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Free Prior Informed Consent (FPIC) in the mining sector

Solution-oriented approaches from Canada and their implications for strengthening Indigenous Peoples' right to consultation in Chile and Peru

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Abbreviations and Acronyms

AIASC	Aymara Association Salar de Coposa – Chile
BGR	Bundesanstalt für Geowissenschaften und Rohstoffe – Germany
BCEAO	British Columbia Environmental Assessment Office
C169	Indigenous and Tribal Peoples Convention, 1989 (No. 169)
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CCPR	United Nations Human Rights Committee
CERD	United Nations Committee on the Elimination of Racial Discrimination
ECLAC	United Nations Economic Commission for Latin America and the Caribbean
CONADI	National Corporation for Indigenous Development – Chile
DP	Defensoría del Pueblo (National Human Rights Institution) – Peru
DGA	General Water Directorate – Chile
DGAAM	General Directorate of Mining Environmental Affairs of the Ministry of Energy and Mines – Peru
DGM	General Directorate of Mining – Peru
DREM	Regional Directions for Mining – Peru
EAP	Environmental Assessment Panel, Voisey's Bay project – Canada
EIA process	Environmental impact assessment process, the full cycle from before the drafting of an environmental impacts study to its subsequent review by environmental authorities until the decision on environmental license
EID	Environmental impact declaration – Chile and Peru
EIAS	Environmental impact assessment study (Canada, Chile and Peru)
EIS-d	Detailed environmental impact assessment study – Peru
EIS-sd	Semi-detailed environmental impact assessment study – Peru
FPIC	Free, Prior and Informed Consent
I/A Court H. R.	Inter-American Court of Human Rights
IAAC	Impact Assessment Agency of Canada
IBA	Impact and Benefit Agreement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMM	International Council on Mining and Metals
IWGIA	International Work Group for Indigenous Affairs
IEPP	Indigenous Engagement and Partnership Plan – Canada
ILO	International Labor Organization
INDH	Instituto Nacional de Derechos Humanos – Chile
INGEMMET	Geological Mining and Metallurgical Institute – Peru
JBNQA	James Bay and Northern Quebec Agreement – Canada
KAM	KGHM Ajax Mining – Canada
KEQC	Kativik Environmental Quality Commission – Canada
LIA	Labrador Inuit Association – Canada
MinCul	Ministry of Culture – Peru
MINEM/MEM/EM	Ministry of Energy and Mines – Peru
MMinería	Ministry of Mining – Chile
MoU	Memorandum of Understanding – Canada
MVMA	Mackenzie Valley Resource and Management Act – Canada
INCO	Vale Inco Newfoundland and Labrador, VINL – Canada
ONAMIAP	Organización Nacional de Mujeres Indígenas Andinas y Amazónicas del Perú
OPIP	Organización de Pueblos Indígenas de Pastaza – Ecuador
OEFA	Agency for Environmental Assessment and Enforcement – Peru
QBSA	Compañia Minera Teck Quebrada Blanca S.A. – Chile
SCC	Supreme Court of Canada
SD	Supreme Decree

SEA	Environmental Impact Assessment Service – Chile
SEIA	Environmental Impact Assessment System – Chile
SENACE	National Service of Environmental Certification – Peru
SERNAGEOMIN	National Geological Survey – Chile
SSN	Stk'emlúpsemc te Secwépemc Nation – Canada
RCA	Resolution of Environmental Qualification – Chile
UN DESA	United Nations Department of Economic and Social Affairs
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VBNC	Voisey's Bay Nickel Company
VMI	Viceministry for Intercultural Affairs – Peru

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Foreword

The debate on Indigenous Peoples' right to consultation and the principle of free, prior, and informed consent (FPIC) has taken a central place in the discourse on development and mining and the design of responsible supply chains. How do responsible mining practices that respect indigenous rights look like?

More than 42 million self-identified Indigenous Peoples live in Latin America, making up about 8% of the population. Despite the efforts to promote their visibility and political participation, Indigenous Peoples still represent 14% of the poor population of Latin America.[1] Since the ages of colonialism, Indigenous peoples continue to face multiple and intersecting forms of discrimination and violence that negatively impact their livelihoods and rights.[2]

Over the past decades, several instruments within the international human rights system were developed and interpreted to address these histories of dispossession and discrimination. Among the most important ones are the ILO Indigenous and Tribal Peoples Convention (C169), adopted in 1989, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) from 2007. The principle of free prior informed consent, most explicitly articulated in UNDRIP, is a crucial safeguard to protecting indigenous rights. FPIC is grounded in the rights to self-determination and to be free from racial discrimination, both guaranteed by core human rights treaties. According to the second UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, extractive activities should never be carried out within the territories of Indigenous Peoples without their free, prior, and informed consent. [3]

More than thirty years after the adoption of C169, and more than ten years after passing UNDRIP, the operationalization of FPIC in the mining sector is – as various UN human rights bodies have documented – still contested. Similarly, the implementation of the right to consultation, enshrined in C169 and UNDRIP, continues to face challenges in the mining sector. The absence of rights-based regulatory mechanisms encourages contradictory interpretations of nearly all FPIC dimensions. This 'regulatory gap' is not only about the procedure of consultations but about a general lack of clarity and consensus on the meaning, scope, and mechanisms for operationalizing FPIC. Throughout the mining cycle, which measures and projects need to undergo consultation and which require consent? Who exactly must be consulted and/or express consent? When should consultations take place? More controversially, what exactly does "consent" mean for Indigenous Peoples and mining stakeholders, and how should it be sought and expressed? Finally, what are the consequences in cases which Indigenous Peoples withhold their consent in the context of mining projects?

Indigenous Peoples, public officials, and companies often have very different answers to these questions. Conflicts over land rights and the use of natural resources have led to violence against Indigenous Peoples on the one hand, and costly litigation, delays, suspension or even termination of mining projects on

[1] See Freire, G. S.; Schwartz Orellana, S. D.; Zumaeta Aurazo, M.; Costa, D.; Lundvall, J. M.; Viveros Mendoza, M. C.; Lucchetti, L. R.; Moreno, L.; Sousa, L. . 'Indigenous Latin America in the twenty-first century : the first decade', World Bank Group, 2015.

[2] See International Work Group for Indigenous Affairs (IWGIA). 'The Indigenous World 2020', IWGIA, 2021.

[3] See the report by the second Special Rapporteur on the rights of indigenous peoples, James Anaya, in its 2013 report, UN Doc. A/HRC/24/41 of 1 July 2013.

the other.[4] However, as past UN Special Rapporteur James Anaya noted: "Despite such negative experiences, looking towards the future, it must not be assumed that the interests of extractive industries and Indigenous Peoples are entirely or always at odds with each other."[5]

This study analyses solution-oriented approaches to implementing consultation and FPIC and evaluates the extent to which such approaches can provide some impulse in regions struggling with high numbers of mining conflicts. "Solution-oriented" approaches are defined as those that approximate international standards grounded in the right to self-determination and that have proven to work in practice. This study does so by empirically examining consultation processes, conflicts, and solution-oriented examples, drawing on case studies from Canada, Chile, and Peru.

Chile and Peru are the world's two top copper producers and are key producers of gold, silver, molybdenum, zinc, and lithium, among other minerals. With mining contributing 10.2% (Chile) and 9.3% (Peru) to each country's GDP in 2019, their economies are highly dependent on maintaining an active mining industry.[6] Strengthening the mining sector is a pillar of both countries' economic development agendas – even more so in the wake of the Covid-19 pandemic. Both countries' governments are positioning their mining industries as engines for economic reactivation and recovery. At the same time, both countries experience high levels of conflicts around Indigenous Peoples' rights in the context of mining and accelerated mining development may exasperate existing tensions. More so in the context of strong global demand for mining products from these two countries. In 2019, 30% of Germany's copper imports came from Peru, 17% from Chile.[7]

While Canada has not yet ratified C169, it has a long history of treaty-making with Indigenous Peoples. In Canada, Indigenous rights, including those recognized in treaties and land claim agreements, are constitutionally protected since 1982. Some provinces reference UNDRIP in their regulations, for example British Columbia's Environmental Assessment Act. Canada is one of the few countries worldwide where solution-oriented approaches to FPIC can be found. This is, however, not to say that indigenous rights always were or currently are respected in Canada.[8] Mining conflicts with indigenous communities also exist in Canada, and there are documented cases in which Canadian companies abroad are associated with the violations of indigenous communities' rights in host countries.[9]

4 This is not only an issue in Latin America, but occurs worldwide, including regions such as North America. See, e.g., Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 255 F.Supp.3d 101 (D.D.C. 2017); and Ktunaxa Nation v. British Columbia, 2 S.C.R. 386 (2017).

5 See above, note 3.

6 See ECLAC. 'Chile: National Economic Profile, CEPALSTAT. Databases and Statistical Publications', at: https://estadisticas.cepal.org/cepalstat/Perfil_Nacional_Economico.html?pais=CHL&idioma=english; ECLAC 'Peru: National Economic Profile, CEPALSTAT. Databases and Statistical Publications', at: https://estadisticas.cepal.org/cepalstat/Perfil_Nacional_Economico.html?pais=PER&idioma=english.

7 See BGR. 'Rohstoffsituation 2019', 2020.

8 See the report by the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada, UN Doc. A/HRC/38/48/Add.1 of 23 April 2018.

9 A. Kassam, 'Guatemalan women take on Canada's mining giants over 'horrific human rights abuses'', The Guardian (13 December 2017), see at: https://www.theguardian.com/world/2017/dec/13/guatemala-canada-indigenous-right-canadian-mining-company.

Due to its historical, socio-economic and legal-administrative features, and the multiple formats for recognizing indigenous land rights, notably treaties and land claim agreements, the conditions in Canada for mining and Indigenous Peoples' rights strongly differ from those in Chile and Peru. Yet, looking at Canadian cases may provide valuable insights even for starkly different contexts. This is because they show that empowering Indigenous Peoples and securing their land and participation rights are mutually enforcing factors that facilitate the operationalization of FPIC.

This study is organized as the following: Chapter 1 seeks to clarify what a human rights-based approach to free, prior and informed consent implies. It identifies the requirements set by UNDRIP, C169 and the jurisprudence of the Inter-American Court of Human Rights (I/A COURT H. R.) regarding whom to consult, when and how consultation shall take place, whether consent is necessary, and what to do if consent is withheld. These international standards are compared to industry standards and Good Practice Guidelines, taking the International Finance Corporation's Performance Standard 7 on Indigenous Peoples (2012), the International Council on Mining and Metals' Position Statement on Indigenous Peoples (2013) and their corresponding implementation guides as example. To see how Indigenous Peoples themselves operationalize consultations and FPIC, two examples of indigenous protocols are presented. Chapter 2 examines how the Chilean and Peruvian legal framework formally regulate consultations within the mining sector and which challenges remain for implementing FPIC in line with international standards. Chapter 3 presents a disaggregated overview of the conflicts and lawsuits that occurred over the past decade in Chile and Peru related to consultations and FPIC in the context of the mining sector. These reviewed mining conflicts and judicial proceedings were/are associated in varying degrees to the questions of who to consult, when, how, and what to do if consent is withheld. Taken together, chapter 2 and chapter 3 help identify which "problem zones" are the most urgent in Chile and Peru. Drawing from Canadian examples, chapter 4 examines solution-oriented cases for the operationalization of consultations and FPIC in practice. Taking the Voisey's Bay project, the Sivumut project, the KGHM/Ajax mine and the NICO project as case studies, it presents which measures triggered consultation and consent, who was consulted, when and how consultation took place, and what was done if consent was withheld. Chapter 5 recommends measures that the German development cooperation and similar international cooperation agencies can take to strengthen the implementation of FPIC in the mining sectors in Chile and Peru.

