

**To:** Cyrus R. Vance Center for International Justice  
**From:** Payet, Rey, Cauvi, Pérez Abogados  
**Date:** April 10, 2023  
**Subject:** Implementation of the right of Indigenous peoples to free, prior and informed consent in the Peruvian legislation

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The main objective of this document is to analyze the implementation of the right of Indigenous peoples to express their Free, Prior and Informed Consent ("FPIC") in the Peruvian regulations and whether they comply with international legal standards related to FPIC.

## **I. INTRODUCTION**

Free, prior and informed consent (FPIC) has progressively evolved in national and international law. FPIC allows Indigenous peoples to give or withhold their consent to a project or any investment that may affect them or their territories, with the resources to make informed decisions.

Since the entry into force of the International Labor Organization's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter, "ILO Convention 169"), several countries have set relevant precedents in the region; however, the Peruvian State was the first Latin American country to regulate the right to prior consultation through a national law.

In this regard, in 2011, Law No. 29785, Prior Consultation Law, was enacted, which established the guidelines to structure the dialogue between the Peruvian state and Indigenous peoples in order to reach binding agreements on administrative or legislative measures that may affect their collective rights.

According to official figures from the Ministry of Culture, the government authority in charge of conducting prior consultation in Peru, eighty-three (83) consultation processes have been carried out to date, of which seventy-two (72) processes are implemented and eleven (11) processes are ongoing. However, although the right to FPIC is mainly recognized for Indigenous peoples in international laws and conventions, local communities often face the same problems of access to land and lack of input to their own development path.

In this regard, this memorandum will detail how the rights of Indigenous peoples are being developed in Peru and how both the political and social context directly affects the development of Indigenous peoples in the country.

## **II. LEGISLATION**

### **2.1 International Legislation**

FPIC has been progressively evolving in international law for some decades. Although the specific international instruments on Indigenous peoples were approved in 1989 with ILO Convention 169, the Peruvian State had already adhered to international legal instruments that ensured the protection of the rights of Indigenous peoples.

In 1978, the Peruvian State ratified the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on December 16, 1966. The International Covenant on Civil and Political Rights developed the self-determination of peoples, referring to the right of all peoples to decide their political status and pursue their economic, social and cultural development; as well as recognized, in its Article 27, the existence of ethnic, religious or linguistic minorities, which may not be denied to have their own cultural life, to profess and practice their own religion and to use their own language.

Likewise, the American Convention on Human Rights (also called the Pact of San José, Costa Rica), signed after the Inter-American Specialized Conference on Human Rights in 1969, was ratified by the Peruvian State in 1978. Among its most relevant provisions, the American Convention established the obligation of the States Parties to respect the rights and freedoms recognized therein and to guarantee their free and full exercise to all persons subject to their jurisdiction, without any discrimination for reasons of race, color, sex, language, religion, political or any other opinion, national or social origin, economic status, birth or any other social condition.

This international framework served as the basis for the ILO Convention 169 in 1989, which became the first international treaty that, in addition to recognizing the human rights and fundamental freedoms of Indigenous and tribal peoples - without obstacles or discrimination - required governments to consult with Indigenous peoples on laws that could directly affect them, to ensure their participation and right to decide on matters that could affect their collective rights. In addition to serving as a basis for the development of legislation in each country party, ILO Convention 169 is an important instrument for Indigenous and tribal women in recognizing and ensuring the protection of their rights and special needs, as well as guaranteeing equal treatment of rights and freedoms between women and men. The Peruvian State ratified ILO Convention 169 in 1995; however, its implementation was not automatic as will be discussed later in this report.

In addition to ILO Convention 169, the Peruvian State voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples of the United Nations and the American Declaration on the Rights of Indigenous Peoples of the Organization of American States, in 2007 and 2016, respectively.

Considering that these are international declarations, the Peruvian State is not obliged to comply with the rights recognized in them; however, these declarations are based on the main international human rights treaties that the Peruvian State is obliged to comply with, including ILO Convention 169, which served as the basis for the elaboration of the declarations.

