to undertake such a huge task.

The first paragraph of Supreme Decree 024-93-AG, which approves the Regulations of the Law creating the National Fund for Natural Areas Protected by the State (FONANPE), states that Article 10 of Decree-Law 26154 creates FONANPE as a fiduciary fund for the conservation, protection and management of PNAs, using resources from International Technical Cooperation donations made for this purpose and supplementary resources transferred from the public and private sectors.

Even if international cooperation is received in the form of donations, this does not explain why international entities should be part of the public body mentioned above and why they should participate in decision-making processes as laid out in Article 6 of Supreme Decree 024-93-AG:

> **Article 60-** The Executive Board of PROFONANPE consists of seven members, as follows:
> a) Three representatives of the Ministry of Agriculture
> The Director General of Protected Natural Areas and Wildlife, National Institute of Natural Resources – INRENA (President of the Board);
> The Director General of Forestry, INRENA; and,
> The Director General of Rural Environment, INRENA;
> **b) A representative of an International Technical Assistance Organisation, invited by the Ministry of Agriculture.**
> c) Three representatives of three Peruvian environmental non-governmental organisations with proven experience in managing Protected Natural Areas, designated by the Peruvian Environmental Network in accordance with its own procedures.
> The PROFONANPE Statute shall indicate the period for which the Executive Board will sit, depending on the status of the members. Members shall be designated in a Supreme Resolution endorsed by the Minister for Agriculture.

Article 7 of the same decree sets out an extensive list of functions, including the following:

> **d)** Approve funding for programmes and projects related to its objectives.
> **e)** Sign acts, contracts and agreements, carry out actions in accordance with its nature and objectives, and entrust certain matters to the Coordinator or any member of the Technical Committee, without affecting the powers which can be granted to any person.
> **h)** Approve annual budgets assigned to Protected Natural Areas by the State, in accordance with the priorities established by the Director General of Protected Natural Areas and Wildlife of INRENA and its Statute.
> **i)** Control and administer its own resources and those of FONANPE, within the limitations established in Decree-Law 26154, the present Regulations and its Statutes.
> **k)** Arrange investigations, audits and balances.
> **l)** Agree to dissolve and liquidate the institution.

As can be seen here, the institution has the capacity to make many decisions, however if we look at the capacities of institutions dealing with indigenous peoples, it is clear that these are usually limited to tasks such as planning or providing support, views and evaluations. One practical example of this can be seen in the Law 28495 which establishes the National Institute for the Development of Andean, Amazonian and Afro-Peruvian Peoples (INDEPA).

Indigenous peoples are involved in an on-going struggle to hold the rights to large areas of land rather than just the territories they have today, about which each level and sector[7] of government can make decisions. In this context, other interests claim rights to the Peruvian Amazon to the detriment of indigenous peoples.

Some of this can be seen in a reference found in a document entitled *Loreto Region In-Situ and Ex-Situ Conservation Plan*, drawn up by the Peruvian Amazon Research Institute (IIAP), the University of Turku, Finland, and Biota BD Oy of Finland, in collaboration with the National University of the Peruvian Amazon:

> 'The following principles must be considered in the in-situ and ex-situ conservation of biological diversity:
>
> State Protected Natural Areas (PNAs) **are part of national and world heritage**, and should be conserved and used sustainably, to the benefit of nature and human populations…'

In the same vein, we find PROFONANPE designing a plan to create new reserves and later PNAs without the knowledge of indigenous peoples. According to the information on its website, PROFONANPE is a private not-for-profit entity with full legal status working in the public sphere. It is governed by its Statutes and by the regulations of Peru's Civil Code, and has the autonomy to sign acts and contracts. PROFONANPE was created on 29 December 1992 with the aim of supporting the conservation and management of natural areas protected by the State.

According to a PROFONANPE document entitled *Preliminary Draft: Development Plans for Indigenous Peoples (PDPI) in Protected Natural Areas – Participatory Management Project for Protected Areas, Peru*, territories affected by PNAs would be as follows:

> *3.5 Territorial organisation and sustainable use of natural resources in the Pastaza and Morona river basins (parallel funding from KfW - Germany)*
> *3.5.1 Analysis*
> This component of the Participatory Management Project for Protected Areas will be run with supplementary funding from KfW. It will cover **both sides of the Peru-Ecuador border**, in an area which SINANPE considers insufficiently covered, **with the possibility of establishing a biosphere reserve, a RAMSAR site and communal reserves**. The area between the lower reaches of the Morona and Pastaza rivers was recently made a Protected Forest. Aside from a few riverside hamlets and settlements with political and administrative functions, the area is mainly indigenous.