The primary objective of this study is to serve as a collection of resources for government, industry and international cooperation stakeholders, providing empirical disaggregated information on the questions of which measures require consultation and consent (TRIGGERS), whom to consult (WHO), when (WHEN), and how (PROCEDURE), and what to do if consent has not been forthcoming (OUTCOME).

1. International standards, industry standards and indigenous protocols

This chapter provides a comparative overview of the international standards, industry standards and indigenous protocols, examining how they define what triggers consultations and FPIC, whom to consult, when and how consultation shall take place, whether consent is necessary, and what to do if consent is withheld.

First, this chapter analyses FPIC requirements as set by UNDRIP, C169 and international jurisprudence of the I/A COURT H. R. What is the international minimum benchmark in terms of implementing FPIC, and which questions remain unregulated or legally undefined? Secondly, the chapter compares the international legal framework to industry standards and good practice guides for FPIC, taking the International Finance Corporation's Performance Standard 7 on Indigenous Peoples (2012), the International Council on Mining and Metals' Position Statement on Indigenous Peoples (2013) and corresponding implementation guides as examples. What are the main differences between the international legal framework and these industry standards? How do industry standards operationalize international standards? Thirdly, the chapter introduces indigenous protocols as frameworks that can guide the implementation of FPIC.

1.1 International FPIC standards within the international human rights system

International human rights law seeks to guarantee Indigenous Peoples' physical and cultural survival, which is strongly tied to their land and resources use. Although not legally binding, UNDRIP exercises influence as soft law and is being considered the "most comprehensive international instrument on the rights of Indigenous Peoples".[10] In 2007, the majority of 144 States voted in favor; there were 4 votes against (Australia, Canada, New Zealand, USA) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Between 2009 and 2010, the four countries that initially voted against it also endorsed UNDRIP.

As an international convention, C169 is legally *binding* for all States that have ratified it.[11] I/A COURT H.

[10] UN DESA, 'United Nations Declaration on the Rights of Indigenous Peoples', United Nations, see at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

[11] Up to June 2021, C169 has been ratified by and is in force in the following 23 countries: Argentina, Plurinational State of Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and the Bolivarian Republic of Venezuela, see at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314.

R. jurisprudence is legally binding for all OAS member States that have ratified the American Convention of Human Rights.[12] Through its jurisprudence, the I/A COURT H. R. has developed the contents and scope of the right to prior consultation and FPIC, as well as other indigenous rights (e.g., land and the use of natural resources). The I/A COURT H. R.'s arguments are mostly based on the American Convention of Human Rights, but have also considered C169, as well as other core human rights treaties.[13] An overview of the international sources and standards on prior consultation and FPIC can be found in Annex 1.

TRIGGERS

UNDRIP affirms that Indigenous Peoples have the right to participate in decision-making in matters that would affect their rights (art. 18). It also stipulates that States need to consult indigenous peoples with the objective to reach consent 1) "before adopting and implementing legislative or administrative measures that may affect them." (art.19) and 2) before approving any "project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (art.32). Consent is explicitly required for 3) measures that would imply the relocation of Indigenous Peoples– which is also only possible after reaching a compensation agreement (art. 10), and 4) measures that would involve the storage or disposal of hazardous materials in the lands or territories of Indigenous Peoples (art. 29).

According to C169, States need to consult Indigenous Peoples "with the objective of achieving agreement or consent" 1) "whenever consideration is being given to legislative or administrative measures that may affect them directly" (art.6), and 2) before undertaking or permitting any programs for the exploration or exploitation of resources pertaining to their lands (art. 15). C169 mandates the requirement of obtaining consent explicitly for relocation of Indigenous Peoples from their lands (art.16).

The I/A COURT H. R. specifies that States can only award exploration and exploitation concessions within indigenous territories if those concessions serve the public interest and do not compromise the cultural and physical survival of the Indigenous Peoples at stake. To protect the unique relationship of Indigenous Peoples with their territory and thus, ensure their survival as Indigenous Peoples, the I/A COURT H. R. establishes that the State must comply with three safeguards when awarding concessions on indigenous territories. For any development, investment, exploration or extraction plan – including proposals to grant mining concession – within indigenous territories, the State must assure:

1) the effective free, prior, informed consultation of Indigenous Peoples of measures affecting them;
2) that environmental and social impacts are assessed before awarding any concession;
3) that Indigenous Peoples receive a reasonable benefit from the project (Saramaka People v Suriname, art. 129 - 137).

The I/A COURT H. R. established that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka People, but also to obtain their free, prior, and informed consent, according to their customs and traditions" (Saramaka People v Suriname, art. 134).[14]

[12] According to the records of the General Secretariat of the Organization of American States, up to March 2021, the American Convention on Human Rights has been ratified by Argentina, Barbados, Plurinational State of Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Surinam, Uruguay and the Bolivarian Republic of Venezuela, see at: https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

[13] The I/A COURT H. R. also takes into account interpretations developed by corresponding UN human rights treaty bodies. For instance, the Committee on the Elimination of Racial Discrimination (CERD), monitoring the implementation of the UN Convention on the Elimination of All Forms of Racial Discrimination, has interpreted that Indigenous Peoples should be consulted comprehensively on matters that affect their land or territories, or their natural resources. See CERD. Lars-Anders Ågren et al. v. Sweden. Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 54/2013, UN. Doc. CERD/C/102/D/54/2013 of 26 November 2020.

[14] "This is based on the reasoning that communities likely experience significant social and economic changes by large-scale developments that likely lead to, e.g. loss of traditional lands, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence." U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, supra note 97, p. 2. Quoted in I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007, Series C No. 172.

However, the I/A COURT H. R. does not define what precisely constitutes a "large-scale" or a "major impact". Mining projects can fall under that category, as the I/A COURT H. R. decision quotes the CERD's argument that: "[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of Indigenous Peoples. The Committee therefore recommends that the prior informed consent of these communities be sought".[15]

Besides international treaties and jurisprudence, UN treaty bodies also provide guidance for understanding what triggers consultation and requires consent. On the necessity of consent, the UN Human Rights Committee in the case of Angela Poma Poma v. Peru considered that "the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process" and that effective participation in the decision-making process "requires not mere consultation but the free, prior and informed consent of the members of the community".[16]

WHO

There is no internationally agreed upon definition of Indigenous Peoples, although the term "indigenous" has been used broadly in international human rights law.[17] While not explicitly defining who "counts" as "Indigenous Peoples" or who exactly shall be consulted, UNDRIP establishes that Indigenous Peoples have the right to self-determination, and "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (art.3). UNDRIP furthermore underlines that "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures" (art. 33.2). In that regard, self-identification serves as the preferred criterion to determine which collectives are Indigenous Peoples.[18]

The question of whom to consult is, at its core, the question of who counts as indigenous and which territories are considered to belong to Indigenous Peoples–, which lands they traditionally own, use, and occupy. C169 identifies as Indigenous or Tribal Peoples all peoples whose conditions are socially, culturally, and economically distinct, who are ruled by their own social, economic, cultural and political institutions, and who descent from the populations which inhabited the country or region before colonialization (art. 1.1). Furthermore, as Indigenous Peoples are considered those who self-identify as indigenous or tribal (art. 1.2). Much of the I/A COURT H. R.'s reasoning revolves around whether or not the Indigenous Peoples in question are collective right holders, have a special relationship to their ancestral territories, and which collective property rights derive from that.[19] Such special relationship may include traditional uses or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or harvesting; use of natural resources associated with their customs or other elements inherent to their culture.[20]

15 CERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty second session, 2003), U.N. Doc. CERD/C/62/CO/2 of 22 September 2008, June 2, 2003, para. 16; quoted in: I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007, Series C No. 172.

16 CCPR. Human Rights Committee, Ángela Poma Poma v. Peru, Communication no. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006 of 24 April 2009.

17 BGR, 'Human Rights Risks in Mining. A Baseline Study', 2016, p. 11. OHCHR. 'E-learning tool on the rights of indigenous peoples. Module 1. Understanding and applying the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)', 2021. Available at: https://www.ohchr.org/EN/Issues/IPeoples/Pages/E-learningIP.aspx

18 Tomaselli, Alexandra, 'Indigenous Peoples and their Right to Political Participation', 2016, p. 39, Nomos.

19 In Case of Kichwa Indigenous People of Sarayaku v. Ecuador, the I/A COURT H. R. finds that the Kichwa group of Sarayaku is a collective right holder, the group, not its individual members, hold the right to consultation. Given the collective nature of the right to consultation as well as other rights enshrined in ILO 169, and that this convention applies also to tribal people, the issue of consulting afro-tribal peoples has arisen. In Colombia, the Constitutional Court has recognized the right of Afro-Colombian tribal peoples to prior consultation on mining projects (Mandé Norte case). In Chile, law 21.151 gives legal recognition to the tribal people of Chilean afro-descendants. In Peru, the legal recognition of Afro-Peruvian collectives was tabled in Congress. However, consultation of Afro-Chilean and Afro-Peruvian tribal peoples lies beyond the scope of this study.

20 See I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 148.

C169 defines indigenous territories as lands that Indigenous Peoples traditionally occupy (art. 14). Neither C169 nor the I/A COURT H. R. jurisprudence define how to identify the extension and boundaries of the claimed ancestral territories because this lies within the competence and autonomy of States. The I/A COURT H. R. often refrains from establishing the real extension of indigenous territories, holding that participatory maps are not sufficient proof. The I/A COURT H. R. often takes the areas that the State officially assigned to the Indigenous Peoples in question as a first reference point, without saying that this would be conclusively the true extension.[21] C169 establishes that governments must take the necessary steps to identify indigenous territories and guarantee the effective protection of Indigenous Peoples' rights of ownership and possession (art.14). The I/A COURT H. R. specifies that States must delimit, demarcate, and grant collective title over the territory of indigenous communities – having property rights is meaningless unless physically established and demarcated.[22] States must install an effective and clear procedure that establishes what steps Indigenous Peoples shall take to request demarcation and titling of their collective property. The State must carry out that delimitation, demarcation and titling of indigenous territories, by consulting with Indigenous Peoples in question and without prejudice to other tribal and indigenous communities. Unless indigenous territories have been delimited, demarcated and titled, no concession can be awarded within that territory, exempt when Indigenous Peoples have given their free, prior, informed consent.[23]

WHEN

According to UNDRIP, States must always consult prior to implementing, adopting or approving the above mentioned measures (legislative or administrative incl. project authorizations), that is, before granting any mining titles or permits in cases in which these would affect Indigenous Peoples and their lands. C169 mandates that States must consult prior to considering, undertaking or permitting any of legislative or administrative measures of programs that affect or pertain to indigenous lands (art. 6).