## **2.2 National Legislation**

### **2.2.1 Prior Consultation**

In Peru, FPIC is regulated by the right to prior consultation, which is the right of Indigenous or native peoples to be consulted in advance on legislative or administrative measures, as well as national and regional development plans, programs and projects that directly affect their collective rights, physical existence, cultural identity, quality of life or development. This right was recognized in ILO Convention 169 and was ratified by Peru in 1995.

However, it was not until August 23, 2011, that the Congress unanimously approved the Prior Consultation Law, due to the social conflict in Bagua, Amazonas, that resulted in the death of thirty-three (33) people, including natives and police officers. The social conflict originated in Bagua was originated by the adoption of an investment policy, as part of the implementation of the Free Trade Agreement (FTA) with the United States, which affected the collective rights of the Amazonian communities in the use and management of the natural resources of their territories.

Within this framework, in 2011, Law No. 29785, Law on the Right to Prior Consultation of Indigenous or Native Peoples (hereinafter, the "Law on Prior Consultation") was approved and, the following year, through Supreme Decree No. 1-2012-MC, the Regulations that develop the provisions of the Law (hereinafter, the "Regulations") were approved. Thus, in accordance with the provisions of ILO Convention 169, the legal framework has established that, in order to be recognized as an Indigenous or native people, two essential elements must be met, one objective and the other subjective. The objective criteria adopted in the Prior Consultation Law are the following:

- Direct descendants of the original populations of the national territory.
- Lifestyles and spiritual and historical ties to the territory they traditionally use or occupy.
- Social institutions and customs.
- Cultural patterns and way of life different from those of other sectors of the national population.

On the other hand, the subjective criterion is related to the collective group's awareness of having an Indigenous or original identity. In other words, the subjective element is related to their self-recognition as Indigenous peoples.

a) Stakeholders in the prior consultation

The holders of the right to consultation are the Indigenous or native peoples whose collective rights may be directly affected by a legislative or administrative measure.

According to Peruvian law, an Indigenous or native people is one that recognizes itself as such and is descended from populations that have inhabited the country since before colonial times and that, regardless of their current legal status, retain their own social, economic, cultural and political institutions, or part of them.

The population of the Andean peasant communities and the native communities or Amazonian peoples can be identified as part of the Indigenous or original peoples, as long as the objective and subjective criteria indicated by Convention No. 169 are present. It is important to bear in mind that the denominations used to designate Indigenous peoples do not alter their nature or their collective rights.

In order to identify Indigenous or aboriginal peoples, the Law of Prior Consultation provided for the creation of an official database of Indigenous or aboriginal peoples and their representative institutions and organizations (hereinafter, the "Database"), which is under the oversight of the Vice Ministry of Interculturality of the Ministry of Culture. The Database is the Peruvian State's official source of sociodemographic, qualitative, and geographic information on the Indigenous or native peoples identified at the national level, in accordance with the identification criteria established in ILO Convention 169.

To date, the Database has identified fifty-five (55) Indigenous peoples in Peru, of which fifty-one (51) are from the Amazon and four (4) from the Andes. According to Ministerial Resolution No. 202-2012-MC, which approved the Directive that regulates the operation of the Official Database of Indigenous or Native Peoples, the main sources for obtaining information are the censuses prepared by the National Institute of Statistics and Informatics; the data of peasant and native communities of the Informal Property Formalization Agency (COFOPRI) and of the Regional Governments through their competent offices; the records of organizations, institutions and communities of the National Superintendence of Public Registries (SUNARP); the legal provisions in force on peoples in isolation and in initial contact (PIACI); the data of the road network of the Ministry of Transportation and Communications; the National Registry of Educational Institutions of Intercultural Bilingual Education of the Ministry of Education; among other complementary sources.

It is important to point out that the Database is constantly being updated and that it is of a declarative and referential nature. Given its nature different from that of a registry, it does not constitute rights.