The Achuar, Kandozi and Quechua indigenous peoples have no idea that their territories lie within territorial organisation plans quite different from their own. At a number of assemblies, the Achuar and Kandozi peoples have ratified their decision not to accept the Ramsar site proposed by the WWF, instead requesting recognition of their integral territory. A few years ago they also rejected the same organisation's proposal to establish a PNA in the area. The Achuar in Pastaza are stubbornly resisting

[7] According to our political constitution, in Peru there are currently three levels of government: local, regional and central. The sectors which most affect indigenous peoples are agriculture, through INRENA, and energy and mining. These sectors grant forestry or mining and hydrocarbon concessions respectively.

the petroleum companies, and along with the Kandozis and Quechuas they are demanding that the Special Land Titling Project (PETT) agree to give them title deeds and increase the area of their native communities. The PETT has however declined to grant them these.

8 International legislation

Legislation in Brazil

Article 231 of the Brazilian Constitution states that the organisation, original customs, languages, beliefs, traditions and rights of indigenous peoples are recognised in their traditional territories, and that it is the Government's responsibility to designate and protect them and to ensure their natural riches and resources are respected.

It also establishes that the exploitation of water resources, including energy generation, research and activities relating to mineral resources and their exploitation in indigenous territories, can only be carried out with the authorisation of the National Congress through a law which provides for prior consultation, the outcome of which must be reflected in the bill.

The Brazilian Congress approved ILO Convention 169 on 20 June 2002 in Legislative Decree 143.

Resolution 196/96 issued by the National Health Commission, states in Regulation IV.3 that in cases where there are restrictions on the freedom to obtain adequate consent, Paragraph e) applies, which states that in culturally-different communities, advance permission must be obtained from community leaders, although every effort must be made to obtain individual consent.

Regarding the territory of indigenous peoples in Brazil, 'under Brazil's current legal system, indigenous lands are the property of the federal union, but are assigned to the permanent union of indigenous peoples, who have exclusive rights to the enjoyment of the resources which exist on the land and in the rivers and lakes'[8].

Legislation in Colombia

Constitution of Colombia

Article 340 of the Political Constitution provides for a National Planning Council made up of representatives of territorial entities and the economic, social, ecological, community and cultural sectors... The Council will hold a consultative capacity and will provide a forum for discussion of the National Development Plan.

The members of the National Council will be chosen by the President of the Republic from a list provided by the authorities and organisations of the bodies and sectors mentioned in the previous paragraph, who must be or have been involved in relevant activities. The Council will serve for eight years, and will be partially renewed every four years as prescribed by law.

According to the law, territorial bodies will also have their own planning councils.

The National Council and the territorial planning councils will together form the National Planning Network.

[8] SANCHEZ, Enrique (ed.). *Derechos de los Pueblos Indígenas en las Constituciones de América Latina*. Editores DISLOQUE. Colombia, 1996, p. 46.

Article 341 states that the Government will design a National Development Plan with the active participation of the planning authorities, the territorial bodies and the supreme council of the judiciary, and will submit the relevant projects to the National Planning Council.

In turn, Article 342 states that the corresponding organic law will regulate the design, approval and implementation procedures of the development plans and will make available appropriate mechanisms to ensure coordination and official budgets.

It will also determine the organisation and functions of the National Planning Council and the territorial councils, as well as the procedures according to which citizen participation in the discussion of development plans will be ensured, and corresponding modifications, in accordance with the Constitution.

ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries was approved in Law 21 on 4 March 1991 and ratified on 7 August 1991.

Decree 1320 of 13 July 1998 regulates prior consultation with indigenous and Afro-descendant communities regarding the exploitation of natural resources and of their territory, with the aim of analysing the economic, environmental, social and cultural impact on an indigenous or Afro-descendant community of the exploitation of natural resources within their territory and the measures proposed to protect their integrity. The Decree is non-binding.

Legislation in Mexico

Political Constitution of the United Mexican States Modified by Decree, 25 April 2001

Article 2 establishes that the Mexican Nation is unique and indivisible.