The I/A COURT H. R. holds that Indigenous Peoples must be consulted at the early stages of any development or investment plan. The I/A COURT H. R. also explicitly states that consultations must occur prior to any exploration project that may affect indigenous territories.[24] In the case pertaining to this ruling, a company had obtained a concession for non-metallic mineral exploration for 10 years, covering parts of property titles granted to an indigenous community.[25] The I/A COURT H. R. argued that "said concession expressly authorizes the company to use the subsoil and to carry out mining, geological, geophysical activities and other works in the concession area. In this sense, the Court considers that due to the purpose of said concession, it could directly impact the territory of the Community in its following phases, throughout the 10-year period in which it was granted. This situation, in the specific case, would require a prior consultation with the Community".[26]

UNDRIP, C169 and I/A COURT H. R. jurisprudence derive the obligation of consulting on a specific measure or project from the potential impact it may generate on protected rights. Regarding the need of consultation before issuing mining concessions, the assumption is that such measures impact rights. Thus, Indigenous Peoples as right-holders must be consulted. However, this assumption is questioned legally and politically. In most Latin American jurisdictions, a mining concession does not grant any permits or warranties for developing a project nor does it grant, formally, rights over the land it covers. However, I/A

21 See I/A Court H.R., Case of the Community Garifuna Triunfo de la Cruz and its members v. Honduras. Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 305.

22 See Yakye Axa Indigenous Community vs Paraguay, Judgement of June 17, 2005, art. 143, Garífuna Community of Punta Piedra and its members vs Judgement of October 8, 2015, art. 169; Kaliña and Lokono Peoples vs Suriname, Judgement of Nov 25, 2015, art. 133. I/A Court H.R., Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400.

23 See I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79.

24 I/A Court H.R., Case of the Garífuna Punta Piedra Community and its members v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304, para. 218.

25 Ibid.

26 Ibid.

COURT H. R. and international soft law such as the reports by the former UN Special Rapporteur suggest that in practice, a concession infringes on Indigenous Peoples' land rights. This tension between domestic law and international standards on mining concessions is a key point of contention related to FPIC.

PROCEDURE

According to UNDRIP, consultations must be undertaken in "good faith" and with the objective to obtain the free, prior and informed consent of Indigenous Peoples through the Indigenous Peoples' representative institutions. C169 holds that consultations should take place "through appropriate procedures and in particular through their [peoples concerned] representative institutions" and "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures" (art. 6). Peoples concerned "shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly" (art. 7), and, whenever appropriate, studies should be carried out, "in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities" (art. 7). If the State owns mineral or sub-surface resources or rights to other resources pertaining to lands, consultations should be carried out "with a view to ascertaining whether and to what degree their [peoples concerned] interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities" (art. 15).

The jurisprudence of the I/A COURT H. R. establishes with most precision how an appropriate consultation should look like. This is because most cases revolve around the question of whether a given consultation was appropriate according to C169 and human rights law. In the case of Kichwa Indigenous People of Sarayaku v. Ecuador, the Court ruled that an appropriate consultation in compliance with international standards must be: 1) prior 2) in good faith with the objective of reaching an agreement, 3) adequate and accessible, 4) based on social and environmental impact assessments, and 5) informed. The ruling provides for each point a paragraph explanation of its meaning.[27] To be in good faith means, for instance, that the consultation follows a demonstrated intention to consider and respect Indigenous peoples concerns, that it is free from coercion and corruption and without undermining the social cohesion of indigenous communities by, for instance, disrespecting the political organization of Indigenous Peoples or trying to establish parallel leaders. Adequate and accessible consultations mean culturally appropriate procedures that respect indigenous customs and traditions and indigenous decision-making processes and internal organization.

The requirement of social and environmental impact assessments prior to granting permits for the exploration and extraction of natural resources is established in Saramaka People v Suriname. In that case, the I/A COURT H. R. decided that the State had violated the Indigenous Peoples' right to property by granting logging and gold-mining concessions without performing prior social and environmental assessments, without consulting with the Saramaka Indigenous Peoples, and without guaranteeing their participation in benefits. Social and environmental impact assessments must be performed by independent and technically capable entities, with the State's supervision.[28] In Kichwa Indigenous People of Sarayaku v. Ecuador, the I/A COURT H. R. argued that "[t]he purpose of these studies is not [only] to have some objective measure of the potential impact on the land and the people, but also [...] to ensure that members of the community [...] are aware of the potential risks, including environmental and health risks," so that they can decide whether to accept the proposed development or investment plan "knowingly and voluntarily".[29]

The mere public presentation of an environmental management plan does not count as proper consultation.[30] Consultations should furthermore be a continuous dialogue and information exchange, that is:

27 I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 177-211.

28 I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 129

29 I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 205.

30 I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, paras. 177-211.

a process, not a one-time event. As established in the safeguards, Indigenous Peoples must also receive appropriate benefits from the project.[31]

OUTCOME

UNDRIP, C169 and the I/A COURT H. R. underline the essential importance of consent as an objective that must be pursued by States before adopting measures that would directly affect Indigenous Peoples' rights. UNDRIP does not specify what shall happen if these consultations were to result in Indigenous Peoples withholding their consent. However, UNDRIP establishes that if indigenous lands have been "confiscated, taken, occupied, used or damaged without their free, prior and informed consent", Indigenous Peoples have the right to redress, either by restitution or through compensations (art.28). On the same topic, C169 mandates that "if Indigenous Peoples do not consent to relocation, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned" (art. 16).

According to the I/A Court H. R., States must adopt "legislative, administrative and other measures necessary to recognize and ensure the right to be effectively consulted or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory" (Saramaka People v. Suriname, 194d). Indigenous Peoples need furthermore to be compensated for the loss of their lands.

1.2 Industry-based standards: IFC and ICMM instruments

Multiple international non-binding initiatives from industries and financial institutions have emerged to ensure that businesses and financial stakeholders respect Indigenous Peoples' rights. The ICMM Position Statement on Indigenous Peoples (2013) and the complementary ICMM Good Practice Guide – Indigenous Peoples and mining (2015), and the IFC Performance Standard 7 on Indigenous Peoples (2012) are among the most prominent initiatives relevant for the mining sector.[32] Whereas States are duty bearers, companies are third parties with the responsibility to respect human rights.[33] An overview of the exact requirements of the ICMM and IFC can be found in Annex 2. The following sections describe main points in which industry standards operationalize and differ from the international legal framework related to FPIC.

1.2.1 Industry standards operationalizing international standards

As to the question of who should be consulted/whom to include in the consultation, the guidance documents of the ICMM and IFC provide indications for a proper methodology, such as undertaking prior research, archival research, ethnographic research, investigating applicable national laws and regulations, and surveys, participatory approaches, and requesting the help of external experts. Both guidance documents state that not only Indigenous Peoples who hold legal land titles should be consulted, but also those who claim lands or have a customary use without legal land titles. Consultations apply also to situations in which Indigenous Peoples do not live anymore on or from their lands, but still have ties to that territory. To respect international standards and to avoid conflict, consultations should also be undertaken if Indigenous Peoples have been previously disconnected or dispossessed from their ancestral lands.[34]

[31] I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, paras. 138-140.

[32] In the Canadian context, the Towards Sustainable Mining (TSM) initiative of the Mining Association of Canada (MAC) is also an important initiative. The TSM FPIC is conceived of as engagement process with goal of achieving support. Indicator 3 aims to confirm that companies are aiming to achieve free, prior and informed consent (FPIC) for impacts on rights before proceeding with development and maintaining it throughout project life. TSM does not specify on how project development should proceed if indigenous community or other Communities of Interest (COI) do not engage with the facility. Participation in TSM is obligatory for members of Canada's mining association; it provides public information on how facilities are performing. It carries no sanctions for weak performance.

[33] See 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 1 et seq.

[34] See ICMM, 'Good practice guide Indigenous Peoples and mining', 2nd ed., 2015, p. 85.

The industry guidance documents also provide insights on the meaning of "significant adverse impact". Both guidance documents state that the perspective of Indigenous Peoples should be taken into account when determining the dimension of the impact: "When assessing potential impacts, it is important that companies address the consequences that Indigenous Peoples themselves consider important and specific in their cultural context".[35] The ICMM Good Practice Guide - Indigenous Peoples and Mining defines "significant" as "important, notable or of consequence, having regard to its context or intensity".[36] "Adverse" means a "harm or detriment that cannot be easily remedied; it is something more than a temporary inconvenience or disruption and cannot be fully mitigated".[37] Both ICMM and IFC specify that consent is necessary if mining projects or activities could impact critical cultural heritage.

If consent is not forthcoming, both ICMM and IFC specify that, to avoid conflicts, any consultation framework should include how Indigenous Peoples define consent as well as agreed upon mediation mechanisms for cases in which disagreements arise. Neither ICMM nor IFC specify any recommendations on what to do if Indigenous Peoples collectively withhold consent. While business companies must act with due diligence in respecting human rights, clarification on the subsequent course of action for companies is deferred to the State, which has the obligation to protect human rights.[38]

1.2.2 Main differences between the international and industry standards

Whereas the international legal framework establishes that consultation must take place prior to granting exploration licenses, the ICMM and IFC guidance documents remain somewhat ambiguous as to when and to what extent consultations should be undertaken in that regard. The ICMM suggests that, to avoid conflict, there should always be an "initial contact" prior to entering indigenous territories,[39] and that "companies may initiate them [baseline studies] earlier if needed (i.e., where there is a risk that exploration activities may damage cultural heritage or potentially adversely affect community health)".[40] The IFC Guidance Note 7 states that in "certain cases it may not be possible to define all aspects of the project and its locations", and that achieving FPIC before approving a project may not be feasible and/or considered meaningful because the determination should be closely related to the defined impacts of a known project.[41] The Guidance Note 7 thus proposes "the appropriate sequencing of achieving FPIC is generally to first agree on key principles through an overall framework, and then consult on specific aspects once designs are further advanced and locations are determined" and suggests agreeing with Indigenous Peoples on a plan that determines the consultation process and next steps.[42]

International law and industry standards may also understand the scale of Indigenous "representative bodies" differently—, for instance, the IFC Guidance Note cites "councils of elders or village councils" as examples for indigenous representation (thus: municipal scale, representing one community). The I/A COURT H. R., however, recognizes whole Indigenous communities as collective subjects of rights. This includes the possibility that Indigenous Peoples' bodies represent a larger scale, such as representing several

35 See ICMM, 'Good practice guide Indigenous Peoples and mining', 2nd ed., 2015, p. 74.

36 See ICMM, 'Good practice guide Indigenous Peoples and mining', 2nd ed., 2015, p. 85.

37 See ICMM, 'Good practice guide Indigenous Peoples and mining', 2nd ed., 2015, p. 85.

38 See 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 1 et seq.

39 See ICMM, 'Good practice guide Indigenous Peoples and mining', 2nd ed., 2015, p. 23.

40 See International Council on Mining and Metals, 'Good practice guide Indigenous Peoples and mining', 2nd ed., 2015, p. 72. The document says: "Baseline studies are usually undertaken at the concept stage as part of an environmental and/or social impact assessment, but companies may initiate them earlier if needed (i.e., where there is a risk that exploration activities may damage cultural heritage or potentially adversely affect community health). Such studies should not be static one-off exercises, but rather updated regularly, particularly when there is a significant change to the scale and/or scope of a project."