In addition to the identification of Indigenous or native peoples, the database also includes a list of Indigenous or native languages, a search engine for localities of Indigenous peoples, an ethnolinguistic map of Peru, Indigenous peoples in isolation and initial contact, among others. The link to access the Database is the following: <https://bdpi.cultura.gob.pe/>

b) Authorities in charge of the prior consultation process

The Peruvian State, through its different levels of national, regional and local government, is solely responsible for organizing, promoting and convening the consultation process. In the case of regional and local governments, the prior consultation process may only be carried out after a favorable report from the Vice-Ministry of Interculturality of the Ministry of Culture.

Although different State entities may carry out the prior consultation process, the Vice-Ministry of Interculturality of the Ministry of Culture, as the technical body specialized in Indigenous matters, is responsible for managing, articulating, and coordinating the policy for implementing the right to prior consultation. However, the final decision on the consulted measure corresponds to the promoting entity, whether it is the Ministry, the regional government or the local government.

It is important to point out that no company or private entity may carry out the prior consultation process.

c) Regarding the measures or decisions consulted

According to the Law on Prior Consultation, proposals for legislative or administrative measures that could directly affect the collective rights of Indigenous or native peoples must be consulted.

In this sense, the consultation is made on the regulatory norms of general scope, as well as the administrative act that authorizes the initiation of the activity or project (such as extractive, forestry, agricultural activities, among others), or the one that authorizes the State to sign contracts for the same purpose.

Likewise, consultation is carried out on norms with the rank of law (laws, regional and municipal ordinances, and legislative decrees) that may directly affect the collective rights of Indigenous peoples. Additionally, the Regulation establishes that consultation is also applicable to administrative measures by virtue of which development plans, programs and projects are approved.

Notwithstanding the foregoing, the Prior Consultation Law establishes certain exceptions for its application, which are detailed below:

- Tax or budgetary rules are not subject to consultation.
- State decisions of an extraordinary or temporary nature aimed at addressing emergency situations arising from natural or technological disasters that require a rapid and urgent intervention to prevent the violation of fundamental rights of individuals do not require consultation.
- The measures dictated to address health emergencies, including epidemics, as well as the prosecution and control of illicit activities, within the framework of the provisions of the Political Constitution of Peru and the laws in force, shall not be consulted.
- Emergency decrees are also not subject to consultation. These decrees are of an extraordinary nature and are issued only in economic and financial matters with a general scope. They are approved by the Executive Power in a session of the Council of Ministers.

Although state entities are responsible for identifying the measures that will be subject to consultation, the institutions or organizations representing Indigenous or native peoples may request the application of the consultation process with respect to a certain measure that they consider affecting them directly.

d) Stages of the prior consultation process

According to the Regulations, the state entities promoting the legislative or administrative measure must comply with the following minimum stages of the consultation process:

- (i) Identification of the legislative or administrative measure to be consulted.
- (ii) Identification of the Indigenous or native peoples to be consulted.
- (iii) Publicity of the legislative or administrative measure.
- (iv) Information on the legislative or administrative measure.
- (v) Internal evaluation in the Institutions and organizations of Indigenous or native peoples on the legislative or administrative measures that directly affect them.
- (vi) Dialogue process between representatives of the State and representatives of Indigenous peoples.
- (vii) Decision.

The maximum term for the development of the publicity, information, internal evaluation and dialogue stages is one hundred and twenty (120) calendar days from the date of delivery of the proposed administrative or legislative measure until the signing of the Consultation Act.

### **2.2.2 Citizen Participation**

One of the mechanisms established in Peruvian law is citizen participation in decision-making processes. In this regard, it is established that participation is the process through which citizens participate responsibly, individually or collectively, in the definition and application of policies adopted at each level of government, and in the public decision-making process, as well as in their execution and oversight.

Specifically, regarding citizen participation in the framework of investment projects, environmental legislation includes the citizen participation process as an essential requirement in the evaluation and execution of public and private investment projects, as well as natural resource management projects, within the framework of the National Environmental Impact Assessment System (hereinafter, "SEIA"). The SEIA, among other aspects, establishes the guidelines for environmental impact assessments of investment projects in the country and classifies such assessments into three categories of Environmental Studies depending on the type of project and the impacts that will be generated.