It also establishes in Point B that in order to overcome the shortages and underdevelopment which affect indigenous peoples and communities, the authorities are obliged to:

> **II.** Guarantee and increase levels of schooling, favouring bilingual and intercultural education, literacy, the completion of basic education, productive training and secondary and higher education. Establish a scholarship system for indigenous students at all levels. Design and develop educational programmes with regional content which recognise the cultural heritage of local peoples, in accordance with legislation on the issue and in consultation with indigenous communities. Encourage respect for and knowledge of the different cultures of the nation.
>
> **IX.** Consult indigenous peoples on the design of national, state and municipal Development Plans, and, where appropriate, incorporate their recommendations and proposals.

In order to guarantee the fulfilment of the obligations in this section, the Chamber of Deputies of Congress, the respective legislatures of the federal bodies and town councils, within the remit of their respective competencies, will establish the specific items which will lead to the fulfilment of these obligations in the expenditure budgets they approve, as well as the forms and procedures which will ensure community participation in the exercise and monitoring of them.

Without detriment to the rights established for indigenous peoples and communities, all comparable communities will have the same rights as established by law.

Article 26 establishes that the state will organise a system for the democratic planning of national development which imparts strength, dynamism, permanence and fairness to economic growth for the independence and political, social and cultural democratisation of the nation.

The objectives of the national project contained within the Constitution will determine the planning objectives. Planning will be democratic. Through the participation of different sectors, the aspirations and demands of society will be brought together and incorporated in the development plan and programmes. Federal public administration programmes will be obliged to submit to the national plan.

The law will authorise the Executive to establish participation and consultation procedures in the national democratic planning system, as well as the criteria for the formulation, implementation, monitoring and evaluation of the plan and of development programmes. It will also determine the bodies responsible for the planning process and the basis by which the Federal Executive will coordinate agreements with the authorities of federal entities, and will encourage individuals to work with them to draw up and implement the process.

ILO Convention 169 was approved by the Senate on 11 July 1990 and ratified by the Executive on 5 September 1990.

Mexico also has a series of laws and legal regulations relating to Indigenous Peoples in each state. These include:

Decree 14156, published in the Official State Newspaper on 12 January 1991, creating the Office of Indigenous Affairs in the State of Jalisco

Law on the Rights of Indigenous Peoples and Communities in the State of Oaxaca, issued on 21 March 1998

Law on Indigenous Rights, Culture and Organisation in the State of Quintana Roo, published in the Official State Newspaper on 30 July 1998

9 Cases of Protected Natural Areas established on indigenous territory in the Peruvian Amazon

The following are testimonies from regional leaders regarding their experiences with the establishment of PNAs on ancestral indigenous territories in their respective regions.

Luis Huachapa Chias
Santiago Comainas Reserve

- They were not consulted about the establishment of the reserves.
- INRENA has proposed splitting the Kampamkis hills in two, with one half as a National Park and the other as a Communal Reserve.
- The organisation and the Huambisa-Awajum indigenous people want territorial rights. An agreement was reached in 2004. The agreement was adopted with support from the San Lorenzo Regional Indigenous Peoples' Committee (CORPI).
- The higher elevation areas of the Morona River valley are affected by 50 logging companies.
- 62 native communities are affected by the reserve.

- The Indigenous Participation in Management of Protected Natural Areas Project (PIMA), funded by the World Bank, has been rejected because it does not grant the territorial rights the Awajum and Huambisa peoples are seeking…
- The World Bank has inquired as to why there has been no progress with the PNA process, and was told that the PIMA is to blame because it is unwilling to work with the communities or recognise their territorial rights (title deeds for native communities).
- The Native Communities have rejected the PIMA representatives.
- The Río Santiago peoples have designed a Strategic Development Plan.
- The PIMA has not supplied all the necessary information to neighbouring communities affected by the PNA. One aspect they have not been told about is the fact that once the Area is created, native communities cannot be given title deeds within it.
- The indigenous people working on the PIMA feel themselves to members of the PIMA rather than of the Communities.
- They have received help from the regional coordinators and the national organisation for Indigenous peoples.

When asked about Prior Consultation, he said that:

- Consultation should take place in the area.
- Consultation should be a majority decision (500 or 1000 people).
- Awajums and Huambisas could be consulted jointly.
- Consultation should be binding.
- It should be paid for by the government.
- Representatives should be selected by the organisations.