41 See IFC Guidance Note 7. Indigenous Peoples. January 1, 2012, GN29.

42 Ibid.

indigenous communities within a province (i.e., Organización de Pueblos Indígenas de Pastaza-OPIP in Sarayaku case which represented 11 associations of Kichwa People of Pastaza).

1.3 Indigenous Protocols

Some Indigenous Peoples have developed their own protocols for free, prior and informed consent, particularly in North America and Latin America, including in Belize, the Plurinational State of Bolivia, Brazil, Canada, Colombia, Guatemala, Honduras, Paraguay, Suriname and the United States of America. These protocols establish how the State and third parties should engage with the communities in order to respect their right to consultation and FPIC. At their core, the protocols lever Indigenous Peoples' right to self-determination to protect other rights such as the right to land and natural resources. Indigenous Peoples in Canada, for example the James Bay Cree, have developed such policies and protocols related to mining. Indigenous Peoples in Chile and Peru have not yet developed protocols specifically for mining, yet Indigenous Peoples in neighboring countries have.

In Argentina, the Atacama and Colla undertook a 2-year process to develop their consultation protocol in the context of lithium extraction – the Kachi Yupi. In 2016, the Argentinian Ombudsman Office issued Resolution DP N° 25/16 officially recognizing the Kachi Yupi protocol, confirming that it aligns with C169 and UNDRIP, and recommending all relevant State agencies to respect it. In Colombia, examples are the consultation and consent protocol of the Arhuaco people in line with their traditional knowledge system, or the protocol of the Embera Chamí communities from the Resguardo Indígena Cañamomo Lomaprieta.[43] In countries such as Brazil and Colombia, judicial and administrative bodies have ordered these protocols to be recognized and followed for ensuring adequate FPIC processes.[44] Indigenous protocols are quite divers – two examples of indigenous protocols illustrate the spectrum of requirements (see Annex 3). Despite their differences, two features of the Kachi Yupi protocol and the protocol of the Arhuaco people stand out in comparison with the international and industry standards: Both Indigenous Peoples specify that activities cannot proceed if they withhold their consent.

[43] The European Network on Indigenous Peoples (ENIP) offers a global database on indigenous protocols. See: https://fpic.enip.eu/en/library/map.

[44] For Brazil, see Biviane Rojas Garzon, 'The Juruna (yudjá) People's protocol: a response to a hard-learned lesson', in: C. Doyle, A. Whitmore & H. Tugendhat (eds.), 'Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights based Engagement', 2019, Infoe, ENIP. For Colombia, see Viviane Weitzner, 'Uninvited 'guests': Harnessing Free, Prior and Informed Consent in Colombia', in the same report.

2. Consultations and FPIC in the mining sector in Peru and Chile

This chapter outlines first, the legal framework for consultations and FPIC within the authorization process of mining projects in Chile and Peru, based on the official legal texts in both countries. Secondly, the chapter summarizes the main challenges of the legal framework and its implementation against the backdrop of international standards. To this aim, this chapter draws on observations made by UN human rights bodies that monitor the implementation of indigenous rights and FPIC, such as the Special Rapporteur on the Rights of Indigenous Peoples and the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR). Two case studies – the consultation for the project Quebrada Blanca Phase 2 in Chile and the parallel consultations for the Apumayo 1 and Apumayo 2 projects in Peru – provide qualitative data on how consultations occur on the ground. These cases were selected after careful consideration of information from experts and stakeholders, academic literature and documents produced by stakeholders, considering the autonomy displayed by some consulted communities during each process, as recorded in available documents. Furthermore, information on the aftermath of the consultation (i.e. judicial proceedings, press reports on conflict and dialogue) was available for both cases, in comparison with other consultations. Additionally, this chapter draws on information from eighteen interviews with Chilean and Peruvian experts and stakeholders, including public officers, indigenous leaders and advisors from civil society organizations.[45]

[45] A total of 52 requests for interviews with indigenous organizations, companies, and national agencies were made by email and phone. Twenty-two responses were received, eighteen of which led to semi-structured interviews.

2.1 Consultations and FPIC in the mining sector in Chile

2.1.1 The legal framework

Chile is a unitary republic where mining and Indigenous Peoples' affairs are regulated at the national level (overview of legal framework listed in Annex 4). There are two types of concessions for the mining sector: exploration concessions and the exploitation concessions.[46] Both types of concessions are granted by a judicial resolution from an ordinary court of justice in a non-contentious judicial proceeding without the intervention of any other authority, except for a technical report issued by the national geologic and mineral service (SERNAGEOMIN for its Spanish name) and the General Treasury of the Republic who collects the necessary fees.[47] The petitioner requesting a concession must specify the geographic coordinates of the requested concession and describe its estimated surface in hectares. After submitting the request for an

[46] The mining concession for exploration is limited to two years, extendable for up to two years. The exploitation concession has indefinite duration. During exploration, the title holder can request an exploitation concession in the same area. Once a concession is granted by the court in final judgement, it must be registered at the Conservador de Minas and published in the mining gazette.

[47] Not all mineral resources can be granted in concession. Among other natural resources, lithium as well as offshore natural resource deposits, or substances of any kind located in areas that, by law, have been classified as important to national security may only be exploited by State-owned companies, through administrative concessions, or by entering into special operational agreements. See N. Eyzaguirre, 'Chile, ICLG Mining Law 2019', 2020.

TABLE A. PRIOR CONSULTATION WITHIN THE STAGES OF THE MINING CYCLE IN CHILE	
Stages of the mining cycle	**Administrative measures consulted**
Acquisition of mining concessions and water rights	None
Early engagement/ Acuerdo Previo	N.A.
Environmental certification for exploration activities	Resolution of Environmental Qualification (RCA), approving or dismissing a project's EIAS. An EIAS is required when the project has important consequences on health, nature, and people).
Exploration activities	
Mine site-design and planning	
Environmental certification for exploitation activities	
Construction and production	
Environmental certification for transportation activities	
Transportation through pipelines and other facilities	
Environmental certification for reclamation operations	
Reclamation	
Closure	None

exploitation concession, the petitioner must request measurement of the petitioned concession *(solicitud de mensura)*, for the approval by the court.[48] Measurement is conducted by engineers or surveyors chosen by the petitioner.[49] Additionally, the petitioner must pay concession fees *(patentes de amparo minero)*.

According to Chile's mining regulation, exploration as well as exploitation concessions grant the titleholder rights over the minerals but not over the surface land. If a granted mining concession covers land owned by a private party, the titleholder can either enter a negotiated lease agreement with the landowner or request a court to order the landowner to lease it in exchange for compensation payments.[50] Such a land easement for mining purposes *(servidumbre minera)* gives the titleholder the right to access and use the necessary surface land. After receiving an exploration or an exploitation concession, a company must then request additional technical permits to begin operations. The key permit for starting mining activities is the environmental license (Resolución de Calificación Ambiental – RCA), which certifies the approval of a project's environmental assessment documents. These documents, submitted by the proposing company, are either an Environmental Impact Declaration (EID) or an Environmental Impact Assessment Study (EIAS).

Sectoral laws and regulations of the mining sector do not refer to prior consultation of Indigenous Peoples. The State's duty to consult is formalized, on the one hand, in Supreme Decree 66 (SD 66) issued by the Ministry for Social Affairs and Development in 2013 (in force since 2014), which regulates the general framework for consultations. On the other, the duty to consult is formalized in the Environmental Act (Law 19.300 of 1994) and its Supreme Decree 40 (SD 40) of 2013, which regulates the environmental assessment process.

The Environmental Act determines which projects must register in the Environmental Impact Evaluation System (SEIA), and whether the project requires an Environmental Impact Assessment Study (EIAS) or only an Environmental Impact Declaration (EID). Citizen participation and indigenous consultations are foreseen only before approval of EIAS, not for EIAD. The Environmental Evaluation Service (SEA), also responsible for conducting the consultations, admin-

[48] SERNAGEOMIN, 'Diagrama de constitución de una concesión de explotación', 2019, at: https://www.sernageomin.cl/wp-content/uploads/2019/01/constituir-una-concesion-de-explotacion-minera.pdf

[49] SERNAGEOMIN, 'Guía de constitución de concesiones mineras de exploración y explotación, 2019, at: https://www.sernageomin.cl/wp-content/uploads/2019/01/Constitucion-concesiones-mineras-Exploracion.pdf.

[50] The need to proof the plausibility of a mining project before ordering a land lease was introduced by national jurisprudence. See A. Anríquez, 'Jurisprudencia (Invisible) sobre servidumbres mineras', Portal Minero, (28 June 2018), p. 485, at: https://www.portalminero.com/display/colu/2018/06/28/Jurisprudencia+%28Invisible%29+sobre+servidumbres+mineras.

isters SEIA. Thus, in the Chilean mining sector, prior consultation of Indigenous Peoples takes place before SEA issues its RCA about a project's EIAS (Table A).

According to SD 40, projects that directly affect Indigenous Peoples and that register in SEIA must be subjected to a process of a good-faith consultation that gives communities the possibility to influence the environmental assessment process. Art. 85 states that:

> *"in the event that the project or activity generates or presents any of the effects, characteristics or circumstances indicated in articles 7, 8 and 10 of this Regulation,*[51] *to the extent that it directly affects one or more human groups belonging to Indigenous Peoples, the Service shall [...], design and develop a process of consultation in good faith, which includes appropriate mechanisms according to the sociocultural characteristics of each people and through their representative institutions, so that they can participate in an informed way and have the possibility to influence during the environmental assessment process".*

Consent is required if projects entail the relocation of Indigenous Peoples (SD 40, art. 7). Additionally, even if not related to mining, art. 29 of Law 19253 (known as Indigenous Law) of 1993 specifies that excavations of indigenous burial sites for scientific reasons also require prior consent from the affected community.