To that extent, citizen participation is mandatory for the owner of the activities, as part of the process of evaluation and approval of their Environmental Studies. This requirement is essential because without complying with the mandatory mechanisms established, the competent authority will not be able to initiate the evaluation of the Environmental Study and in this sense, the owner of the activity will not be able to obtain the environmental certification, a mandatory requirement for the start of the productive activities, as well as in its subsequent execution, follow-up and control.

However, it should be noted that citizen participation is applicable to any natural or legal person, individually or collectively, whether considered an Indigenous people or not, while prior consultation is only applicable to Indigenous or native peoples. Likewise, citizen participation, depending on the type of mechanism and the stage at which it takes place, can be carried out by the State or by the owner of the activity, whereas, in the case of prior consultation, it can only be carried out by the State.

## **III. JURISPRUDENCE**

### **3.1 International Jurisprudence**

The Political Constitution of Peru of 1993 establishes that international human rights obligations ratified by Peru, such as the rights of Indigenous peoples detailed in ILO Convention 169, have constitutional rank. Peru has no specific jurisprudence in the Inter-American Court of Human Rights (hereinafter, "IACHR Court"). However, the IACHR Court has developed relevant jurisprudence related to the participation of Indigenous peoples in decision-making regarding their lands.

The IACHR Court begins to develop the right to prior consultation through the case of the Saramaka people v. Suriname. This case revolves around the international responsibility of the State of Suriname for not adopting effective measures to recognize the communal property rights of the Saramaka people. In this case, the IACHR Court establishes, for the first time, the duty to actively consult with the community, based on their customs and traditions, which implies constant communication between the parties and that the State accepts and provides information (2007, para. 133).

The case of the Saramaka people vs. Suriname lays the foundation at the international level on the right to prior consultation. However, the case is not only limited to establishing the obligation to consult the Indigenous peoples involved, but also to obtain their free, prior and informed consent, following the traditions and customs of the Indigenous peoples. In this sense, the IACHR Court marks a milestone by developing free, prior and informed consent, which will be required in those cases in which "*large-scale development or investment plans that would have a major impact within the Saramaka territory are involved*" (2007, para. 134).

Subsequently, on June 27, 2012, the case of the Kichwa people of Sarayaku vs. Ecuador arose, which deals with the Ecuadorian State's failure to comply with its obligation to adopt the necessary measures to ensure that the Kichwa people of Sarayaku participate, through their institutions, in accordance with their values, customs and forms of organization, in decision-making on matters and policies that affect their territories (2012, para. 232). In this same judgment, it is stated that the right to prior consultation shall be considered a general principle of international law (2012, para. 164). The judgment in the case of the Kichwa people of Sarayaku v. Ecuador and the Saramaka people v. Suriname establish precedents that reaffirm the obligation of States to carry out prior consultation processes.

While there is a similarity between the judgments issued by the IACHR Court in considering it an obligation to carry out prior consultation processes with Indigenous peoples, there is also a distinction regarding the need to ratify ILO Convention 169. In the judgment in the case of the Saramaka people v. Suriname, it is mentioned that it would not be necessary for the State to ratify ILO Convention 169 in order to consider it a duty of the States to carry out prior consultation processes. This is based on an evolutionary interpretation in which it is considered that at the time the State of Suriname ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights, the State of Suriname was obliged to consult with the peoples (2007, para. 93). However, in the judgment of the case of the Kichwa people of Sarayaku vs. Ecuador, the position of the IACHR Court varies when it mentions that the Ecuadorian State would have the duty to carry out prior consultation when ratifying ILO Convention 169 (2012, para. 172).