Edwin Vásquez
President of the Iquitos Regional Organisation of the Interethnic Association for the Development of the Peruvian Jungle (ORAI)
Gueppi Reserve

- The institutions involved (NGOs, PIMA and INRENA) have not consulted anybody, they just hold information meetings.
- The Secoya people have not been told anything.
- The Federation of Putumayo Border Area Native Communities (FECONAFROPU) and all the Native Communities rejected the proposed reserve in 2000. In 2001, a workshop was held with the GEFF. The Secoya people rejected the proposals, but the institutions brought in the teachers, who went against the chiefs and approved the reserve.
- AVESUSTENTA came along and used the regional leaders.
- The Secoyas consequently agreed to separate from the ORAI, but agreed to continue to work with the Interethnic Association for the Development of the Peruvian Jungle (AIDESEP).
- Now the Secoyas are working with ORAI again and are requesting a Territorial Reserve.
- The Medio Putumayo, Ampiyacu and Papayacu regions have been catalogued by the NGO *Instituto del Bien Común* (IBC) as a 'Mosaic of Use Area', a category with no legal status.

When asked about prior consultation, he said that:

- Eight different indigenous peoples live in the Putumayo River valley region – there should be one large consultation involving everybody.
- It should be backed up by support from CORPI. Organisations should help each other and strengthen their capabilities in coordination and decision-making.
- Consultation should take place in a location chosen by the Indigenous Peoples.
- The accreditation of representatives should be carried out by the organisations (who has the right to participate?)
- Reject any institution which does not fit in with the indigenous movements' agreements.
- Territorial rights, not PNAs.

- Information should contain important points and be easily understandable. Laws should be included without comments from others and all possibilities should be outlined.

Problems in the Implementation of Communal Reserves

Amarakaeri Communal Reserve
Antonio Iviche
Harambuk Leader

- There is an Executor of the Administrative Contract (ECA).
- They requested the administrative contract from INRENA.
- They have presented INRENA with a shortlist for the Head of the Communal Reserve.
- Mining is a serious problem.
- Clashes between loggers and uncontacted indigenous people have resulted in deaths.
- Alliances between groups of indigenous peoples are important.

El Sira Reserve

Fredy Vásquez Quinchocre
Ashaninka Leader

- The Ashaninka People are spread across three departments (Junín, Pasco, Huanuco).
- A number of peoples benefit from the El Sira Communal Reserve: Ashaninkas, Asheninkas, Yaneshas, Yines, Shipibos.
- They have held a number of meetings to form a local coordination committee.
- 71 Native Communities have been consulted on the process.
- They have established an Executor of the Administrative Contract for El Sira Communal Reserve (ECOSIRA).
- Two regional organisations – the Ucayali Regional Organisation of the Interethnic Association for the Development of the Peruvian Jungle (ORAU) and the Regional Association of Indigenous Peoples (ARPI) - and 11 Federations have participated in Reserve meetings.
- Beneficiaries have not yet participated in the administration of the PNA.
- ECOSIRA has not yet been entered into the Public Records.
- The Management Committee has not yet been set up (universities, local governments, businesses, indigenous organisations, regional governments, NGOs, INRENA). It is a permanent coordinating body.
- They have yet to sign the agreement with INRENA which will initiate joint administration.

What form should Consultation take?

There should be at least three consultations, one per basin: Satipo, Atalaya, Puerto Bermúdez.

Javier Macedo Gonzales
Cordillera Azul National Park

- The communities living between the Pisqui (Shipibo) and Cushabatay (Yines) rivers are within the Cordillera Azul buffer zone.
- The Nuevo Edén community requested expansion into uncontacted indigenous territory and untitled territory adjacent to the Cordillera Azul. IBC tried to establish territorial reserves.
- The Cordillera Azul Centre for the Conservation, Research and Management of Natural Areas (CIMA) is not interested in territorial rights, only in the PNA.
- Maple Gas has been exploiting the area for ten years. Prior to that it was Petro Perú.
- There was no consultation.

- The organisation held a workshop to collect testimonies from native communities and then held a press conference.
- There are nine oil wells on the Canaan de Cashiyacu Native Community's territory.
- The community wants three things: decontamination, compensation, and payment for the use of their territory.
- The company will only deal with the Native Community, not with their organisations or legal advisors.
- The company proposed a meeting in Pucallpa, but did not want legal advisors or representatives of the federation or regional organisations to attend. The meeting was held.
- Alliances are being sought.
- If no solution can be found, stronger action will be taken.
- The General Manager of Maple Gas has been invited to a new meeting.
- The contamination does not only affect the Canaan community. It also affects the Contamana settlement and the Cashiyacu ravine, especially when it rains.