The prior consultation of Indigenous Peoples must be conducted by SEA within its assessment of an EIAS, and before its decision-making about the environmental license (Table A). Mining concessions are already granted at this stage by judicial orders. The granting of the environmental license is one of the last steps before a company can begin proposed operations. Mostly, consultations are conducted within the environmental assessment for the exploitation phase, not for exploration – the latter requiring mostly only an EID, not an EIAS. However, in the case of the Paguanta exploration project, the Supreme Court ruled in 2012 that an EID would not be sufficient and an EIAS with a corresponding indigenous consultation would be necessary.[52]

SD 66 sets different phases of the consultation, from preparatory meetings to the documentation of the consultation and its results determining that each phase should not extend beyond 20 or 25 business days. Nevertheless, mining consultations reasonably have exceeded that timeframe for different reasons, including the necessary coordination and arrangements between SEA and indigenous organizations (see Table B). In practice, a consultation process lasts the necessary period that the EIA process lasts (from one to two years).[53] The institutional design of prior consultation on mining projects, set during the environmental assessment, provides some margin of bargaining for Indigenous Peoples, through meetings with the State and the mining proponent.[54] During the consultation process, the company can provide information to the consulted groups and the State to better appraise the susceptibility of direct impact of indigenous rights.[55] Likewise, mining companies, Indigenous Peoples and the State can potentially convene on adequate measures of prevention, mitigation, compensation, and reparation.

SD 66 as well as SD 40 underline that consultations serve the purpose of giving Indigenous Peoples the possibility to meaningfully influence environmental assessments. However, if no agreement is reached, the State's duty to consult is still fulfilled (SD 66, art. 3; SD 40, art. 85). Agreements formally reached by the company, SEA and indigenous organizations are included

[51] Article 7 of SD 40 refers to the resettlement of communities or significant alterations of local population's traditions and livelihoods, article 8 to locations on or close to protected populations (meaning: indigenous peoples), resources or areas of environmental value, and article 10 to alteration of cultural heritage.

[52] See, in this context, Supreme Court of Chile in the case Rol 11.040-2011, Decision of 30 April 2012.

[53] Interview 01. According to one study ordered for the elaboration of the National Policy for Mining has identified that the speediest consultation took one month and three weeks, while the longest consultation, 28 months and three weeks. See S. Donoso 'Pueblos indígenas', 2020, at: http://www.politicanacionalminera.cl/wp-content/uploads/2020/09/Pueblos-Indígenas-PNM-2050.pdf.

[54] Official documentation of the QB2 consultation show that SEA held 69 meetings with the eight consulted indigenous organizations and communities, plus 15 tripartite meetings that included the company between April 2017 to July 2018. For some of these meetings, Indigenous Peoples submitted documents to identify the impacts on their rights or expressed verbally the negative impacts of the mining activities.

[55] During a consultation process, the company proposes measures to address the impacts on indigenous rights. Consulted Indigenous Peoples review these measures and suggest some improvements or express their dissent. If an agreement on the measures is reached, they are incorporated into the environmental assessment documentation annexed to the RCA.

in the RCA, and afterwards legally enforceable by the Environmental Superintendence (SMA).

TABLE B. STEPS OF THE SEA CONSULTATION PROCESS WITH INDIGENOUS PEOPLES[56]

Art.16 of SD 66 considers 5 stages to the consultation. SEA has distributed methodically the five stages of SD 66 into the following four steps considering the deliverables from each step:

1. Preparatory meetings – Resolution to Initiate the Consultation Process

2. Planning the consultation process – Methodological Agreement between SEA and Indigenous Peoples

3. Internal deliberation of groups belonging to Indigenous Peoples and dialogues that include in some cases the companies – Final Agreement Protocol

4. Systematization of the process – Final Report of the Consultation; Consolidated Evaluation Report or Act detailing possible agreements reached; notification of RCA

2.1.2 Prior Consultation of Quebrada Blanca Phase 2 – Teck, and Aymara and Quechua groups

The mining company and their operations

Quebrada Blanca is a copper mining project in the region of Tarapacá, in the north of Chile. It began operations in 1989[57] and is operated by Compañía Minera Teck Quebrada Blanca S.A. (QBSA), where Teck holds most ownership. Teck is a Canadian company with ICMM membership since 2006. During the year of 2018, Quebrada Blanca produced 25,500 tons of copper.[58]

Quebrada Blanca encompasses an open pit mine and on-site ore processing to produce copper cathodes. In September 2016, Teck submitted its EIAS to the SEIA for the Quebrada Blanca Phase 2 project (QB2). This constitutes a new project on the original mine site that will extend the productive life span of the mine for 25 additional years (from 2022 to 2046), expand the open pit and include new activities such as hypogenic copper and molybdenum reclamation in a new processing concentrator, a desalination plant plus corresponding transportation and closure activities.

Consultation process within the environmental assessment

SEA Tarapacá initiated the review of the EIAS in October 2016, taking into consideration the identification of impacts on indigenous stakeholders proposed by the company.[59] In its EIAS, the company identified that the operations could negatively impact a section of the Coposa saltflat, the Ramaditas archaeological site and other sites of cultural value.[60] Given this information and the knowledge about Indigenous Peoples in the area stemming from a previous consultation conducted by SEA for a previous Quebrada Blanca project, SEA Tarapacá conducted preliminary meetings with Indigenous Peoples to assess potential impacts on their livelihoods and cultural practices.[61] In March 2017, SEA Tarapacá initiated the consultation process of the project QB2, after concluding in Exempt Resolution 15/2017 that the magnitude of adverse impacts justified a consultation.[62]

SEA included in the consultation the following indigenous (Aymara and Quechua peoples) collectives: Aymara group Chiclla; Aymara groups Copaquire and Tamentica (both members of the Aymara Indigenous Community "Hijos de la Tierra"); Quechua Community of Huatacondo; Aymara Association Salar de Coposa (AIASC); Aymara Farming Association of Copaquire;

56 See SEA, '¿Qué es la Consulta Indígena en el SEIA?', N.d., at:, https://www.sea.gob.cl/participacion-ciudadana-y-consulta-indigena/que-es-la-consulta-indigena-en-el-seia.

57 'Fact sheet of Iquique', 2010, at: http://repositorio.uchile.cl/bitstream/handle/2250/111743/carvajal_r.pdf?sequence=1.

58 Consejo Minero de Chile, 'Cifras actualizadas de la minería. Operación de las empresas socias del Consejo Minero. Regiones de Tarapacá y Antofagasta', 2019, p. 19, at: https://consejominero.cl/wp-content/uploads/2019/05/Cifras-actualizadas-de-la-mineria_Abril-2019.pdf.

59 See SEA, 'Exempt Resolution 83/2016', October 3, 2016, at https://infofirma.sea.gob.cl/DocumentosSEA/MostrarDocumento?docId=6e/16/d4772a23d725435719e87e6da3e0ab45450d.

60 See TECK Quebrada Blanca S.A., 'Estudio de Impacto Ambiental. Proyecto Minero Quebrada Blanca Fase 2', 2016, at: https://seia.sea.gob.cl/documentos/documento.php?idDocumento=2131794108; SEA. Exempt Resolution 15/2017, March 3, 2017, para. 8, at: https://seia.sea.gob.cl/archivos/2017/04/05/RE_N_015-2017_Inicio_PCPI_PMQBF2.pdf.

61 See 'Acta Primera reunión artículo 86 GHPPI de Tamentica y Copaquire', October 21, 2016; 'Acta Primera reunión artículo 86 Asociación Indígena Aymara Salar de Coposa', November 3, 2016; 'Acta Segunda reunión artículo 86 GHPPI de Tamentica y Copaquire', November 4, 2016; 'Acta Primera reunión artículo 86 Comunidad Indígena Quechua de Huatacondo', November 15, 2016.

62 See SEA, 'Exempt Resolution 15/2017', March 3, 2017, at: https://seia.sea.gob.cl/archivos/2017/04/05/RE_N_015-2017_Inicio_PCPI_PMQBF2.pdf.

Aymara Association Naciente Collahuasi; Aymara Cultural and Farming Association Quebrada Yacollita y Caya. SEA denied the requested inclusion of six other indigenous collectives into the consultation process after deciding that there was not enough evidence substantiating their claims of direct impact – an inclusion criterion required by the national jurisprudence of Chile.

SEA Tarapacá communicated separately with each consulted indigenous party to begin the process. They agreed on the methodology of the consultation process. After internal deliberations, all indigenous parties except AIASC reached an understanding with SEA. With these indigenous parties, SEA convened tripartite meetings that included the company, which resulted in a protocol of final agreements.

SEA and AIASC signed a disagreement protocol, the contentious issue were the impacts of an access road on the area of Lupeguano, a sacred place for grazing and other cultural activities. AIASC argued that past mining activities conducted by other company had dried local wetlands and affected other territories of the Salar de Coposa.[63]

The negotiations between SEA Tarapacá and AIASC revealed the difficulties of intercultural dialogue. On the one hand, SEA Tarapacá recorded in the public record of the EIAs file that AIASC acted with "bad faith" and "distrust" because it continuously asked for more time to internally assess project information and to discuss with SEA Tarapacá, but that it was not forthcoming with agreements.[64] On the other hand, AIASC noted that the meeting schedules provided by SEA Tarapacá contradicted the working schedule of its assembly members and that it was not receiving the necessary time to assess project information.[65]

Outcome of the process

On 17 October 2018, SEA issued RCA 0074/2018, granting the environmental license to QB2.[66] The consultation report, the agreements and disagreements between the parties, and the voluntary commitments assumed by the company were included in the RCA. After the consultation, SEA Tarapacá presented the consultation results and gathered feedback from the indigenous organizations.[67]

In November 2018, the SMA initiated sanction proceedings against Teck for environmental damage and loss of wetlands. No information available indicates that SMA verified on the ground the level of Teck's fulfilment of consultation agreements. In August 2020, Teck reported that in 2019 it provided financial benefits to the eight indigenous collectives who were consulted, including AIASC.[68]

After the consultation process, nine judicial and administrative requests to invalidate the RCA were submitted "alleging that the impacts had not been adequately addressed during the indigenous consultation process or requesting an additional or expanded consultation".[69] The Evaluation Commission of the Tarapacá Region denied the different petitions in November 2019 and February 2020.[70]

63 See Asociación Indígena Aymara Salar de Coposa. Letter, June 27, 2018, at: https://seia.sea.gob.cl/archivos/2018/07/03/Carta_s_n_AIASC-SEA_290618.pdf.

64 See SEA. Informe Final Del Proceso De Consulta, 2018.

65 See SEA. Informe Final Del Proceso De Consulta, 2018; Asociación Indígena Aymara Salar de Coposa. Letter June 27, 2018, at: https://seia.sea.gob.cl/archivos/2018/07/03/Carta_s_n_AIASC-SEA_290618.pdf.

66 See SEA. Resolution of Environmental Classification 72/2016, September 9, 2016: https://seia.sea.gob.cl/archivos/2016/09/14/Res_0072_RCA.pdf.

67 Interview 01.

68 Teck. 'Extractive Sector Transparency Measures Act - Annual Report', 2019, at: https://www.teck.com/media/ESTMA-Submission-Teck-Resources-Limited-2019.pdf; Teck. 'Economic Contribution Report', 2020, at: https://www.teck.com/media/Teck-2019-Economic-Contribution-Report.pdf.