The Saramaka people vs. Suriname judgment was issued prior to the enactment of the Peruvian law on prior consultation; however, it can be observed that many of its binding rules have been developed in the different articles of the Law on Prior Consultation and its Regulations. In turn, the case of the Kichwa people of Sarayaku vs. Ecuador, that was issued after the enactment of the Law, reaffirms many of the points discussed in the first case. However, we have been able to observe that there is a point in both jurisprudential cases that Peru has not yet developed correctly, neither in practice, nor at the normative level, on what would be the appropriate moment in which the process of prior consultation should be carried out, which continues to be a debate to date.

In addition to the above, another relevant aspect at international level is the status of the Universal Periodic Review (hereinafter, "UPR"), which aims to review compliance with the human rights commitments of the one hundred and ninety-three (193) member States of the United Nations. The UPR is configured in cycles of four (4) and a half year, being the last UPR of Peru in 2017, so Peru would currently be in this evaluation process. The documents on which the reviews are based are information from the State, information from



experts and/or independent human rights groups, and information from other stakeholders including national human rights institutions.

In the framework of the UPR process, the National Organization of Andean and Amazonian Indigenous Women of Peru (hereinafter, "ONAMIAP") has submitted an alternative report for the evaluation of the Peruvian State before the UN around human rights. In this report, ONAMIAP reports that the regulation on prior consultation is not in line with international standards on the rights of Indigenous peoples and does not guarantee the right to free, prior and informed consent. In view of this, ONAMIAP mentions that the Peruvian State considers that prior consultation should only apply in the context of measures issued by the Executive Branch, given that to date there has been no procedure that guarantees prior consultation for measures taken by the Legislative Branch.

Additionally, ONAMIAP details in its report that the State allows companies to enter Indigenous territories before prior consultation processes are initiated, which causes companies to deploy strategies that divide the communities. Finally, they detail that the State does not guarantee that consent is informed, since the consultation processes do not provide information on the impacts of the extractive activity, due to the fact that in Peru the Environmental Impact Studies are not consulted. To date, the results of Peru's last UPR period are not available.

### **3.2 National Jurisprudence**

National jurisprudence has had different interpretations regarding the application of the right to prior consultation. Constitutional Court Decision No. 03343-2007-PA/TC, dated February 19, 2009, develops the definition of self-determination of Indigenous peoples and its link to the right to prior consultation of Indigenous peoples. Self-determination consists of the "capacity of Indigenous peoples to organize themselves autonomously, without political or economic interventions by third parties, and the power to apply their customary law" (2007, fd. 32). This, according to the same judgment, serves as a basis for the configuration and support of the right to prior consultation (2007, fd. 33).

Along these lines, the Constitutional Court detailed, on November 11, 2008, in its Ruling N° 06316-2008-PA/TC, that prior consultation will be recognized as a participation mechanism, which allows native communities to decide the priorities they have in their development process and the preservation of their culture. This promotes citizen participation in the exercise of political power and allows the opinions of the communities to be translated into the decisions that may be made (2008, fd. 21).

In addition, Constitutional Court Decision No. 0022-2009-PI/TC, of June 9, 2010, focuses on the importance of distinguishing between the right to prior consultation and the right to veto. It is mentioned that ILO Convention 169 does not develop the attribution to Indigenous peoples of the right to veto and that the interpretation of the articles of ILO Convention 169 does not imply the right to veto (2009, fd 24). As a result, it is mentioned that the obligation of the State is to consult the Indigenous people, which does not mean that they have the ability to reject the decisions taken, because as mentioned in Convention 169, the purpose of prior consultation is to reach an agreement.

Likewise, on June 30, 2010, in Ruling No. 05427-2009-AC, the Constitutional Court urged the Ministry of Energy and Mines to regulate the procedure to carry out the right to prior consultation, due to the fact that the absence of such regulations has caused and continues to cause social conflicts in the country (2009, fd. 43). Subsequently, through Ruling A.P. N° 29126-2018 Lima, issued by the Supreme Chamber of Constitutional and Social Permanent Law, dated October 24, 2019, it is provided for the expulsion from the legal system of the rules that allowed measures related to public services to be exempted from the right to prior consultation of Indigenous peoples. This sentence has been declared with retroactive effect, so it may be applied retroactively from the date that the right to prior consultation began to be in force in our country, that is, since the publication of the Regulation, year 2012.