10 Important points

From the comments on PNA Consultation, we can extract some important points:

a The problem is that ILO consultations are non-binding.
b There are no legal mechanisms in place to request the non-application or nullity of a law which in order to be passed required a prior consultation process which was not carried out in good faith.
c Between 1993 and 1999 a series of laws and regulations (Supreme Decrees) have been approved which affect the rights and interests of indigenous peoples regarding their ancestral territories with no prior consultation.
d INRENA and the Ministry of Agriculture have not carried out consultation processes on the establishment of reserves, in contravention of ILO Convention 169 and Article 43.2 of the Regulations on Protected Natural Areas.
e According to indigenous representatives, meetings held by INRENA and environmental NGOs have been purely informative, rather than dealing with Consultation.
f Within Protected Natural Areas, decision-making is solely the responsibility of INRENA and the employees designated by it.
g Communal Reserves are to be regarded as *sui generis*, subject to the approval of a special Administration regime which would enable the participation of indigenous peoples in decision-making at local level through a Resolution by the Managing Director of INRENA, which can be modified or repealed.
h More and more indigenous peoples are requesting territorial rights.

11 Final lessons

Based on the statements of the participants, we can conclude that free, prior and informed consultation should be based on the following principles:

NOTE: Principle: We use *Principle* here to mean: 'Original basis, fundamental reason on which conduct is based'.

Principle of Location

Consultation should take place in the indigenous territory chosen by the people to be consulted.

The reason for this principle is that people feel safer and more able to express themselves in their own territory rather than in an unfamiliar place. It must not be forgotten that indigenous people generally belong to a different culture to the people, institution or government consulting them, and that there have been conflicts and even clashes between the cultures of the indigenous peoples and the consultants, sometimes with serious consequences for the indigenous peoples.

Furthermore, consultation and decision-making processes are often carried out in distant cities which are expensive to get to, and the indigenous peoples do not necessarily have the financial resources to reach them. The people or institutions consulting them often pay for travel and lodging, meaning that indigenous people are obliged to make very important decisions in unfamiliar surroundings where they are a minority, and without the support of their community in discussing issues which they are often not authorised to make decisions about on behalf of their communities.

Principle of Cultural Plurality

Prior information and the consultation itself must be made available in the language and through the cultural systems of each people.

Many indigenous peoples have a series of processes which they must complete before an important Consultation. These may entail weeks of physical, mental and spiritual preparation, as well as reflection and consultation processes within the community.

Consultation should be planned with respect for the timeframe each people requires for organisation and preparation.
Other obvious aspects such a language should also be taken into account.

Principle of Full, Adequate and Truthful Information

The information and relevant legal regulations necessary for making decisions should be provided in their entirety and sufficiently in advance for them not only to be read but to be analysed and discussed.

It is very important that legal regulations be provided without comments from third parties, because interpretations or comments on the law can sometimes be confused with the law itself, so that a particular opinion or point of view on the regulation or consultation may be taken to be an actual legal regulation.

Principle of the Binding Effect of the Result of Consultation

Once the people have made a decision, whether positive or negative, regarding the legislative or administrative measure put to consultation, it should be respected and upheld by the Government.

The big problem with Consultation in ILO Convention 169 is that it is non-binding and does not have to be respected by governments, so there are no guarantees that the outcome of the consultation will be respected. Non-binding consultation is almost a joke.

Principle of Respect and Sanctions

If Institutions or government employees withhold information or do not allow decisions to be made in accordance with the culture of a people they should be severely sanctioned.

There are no sanctions in place for government employees who do not respect the decisions of indigenous peoples, or who despite already having received a negative response insist on consulting them again and again until finally, through exhaustion, pressure or error, they give in or sign.

Principle of Consulting Each People

Each people affected should be consulted, and they should decide how many consultations are necessary.

For example there should be a consultation with the Kandoshi people, who will decide where it should take place, and also whether consultations in other locations are necessary due to the size of the population or geographic distribution.

Principle of Privacy in Decision-making

The peoples should decide whether they wish to be alone or who may be present at the time of making a decision.

It is only natural that we sometimes make decisions alone and sometimes surrounded by others. Indigenous people should also have this right.

Principle of Representativity

Each people should name their representatives and decide on the minimum number of representatives necessary for a decision to be valid.

There have been occasions where persons not belonging to the people in question have attended and been allowed to vote on decisions which only affect indigenous people. The indigenous people themselves should therefore be the only ones who can decide who represents them.