69 Interview 01; Teck. 'Sustainability report, 2020, at: https://www.teck.com/responsabilidad-es/enfoque-orientado-a-la-responsabilidad/Informe-de-Sustentabilidad-y-Portal-de-Divulgacion/temas-de-materialidad/relaciones-con-las-comunidades/, Comisión Chilena del Cobre. Dirección de Estudios y Políticas Públicas. 'Documento Base Política Nacional Minera 2050. Región de Tarapacá.', 2020, at: http://www.politicanacionalminera.cl/wp-content/uploads/2020/05/2020-04-24-PNM2050-Documento-Base-I-Región.pdf; 'Proyecto chileno Quebrada Blanca 2 enfrenta escollo judicial', Minería Pan-Americana (November 9, 2018), see at https://www.mineria-pa.com/noticias/proyecto-chileno-quebrada-blanca-2-enfrenta-escollo-judicial/; 'Aymaras presentaron recurso por aprobación de minera Quebrada Blanca Fase 2.', Cooperativa (November 11, 2018), at: https://www.cooperativa.cl/noticias/pais/region-de-tarapaca/aymaras-presentaron-recurso-por-aprobacion-de-minera-quebrada-blanca/2018-11-08/111652.html.

70 Francescone, K., Lopez, M. P., and Cuenca, L. 'Análisis del proyecto Quebrada Blanca Fase II', 2020., at: olca.cl/oca/informes/ESP-Quebrada-Blanca-Reporte.pdf.

2.2 Consultations and FPIC in the mining sector in Peru

2.2.1 The legal framework

Peru is a unitary republic where mining and Indigenous Peoples' affairs are regulated at the national level (legal framework detailed in Annex 5). All natural resources (except land) within the Peruvian territory are owned by the Peruvian State, which has sovereignty and eminent domain on its use and deployment.[71] The Peruvian General Mining Act of 1991 introduced a system based on mining concessions under which reconnaissance and prospecting do not require special titles or permits. A single mining concession grants the exclusive right to explore and, if deposits are found, exploit minerals. The petitioner must submit the geographic coordinates of the requested concession, the description of the estimated surface in hectares, the name of the mining concession, and pay applicable fees.

The Geological, Mining and Metallurgical Institute (INGEMMET), through the Directorate for Mining Concessions, is responsible for granting mining concessions for medium and large-scale mines, while Regional Directions for Mining (DREM) grant mining rights for artisanal and small activities.[72] INGEMMET and DREMs are not required to conduct any participatory processes or indigenous consultation when issuing the concessions listed above. However, to begin exploration, exploitation, beneficiation, general works, and transport operations, a proponent who holds a mining concession needs to meet additional requisites related to environmental and other permits.

A mining concession does not grant land rights. When proponents acquire a mining concession, they inevitably also need to gain usage rights over the corresponding surface lands. When land is owned under a private property regime, the proponent may request a land easement *(servidumbre minera)* on the land, for which the affected owner receives a compensation (usually monetary payments).[73] Owners can oppose the easement, in which case the State may settle the dispute. However, the supervisory administrative body of mining concessions *(Consejo minero)* has emphasized that land easements can only be applied if the landowner agrees to settlement. In this context, mining companies seek to negotiate agreements with the landowners on obtaining surface usage and corresponding compensation payments *(Acuerdo previo)*.

Peru is among the few countries worldwide to have a dedicated, statutory law on prior consultation of Indigenous Peoples. Law 29.785 of 2011 (Law on Prior Consultation) and its Regulation (SD 001-2012-MC) incorporate the right of Indigenous Peoples to consultation into the national legislative corpus. According to Law 29.785, the right to prior consultation applies to administrative or legislative measures that directly affect Indigenous Peoples' collective rights, their physical existence, cultural identity, quality of life or development. Thus, national and regional development plans, programs and projects that directly affect these rights must undergo consultation (art. 2).

The Peruvian legal framework does not foresee specific formats for seeking Indigenous Peoples' FPIC to mining activities. The General Mining Act predates the entry into force of C169 in Peru, and Law 29.785, hence adjustments were introduced through sectoral regulations to operationalize consultations in the mining sector. Ministerial Resolution 403-2019-MINEM/DM specifies which administrative procedures of the mining sector are subject to prior consultation. Accordingly, consultations are necessary before:

- Granting or modifying a beneficiation concession (expanding or adding built capacities on new areas)
- Start of exploration activities
- Authorization to start exploitation activities
- Granting or modifying a mineral transport concession (expansion of areas)

Art. 3 of this Ministerial Resolution introduces the possibility of initiating consultations once the request for environmental license (approval of EIAS) applica-

[71] The Peruvian Constitution of 1993 prescribes that: a) the State cannot appropriate land for mining purposes, and b) State cannot participate in the economy.

[72] A framework of specific regulations applies to artisanal and small-scale mining (ASM), including a decrees package for the comprehensive mining formalization process and the Law of Formalization and Promotion of ASM, and complementary regulations and decrees, among others before the DREMs and DGAAM.

[73] Size, frequency and other details of the compensation are negotiated between the parties.

TABLE C. CONSULTATIONS WITHIN THE STAGES OF THE MINING CYCLE IN PERU	
Stages of the mining cycle	**Administrative measures consulted**
Acquisition of mining concessions and water rights	None
Early engagement/Acuerdo Previo	N.A.
Environmental certification for exploration activities	None
Exploration	Directorial resolution to authorize the start of exploration activities
Environmental certification for exploitation activities	None
Mine site-design and planning	N.A.
Construction and production	Directorial resolution to authorize production activities (includes the approval of the mining plan and the construction of landfills)
Environmental certification for transportation activities	None
Transportation through pipelines and other facilities	Directorial resolution to authorize transportation operations (a.k.a. transportation concession)
Environmental certification for reclamation operations	None
Reclamation	Directorial resolution to authorize reclamation operations (beneficiation concession)
Closure	None

ble to the above mentioned activities has been submitted to SENACE for review.[74]

This means, consultations are conducted after the granting of mining concessions and after environmental licensing, but before the final administrative measure allowing the start of mining activities. At the time of writing, no consultations under art. 3 of Ministerial Resolution 403-2019-MINEM/DM had been initiated.

The Ministry of Energy and Mining (MINEM) through its General Office for Social Management (OGGS) carries out the prior consultation process on mining activities, for which it may receive technical advisory from the Vice Ministry for Intercultural Affairs (VMI). Law 29.785 explicitly states that the objective of prior consultations is to seek an agreement or consent through intercultural dialogue (art. 3). During consultations, the MINEM presents information about the project; this may include information from the EIAS, which at this point has already been approved by the environmental certification agency SENACE. In most mining consultations, indigenous parties have expressed their agreement to the administrative measure after a short internal deliberation and without holding a dialogue meeting with the MINEM (Table D, stage 6, for a list of consultations conducted and in process see Annex 7). While the MINEM takes these decisions as expression of consent, it is questionable whether these processes have been 'free and informed' given the short time frame for information activities and internal deliberation (occurring generally on the same day). In addition, international standards are undercut by the fact that article 19 of the Law 29.785 allows for consultation processes to end before the parties dialogue about the consulted measure.

[74] In some exceptional cases, consultation can occur even though the mining company has not acquired the Acuerdo Previo.

TABLE D. STAGES OF THE PRIOR CONSULTATION PROCESS APPLICABLE TO MINING

1. **Identification of the measure to be consulted**
2. **Identification of Indigenous Peoples**
   Preparatory phase informing about the consultation process; elaboration and signing of 'Consultation Plan' between State and indigenous communities.
3. **Public announcement of the measure to be consulted** (max. 120 calendar days for phases 3 to 6)
4. **Information provision** to the indigenous communities about the consulted measure
   The information presented to Indigenous Peoples tends to be about the project in general, not the EIAS specifically. The MINEM may include contents from the EIAS to which it has access.
5. **Internal evaluation** of the measure by the communities (max. 30 calendar days)
   Consultation Minutes documented and submitted by the communities to the MINEM.
6. Optional: **Intercultural dialogue** between the State and indigenous communities
   Signed Consultation Agreements
7. State **Decision**
   State-led final official report of the consultation process

2.2.2 Prior Consultations of Apumayo exploration and exploitation projects in Peru

The mining company and its operations

Apumayo S.A.C., then subsidiary of Aruntani Group S.A.C., is a Peruvian company holding several mining concessions in the districts of Chaviña and Sancos, province of Lucanas, department of Ayacucho in Peru.[75] Since the mid-1990s, it conducts gold and silver prospecting, exploration and exploitation activities in its mining unit Apumayo, a conglomerate of mine sites in Ayacucho.[76] Even though C169 had entered into force in 1995, mining operations were authorized without consultation.

Apumayo S.A.C. and another subsidiary company of the Aruntani Group negotiated compensation agreements with the three local peasant communities to gain access to the indigenous lands. While there is little information about such agreements, one of the few available *Acuerdo Previo* was annexed to the environmental license. This document from 2010 says that the peasant community Para authorized the use of their lands for all mining activities, in exchange for a cheque. Further, it states that the company commits to invest periodically in the community's health, education, nutrition, and economic development after the initiation of exploitation activities.[77] Four years later, a new *Acuerdo Previo* was established for the Ayahuanca area, located on lands of the peasant community Para.

After obtaining the mining concession and securing access to indigenous lands through such agreements with the peasant communities, Apumayo S.A.C. presented a detailed EIAS to the MINEM for exploiting four (later five) open pits and a semi-detailed EIAS for new explorations.[78] The MINEM, at this time still in charge of environmental licenses, approved the EIAS

[75] At the time of the consultation, Apumayo hold mining rights over the following concessions: Grace 5, Grace 6, Tajo Ayahuanca 476, Tajo Ayahuanca 477, Apurimac 41, Apurimac 42.

[76] Since 2013, Apumayo S.A.C. owns the beneficiation plant Apumayo of 326.94 hectares with an installed capacity of 15,000 Metric Tons per day. The beneficiation plant comprises a leaching PAD, rich solution pond, intermediate solution pond, large event pond, a Merrill Crowe beneficiation plant, smelter, cyanide destruction plant, civil works, among other components. For more details see MINEM, 'Directorial Resolution 253-2013-MEM/DGM', 'Report 282-2013-MEM-DGM-DTM/PB' and 'Report 285-2015-MEM-DGM-DTM/PB' at: http://mineria.minem.gob.pe/en/directorio_minero/authorized-benefit-plants/.

[77] The System of Online Environmental Assessment of MINEM (SEAL in Spanish) shows one agreement "Acuerdo previo" celebrated in May 2010 with Para community related to the Jispiccahua property, available at: http://extranet.minem.gob.pe/seal.

[78] See MINEM, 'Directorial Resolution No. 352-2013-MEM/AAM'.

and later allowed modifications to expand and redesign exploration and exploitation activities.[79]

Consultation process

After the environmental licensing, Apumayo S.A.C. requested from MINEM two authorizations to start operations: The first, presented in 2015, referred to start the exploration of 102 drilling rigs (Apumayo 1 exploration). The second, presented in 2016, to carry out the modified mining (exploitation) plan and the construction of a landfill, a topsoil dump, a quarry, access routes to each component, and other auxiliary facilities (Apumayo 2 exploitation). The General Directorate of Mining (DGM) granted both authorizations, but as they were two separate administrative measures, each required its consultation. Thus, two parallel consultations were conducted about distinct types of mining projects – one for exploration and one for exploitation– albeit corresponding to the same mining unit.