After the aforementioned rulings, the Constitutional Court developed in its Ruling No. 03066-2019-PA/TC, dated January 20, 2022, a position contrary to the aforementioned. In this judgment, the lawsuit filed by the Indigenous communities in the context of the granting of mining concessions without having participated in a prior consultation process was declared inadmissible. In order to develop its grounds, the Constitutional Court established that ILO Convention 169, in our Peruvian legal system, does not have constitutional rank, as detailed below:

*"However, the right to prior consultation is not recognized by the Constitution, either expressly or tacitly, so it is not possible to claim protection through the amparo process, since it is not a fundamental right.*

*4. In any case, the right to prior consultation emanates from Convention 169, which does not grant it the character of a fundamental right, so it cannot be inferred that it is a right of such a dimension and even less that it has constitutional rank [...]" (2019, paras. 3 and 4).*

The Constitutional Tribunal states the above ignoring the fact that the Political Constitution of Peru provides that international treaties that have been ratified by Peru and that deal with human rights are part of the Peruvian legal system and are considered of constitutional rank.

In response to this latest ruling of the Constitutional Court, the Inter-American Commission on Human Rights has issued a press release, which reaffirms that the Inter-American Court has declared it an obligation of the States that have ratified ILO Convention 169 to carry out prior consultation processes when the interests of Indigenous peoples are affected. Likewise, it points out that it is the obligation of the judges to apply the control of conventionality between the American Convention on Human Rights and the internal norms of the States.

Likewise, the Ombudsman's Office issued a statement regarding this latest ruling of the Constitutional Court in which it indicates that the vote issued constitutes a setback in the protection of the rights of Indigenous peoples, which is contrary to international treaties and the Constitution, and also departs from the standards previously established in the jurisprudence of the Constitutional Court itself. Additionally, it is mentioned that the Court has pronounced in this sentence in the least favorable way for the optimization of the rights to cultural and ethnic identity, participation and prior consultation, which would affect the rights of Indigenous peoples.

Following the same line, the president of the Commission of Amazonian and Afro-Peruvian Peoples, Environment and Ecology of the Peruvian Congress urged the Constitutional Court to recognize and respect the right to prior consultation. In this letter she highlights the concern generated by this decision of the Court because it collides with the Constitutional Court's own jurisprudence.

In this sense, although the Constitutional Court has been setting precedents on the enforceability of ILO Convention 169 since its entry into force in the country and the recognition of the right to prior consultation of Indigenous peoples, pronouncements such as Judgment No. 03066-2019-PA/TC represent a setback in the recognition of the rights of Indigenous peoples.

#### **IV. CONCLUSION**

Peru has one of the largest Indigenous populations in South America, but it is also one of the most excluded populations in economic, political and cultural terms. For decades, Indigenous leaders have struggled to gain recognition of their collective rights, including the implementation of the ILO Convention 169. Although the ILO Convention 169 was ratified by the Peruvian State in 1995, its implementation began almost two decades later, in 2011, when Congress approved the Prior Consultation Law.



The purpose of Prior Consultation Law is to promote the establishment of agreements between the State and the Indigenous peoples, in relation to legislative and administrative measures that could significantly affect their lives. The regulation of the law defines that the "administrative measures" subject to consultation are the regulatory norms of general scope, as well as the administrative act that authorizes the initiation of the activity or project insofar as they may directly affect the collective rights of Indigenous peoples.

The state entity that is responsible for the consultation process is the Ministry of Culture, who must coordinate all public policies related to the implementation of this right. The final decision regarding the approval or disapproval of any legislative or administrative measure is in the hands of the State.

Although, after more than 10 years of implementation of the Prior Consultation Law, there is still a demand for its content to be in line with international standards that have been moving towards greater and better protection, there is broad recognition by the various social, economic and political actors of its existence and importance for the sustainability of public decisions.

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