Principle of Participation of Persons with Decision-Making Powers

The government institutions or employees doing the consulting should have the relevant powers and should authorise representatives who have full rights to speak on behalf of the government and whose comments and agreement are binding on the government.

On some occasions in three-way talks between indigenous peoples, oil companies and the State, agreements have had to be discussed again because company representatives changed and it was discovered that the previous representatives were not authorised to make commitments on behalf of the company. In order to avoid this, all representatives must have the power to make commitments on behalf of those they are representing.

Principle of Deciding Only When Completely Sure

No one should be obliged to make a decision when they are not completely convinced.

Indigenous people should be adequately informed that they are not obliged to make a decision if they are not completely sure. They should also be told that they can accept, reject, partially accept, partially reject or choose not to give an opinion on an issue and request a day, a month, a year or however long is necessary for them to decide what is best for their people.

Principle of No Dialogue

An indigenous people should be able to agree or disagree and communicate that decision without having to discuss it or be consulted about it.

In the United Nations there is a legal right to veto. An indigenous people should also be able to state that they do not want any form of protected natural area, that they want to keep their territory intact, and that they will not negotiate or consult on their decision with anybody.

Indigenous people should be able to decide that water is not negotiable or concessible, and refuse to debate their decision. As long as their decision is not a crime, e.g. murder, then they should be able to exercise their right not to enter into dialogue.

Principle of Self-Management and Self-Financing

Indigenous peoples should be informed as to the extent to which institutions formed after accepting a consultation will be self-managing and self-financing.

For example, Communal reserves are administered by the executor of the contract, an institution which should not be for profit, but no information is provided about how it will be financed or whether it falls outside the traditions of the peoples concerned. In the majority of cases the institution is not self-managing or self-financing. It is very important that indigenous peoples are aware of this at the time of making their decision.

Principle of Mass Consultation and Necessary Time

For a consultation to be valid, it should involve the indigenous people being consulted as a whole, and should last as long as is necessary for them to understand the proposals and think about and analyse them.

There are often problems with budgets or timeframes which allow for only a small proportion of the affected people to be consulted. It is important that institutions guarantee unconditional funding for mass participation in consultation meetings and the necessary timeframe for decisions to be made.

Principle of Critical Points

For a consultation to be valid, it should be guaranteed that critical points are covered in depth and with sufficient time and information.

For example, a critical point in Protected Natural Areas is who will own the areas being preserved, how they may be used, and whether or not communities can continue to expand and receive title deeds.

In order to guarantee that critical points are covered, meetings should be held between the representatives of the indigenous peoples and the consultants, at which the indigenous representatives will decide on the critical points that must be dealt with and agree an agenda with the consultants.

Principle of Consultancy

Indigenous people have the right to participate with consultancy from other indigenous peoples and from indigenous or non-indigenous organisations as they see fit.

It must be remembered that the issues dealt with in a consultation are not necessarily familiar to the indigenous culture, so they may require support from other indigenous peoples and indigenous or non-indigenous organisations.

Furthermore, governments, ministries and companies all have consultancy teams, so it is only fair that indigenous people be allowed this too if they wish.

Criteria

a All instruments used in the consultation should be intercultural. All discussion documents should be guaranteed to be intercultural and easily understandable for the indigenous people as a whole. For example, Environmental Impact Studies are not intercultural, but drawing a map containing all relevant information (human, plant, animal, etc.) and then adding to it what is being proposed can be understood by both cultures.

b Alliances and support between peoples. Indigenous peoples should be able to request support from other peoples and their participation in the consultation process if they wish.

c Representatives of the indigenous people should report back to the indigenous people. If the indigenous people have appointed someone to prepare the consultation process, that person should be considered part of the indigenous people rather than a 'member of the consultation team', and should therefore be free to report back to the people and keep them informed.

This study explores the right of indigenous peoples to free, prior and informed consultation and prior consent in Peru. Drawing on interviews with indigenous leaders regarding the imposition of State protected area policies on indigenous communities, it presents a series of principles and preconditions for the right to FPIC. Throughout, the authors stress that any efforts by external interests or third parties to obtain FPIC must uphold indigenous peoples' fundamental right to self-determination, including their right to say "no".

Forest Peoples Programme

1c Fosseway Business Centre, Stratford Road,
Moreton-in-Marsh GL56 -9NQ, England
tel : +44 (0)1608 652893 fax: +44 (0)1608 652878
info@forestpeoples.org www.forestpeoples.org