The MINEM requested technical assistance from the Ministry of Culture (MINCUL) to determine the presence of Indigenous Peoples in the project's area of influence. Through fieldwork, the MINCUL identified three local groups of the Quechuas Indigenous Peoples – the peasant communities Chaviña, Para and Sancos.[80] Based on their location inside what was been defined as 'the direct influence area' of the each project, each consultation process concerned two of the three communities (see Table below). The MINEM excluded one community from each consultation without considering the cumulative impacts of these projects as they belong to the same mining unit.[81] This criterion allowed for one consultation per project, not per stage of the same project.[82]

Apumayo 1 exploration

Included:	Chaviña Peasant Community and Para Peasant Community
Excluded:	Sancos Peasant Community

Apumayo 2 exploitation

Included:	Sancos Peasant Community and Para Peasant Community
Excluded:	Chaviña Peasant Community

The peasant community Para disputed its identification as Indigenous Peoples by MINCUL. MINEM decided to continue with the consultations despite Para's opposition. After the preparatory phase, the Para community assembly decided to abandon both consultations.

The consultation with the community Sancos ended after they agreed to Apumayo 2, only hours after having attended the information workshop. Therefore, the consultation ended without intercultural dialogue between the State and the peasant community. In their written statement, the representatives of Sancos requested environmental protection, the supervision of mining activities and the company's fulfillment of their agreements with the community. One month later, the Defensoría del Pueblo (DP) transmitted allegations that representatives of farms and annexes pertaining to Sancos, but with views different from the representatives who approved the project, had been excluded from the consultation; MINEM denied the claims.[83]

The peasant community Chaviña attended its informative workshop, and then held internal meetings. Three days after the information workshop, they decided not to give consent to the exploration activities of Apumayo 1. It then progressed to the dialogue phase with the MINEM. After two sessions of dialogue, Chaviña and the MINEM could not reach an agreement. Chaviña cited, among its several reasons for opposition, the negative experiences with the company's conduct in previous years. During the consultation of Apumayo 1, Chaviña representatives complained that the exploitation project Apumayo 2 would cumulatively and negatively affect their lands and access to water. Therefore, the community emphasized their opposition to any activity implemented by Apumayo S.A.C.

79 See MINEM, 'Directorial Resolution No. 378-2011-MEM-AAM'; 'Directorial Resolution No. 500-2014-MEM-DGAAM'; and 'Directorial Resolution No. 119-2016-MEM-DGAAM'.

80 See VMI, 'Letter 30-2016/DCP/DGPI/VMI/MC', 'Report 000001-2016-JLR/DCP/DGPI/VMI/MC', 'Letter 67-2016/DCP/DGPI/VMI/MC', and 'Letter 129-2016/DCP/DGPI/VMI/MC'.

81 See MINEM, 'Directorial Resolution No. 500-2014-MEM / DGAAM', October 2, 2014; 'Directorate Resolution No. 119-2016-EM / AAM', April 22, 2016.

82 See MINEM, 'Memorandum 1356-2016/MEM-DGM', that quotes 'Memorandum 009-2015-MEM/VMM' that circumscribes the consulted Indigenous Peoples to those peasant communities included in the 'direct influence area' as provided by the environmental licence and excluding other peasant communities. Consultation has been restricted to those peasant communities located in certain areas related to previous stages of the mining cycle to avoid carrying out so many consultation processes as mining stages for the same project are requested.

83 See Defensoria del Pueblo, 'Letter 098-2016-DP/AMASPPI-PPI'.

Throughout the consultation, Chaviña expressed a strong agency in claiming their rights. Chaviña had the technical capacities for identifying environmental impacts, and presenting claims before the environmental enforcement authorities. They also used a human rights-based perspective when engaging with the MINEM.[84] Their representatives had received training on the right to prior consultation with MINCUL, whose staff also assisted them informally during the process.[85] Chaviña had previous experiences in mobilization and community members living in Lima were able to access information as well as lobby public officials.[86] They reached out to other interested parties (local journalists, local *frentes de defensa,* indigenous women national organizations) aligned with their priorities.[87]

Outcome of the process

Despite Chaviña's opposition, the MINEM decided to grant both mining authorizations.[88] In reaction, Chaviña used other means available to enforce their opposition to the projects. It issued two formal requests to the MINEM to deny the authorization of exploration and exploitation operations, emphasizing that the authorizations would unfavorably affect the rights to life and health, and damage the natural resources and shared biodiversity of the three communities.[89] The *Consejo minero,* serving as supervisory administrative body of the MINEM, rejected both requests. Chaviña also denounced polluting activities by the mining company to the environmental officials. The Environmental Oversight Office (OEFA) registered inadequate treatment of acidic water and contaminated areas in the lands of Para community.[90] However, Para denied entry to their territories to the OEFA supervisors. In April 2017, without expanding on the causes, Para representatives communicated to the MINEM their rupture with Apumayo S.A.C. and requested the intervention of the Presidency of the Council of Ministers to avoid social conflicts in the area.[91]

In 2018, several local stakeholders including the Chaviña and Sancos communities requested a revision of the authorization of the exploration project due to the expected negative effects on agriculture, water resources, and on the human rights of the population; which was rejected by the *Consejo minero*.[92]

In November 2019, hundreds of citizens from the districts Chaviña and Coracora, entered the Apumayo compound and protested for three days, denouncing the pollution of water resources by mining activities.[93] Up to the end of 2020, authorities from the region of Ayacucho have requested the protection of rivers and lakes headwaters and the annulment of mining licenses to mining companies located near these water resources, including Apumayo S.A.C.

2.3 Remaining challenges against the backdrop of international standards

1. The first challenge relates to identifying Indigenous Peoples and the protection of Indigenous Peoples' land rights. Both UNDRIP and C169 hold that States must take the necessary steps to identify indigenous lands and guarantee the protection of their rights of ownership and possession. The I/A COURT H. R. determines that States must delimit, demarcate, and grant collective title over the territory of the members of Indigenous Peoples, following their customary laws, and through consultations with the Indigenous Peoples concerned, without prejudice to other tribal and indigenous communities.

Chile: The Chilean Constitution, stemming from the Pinochet dictatorship period, does not mention In-

84 Interviews 03, 04 and 05.

85 Interview 03.

86 Interviews 03, 04 and 05.

87 Interviews 03, 04 and 05.

88 See MINEM, 'Directorial Resolution 0010-2017-MEM/DGM', and 'Directorial Resolution 0014-2017-MEM/DGM'.

89 See Consejo Minero, 'Resolution 559-2017-MEM/CM'.

90 See OEFA, 'OEFA ordena a la minera Apumayo S.A.C. paralizar botadero por inadecuado tratamiento de aguas ácidas', OEFA (20 February 2017), at: http://www.oefa.gob.pe/oefa-ordena-a-la-minera-apumayo-s-a-c-paralizar-botadero-por-inadecuado-tratamiento-de-aguas-acidas/ocac02/.

91 Comunidad Campesina de Para. 'Letter 013-2017/PCCP/CCP'.

92 See Consejo Minero, 'Resolution 310-2018-MEM/CM'.

93 See S. Huamaní, 'Chaviña y Coracora desaloja a los trabajadores de la empresa Apumayo', Youtube (15 November 2019), see at https://www.youtube.com/watch?v=EY6DzMHKxPw. These protests reflect rising tensions after the approval of authorizations to conduct mining activities.

digenous Peoples.[94] Instead, the main legal source for recognition of Indigenous Peoples and their rights is the lower-ranking Law 19.253 from 1993, also known as Indigenous Law (Ley Indígena).[95] According to Law 19.253 (art. 9), indigenous communities are groups of people belonging to the same ethnicity and meeting one or more of the following criteria:

- Belonging to the same family tree
- Recognize traditional authorities.
- Were or are in communal possession of indigenous lands.
- Originate from the same ancestral settlement.

The Indigenous Law establishes the National Corporation for Indigenous Development (Corporación Nacional de Desarollo Indígena – CONADI), responsible for promoting, coordinating, and executing State action in favor of Indigenous Peoples. It provides technical assistance on indigenous affairs to State agencies and, based on the identification criteria specified in Law 19.253, records indigenous communities and associations in the national registry of indigenous communities and associations. Inclusion in the registry requires indigenous organizations to conform a representative assembly, establish a representative board with corresponding statutes, and formally adopt their own organizational rules, which must be signed by a notary.[96] Inclusion in the CONADI registry serves as de facto recognition of a group's indigenous status. Furthermore, Law 19.253 creates the public registry of indigenous lands (art. 15), which is kept by CONADI. Inscription in this registry legally recognizes lands as indigenous and grants them the protections established in art. 13.

The CEACR acknowledges important advances in establishing a mechanism for demarcation, titling and public registration of lands traditionally occupied by Indigenous Peoples. However, this process has yet to be finalized and information on settling land disputes is still missing.[97] CONADI has yet to strengthen its comprehensive monitoring of the legal and indigenous status of lands in mining areas.[98]

Peru: In Peru, the Vice Ministry for Intercultural Affairs (VMI) is responsible for maintaining an Official Database of Indigenous Peoples, which at the time of writing registered 55 Indigenous Peoples. Indigenous Peoples are recognized in the Peruvian Constitution of 1993 and their rights are enshrined in article 89 through references to cultural identity and land rights. Article 89 of the Constitution and ordinary laws divide indigenous populations into two broad groups – native communities and peasant communities. This means that the legal framework incentivizes Indigenous Peoples to adapt their own ancestral social structures and forms of organizing to fit into these two legal formats. Collective rights are granted to native communities and peasant communities recorded as such. While being registered in the Database de facto recognizes the indigenous status of a peasant or native community, absence from it does not negate indigenous status. For this, it draws on four general identification criteria:

- Historical continuity with populations predating the colonialization period
- Connection with territories inhabited by ancestors
- Maintenance of all or parts of their distinct cultural institutions
- Self-identification as indigenous

However, the process of officially registering communities and formalizing their land ownership through land titles is slow. Subnational governments, who are responsible for these steps, lack necessary resources and capacities. It is unclear how to settle disputes over overlapping rights in indigenous lands, territories and natural resources. Additionally, the building of a national registry of indigenous lands still requires work. Furthermore, the VMI lacks resources to complete comprehensive field research and identify Indigenous Peoples among peasant communities in mining areas. Accelerated field visits would be required to close the knowledge gap on indigenous communities among peasant communities.

94 At the time of writing, there are discussions related how to address the issue of constitutional recognition of Chile's indigenous peoples.

95 In May 2019, the Government of Chile began a consultation process to evaluate a possible revision of the Indigenous Law. See CONADI, Consulta indígena. Ley indígena 2019, at: http://consultaindigena2019.gob.cl/

96 See CONADI, 'Inscribirse en el registro de comunidades y asociaciones indígenas', Chile Atiende Platform (11 January 2021), see at https://www.chileatiende.gob.cl/fichas/694-registro-de-comunidades-y-asociaciones-indigenas.

97 CEACR. 'Direct Request (CEACR) Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Chile (Ratification: 2008)- adopted 2018, published 108th ILC', 2019, at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3962690,102588,Chile,2018.

98 Interview 06.

2. Challenges arise from establishing criteria of what constitutes being "directly affected" or the "direct impact" – which both in Chile and Peru is mainly limited to Indigenous Peoples living within the area of direct influence. C169 stipulates that consultations are required when measures may affect Indigenous Peoples directly (art 6), but it does not specify the meaning of such direct impact. Being located within the area of direct influence is a criterion to identify stakeholders, but it is not a sufficient criterion to assess the impact on indigenous rights and to exclude or include an indigenous community in a consultation process. Even less, when the EIAS does not take into account the different relationships between Indigenous Peoples and their lands and natural resources. The importance of a broader understanding of "impact" has been highlighted by former UN Special Rapporteur on the rights of Indigenous Peoples, Victoria Tauli-Corpuz: "The criterion of 'impact' must be flexible and apply whenever a State decision may affect indigenous peoples in ways not felt by others in society. This includes cases of administrative or legislative measures of general application, if those measures could affect indigenous peoples differently in some way given their specific conditions and rights."[99]

Chile: SEA starts identification of potentially affected Indigenous Peoples by looking at the area of direct influence proposed by the company. Subsequently, it may include groups outside that area who may be adversely impacted in their livelihood systems if these communities can present evidence to substantiate their claims.[100] Limiting the identification of who is consulted based on the geographical distance to the mining operations may risk excluding Indigenous Peoples from consultation who are impacted through other relationships they sustain with their territories. For instance, Indigenous Peoples' houses or fields lie outside the area of direct influence. Still, they use them for sustaining their livelihoods, or their cultural practices are connected to areas overlapped by the mining project. Moreover, the environmental assessment process in Chile has limited capabilities to appraise and mitigate *cumulative* environmental impacts of multiple projects in a particular area of intervention or impacts derived from climate change.[101]

Peru: The fieldwork conducted by the VMI is seen by interviewees as an essential advance in producing information on Indigenous Peoples, even if it has been discontinued. For instance, in the case study of Apumayo 2, the data collected by the VMI during the fieldwork provided information about sacred places, the distribution of lands, the relationships with water sources and other relevant information. All this data is essential to assess the direct impacts on indigenous rights but it remains disconnected from the identification of who must be consulted. The key criterion is location within the area of direct influence. Thus, the primary source of information for the consultation process are the EIAS, whose content, already approved by the time of consultation, cannot be adjusted to new evidence on to the project's impacts on collective rights. Furthermore, also cumulative impacts of mining are insufficiently considered.

3. Challenges related to the definition of "direct impact" arise also from the timing of the consultation. International standards require States to ensure that Indigenous Peoples influence decisions that may affect them.[102] The I/A COURT H. R. jurisprudence indicates that Indigenous Peoples "must be consulted [...] at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case". The I/A COURT H. R. has repeated this interpretation in its subsequent rulings. Furthermore, the CEACR considered that "according to [C169] Article 6, the consultation must be consultation, which implies that the communities affected are involved as early on as possible in the pro-

[99] See the report by the third Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, in its 2020 report, Mandate impacts and consultation process, UN Doc. A/HRC/45/34 of 18 June 2020.

[100] SEA, 'Área de influencia de los sistemas de vida y costumbres de grupos humanos en el SEI*', 2020, at: Available at: https://sea.gob.cl/sites/default/files/imce/archivos/2020/03/13/Guia_AI_SVCGH.pdf.

[101] SEA has not issued guidelines addressing cumulative impacts yet. In February 2020, it published a commissioned report which found that 46 of 78 reviewed EIAS considered cumulative impacts in their methodologies. It does not state whether QB2 is among those EIAS. The report finds that Chile has no dedicated regulation on the topic of cumulative impacts and presents different steps for implementing the assessment of cumulative impacts within SEA with or without regulatory/legislative changes. See: SEA. 'La importancia de la evaluación de Impactos Acumulativos', 2020, at: https://sea.gob.cl/sites/default/files/imce/archivos/2020/07/15/2_revista_tecnica.pdf; SEA. 'Informe Final Recomendaciones metodológicas para la evaluación de impactos acumulativos en el Sistema de Evaluación de Impacto Ambiental de Chile', 2020, at: https://sea.gob.cl/sites/default/files/imce/archivos/2020/07/informe_final_consultoria_impactos_acumulativos.pdf.

[102] I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 133.

cess, including in environmental impact studies."[103] The CERD also states that "environmental and social impact studies should be part of the consultation process with Indigenous Peoples. [...] Based on these studies, consultations must be held from the early stages and before the design of the project, not only at the point when it is necessary to obtain approval."[104]

In this regard, the I/A COURT H. R. analyzed in the Garífuna Punta Piedra Community and its members v. Honduras, a mining concession covering part of the margins of community land. Despite the scant overlap, the I/A COURT H. R. ruled that carrying out mining or any other works would generate a "direct impact" on collective rights, and therefore FPIC was required.[105]

Chile: Exploration and exploitation concessions themselves do not require consultations in Chile, based on the argument that concessions would not affect indigenous peoples directly as additional permits are required to authorize the start of the mining project. The CEACR, however, requested Chile "to take the necessary measures (including legislative measures) to ensure that Indigenous Peoples are consulted before concessions are granted for mining exploration or exploitation on lands that they traditionally occupy".[106] Furthermore, consultations within the environmental assessment mostly take place only for mining (exploitation) projects, not for exploration – though there are exemptions, such as in the case of the Paguanta mining project after judicial proceedings. The CEACR also observes that a legal loophole in the application of the right to prior consultation in Chile persists: the granting of mining concessions and the decisions over contested environmental licenses are issued by courts, not through administrative measures. Because they are judicial measures, several decisions by Chilean lower courts have ruled on procedural grounds that concessions and environmental licenses (RCA) do not require any consultation, arguing that indigenous peoples have the right to consultation only before administrative or legislative measures that may affect them.

Peru: Indigenous Peoples do not participate in the decision-making process over the granting of mining concession, which has been observed critically by the CEACR, indigenous organizations, and civil society representatives.[107]

Furthermore, consultations have taken and still take place *after* the termination of the EIA process; the possibility contained in art. 3 of Ministerial Resolution 403-2019-MINEM/DM (see above) has not implemented in practice yet. The DP, being the National Human Rights Institution of Peru, has repeatedly called for consultations to be implemented before mining projects obtain environmental licenses.[108] It has also questioned the scope and cultural adequacy of information provided to indigenous communities during consultation.[109] In a similar vein, the CEARC has observed that consultation phases are conducted in very

[103] See CEACR. 'Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT). Reclamación (artículo 24) - Colombia - ILO 169', 2001.

[104] See CERD. Lars-Anders Ågren et al. v. Sweden. Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 54/2013, UN. Doc. CERD/C/102/D/54/2013 of 26 November 2020.

[105] I/A Court H.R., Case of the Garífuna Punta Piedra Community and its members v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304, para. 219.

[106] CEACR, 'Direct Request (CEACR) Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Chile (Ratification: 2008)- adopted 2018, published 108th ILC', 2019, at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3962690,102588,Chile,2018

[107] CEACR, 'Observation (CEACR) - adopted 2017, published 107th ILC session (2018) Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Peru', 2018, at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3344391; ONAMIAP, #ConsultaPreviaEnEmergencia, "El Estado realiza consulta previa de lo que quiere y a quien quiere". Consulta previa de concesiones mineras: Hoja de ruta: caso paradigmático del derecho a la consulta previa, libre e informada de los pueblos indígenas', Twitter (25 May 2021) at: https://twitter.com/onamiap/status/1397331140541829122; Grupo de Trabajo sobre Pueblos Indígenas de la Coordinadora Nacional de Derechos Humanos, 'Informe Alternativo 2018 Cumplimiento de las obligaciones del Estado peruano del Convenio 169 de la OIT', at: https://dar.org.pe/archivos/publicacion/Informe_Alternativo_2018.pdf.

[108] See Defensoría del Pueblo, 'Report 01-2019-DP-AMASPPI-PPI: El derecho a la consulta previa y la modificatoria del estudio de impacto ambiental del proyecto minero Antapaccay – expansión Tintaya – integración Coroccohuayco', 2019, at: https://www.Defensoría.gob.pe/wp-content/uploads/2019/08/Inf-001-2019-PPI-Consulta-previa-y-EIA-proyecto-Coroccohuayco.pdf.

[109] See Defensoria del Pueblo, 'Report 003-2016-DP-AMASPPI-PPI sobre el proceso de consulta previa del proyecto de exploración minera La Merced', 2016, at: https://cdn.www.gob.pe/uploads/document/file/1191892/Informe-N-003-2016-DP-AMASPPI-PPI-La-Merced20200803-1197146-y5i4qr.pdf.

short timeframes, which could jeopardize effective participation of Indigenous Peoples consulted.[110]

4. Challenges persists in the management of land easements, which often fails to protect indigenous land rights. C169 art. 17 enshrines Indigenous Peoples' collective right to consultation "whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community". The I/A COURT H. R. has ruled that "based on the principle of legal certainty, the territorial rights of Indigenous Peoples must be implemented by the adoption of the legislative and administrative measures required to create an effective mechanism for delimitation, demarcation and titling that recognizes those rights in practice and makes them enforceable before the State authorities or third parties". [111]

Chile: When the surface land is registered as indigenous land and owned by an indigenous community, the mining titleholder formally requires the approval of CONADI to obtain a land easement *(servidumbre minera)*. In practice, however, CONADI as well as SERNAGEOMIN and the courts do not always verify the presence of indigenous lands.[112]

Peru: When the surface land is the property of indigenous communities, mining companies negotiate with the communities to gain access. In practice, negotiations between companies and Indigenous Peoples almost always end in an *Acuerdo previo*.[113] It is important to note that these negotiations generally take place in a context of strong power asymmetries between the negotiating parties. A combination of economic needs, lack of information and promises of local benefits constitute a scenario in which communities may be compelled to sell off their usage rights over their lands.[114] These negotiations do not aim at ensuring Indigenous Peoples' participation in mining decisions – they are not consultations. Furthermore, these negotiations influence the opinion and decision-making processes within the communities *before* project characteristics are known. The agreed upon compensations often serve as entry point for the company to raise economic expectations in contexts of poverty and exclusion from public services.

[110] CEACR, 'Observation (CEACR) - adopted 2017, published 107th ILC session (2018) Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Peru', 2018, at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3344391.

[111] I/A Court H.R., Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, para. 97; I/A Court H.R., Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, para. 133.

[112] N. Yáñez, Molina, R., 'La gran minería y los derechos indígenas en el norte de Chile', 2008.

[113] F. Ramirez-Gaston, 'Las servidumbres mineras, figura obsoleta?', Enfoque Derecho (31 October 2011), at: https://www.enfoquederecho.com/2011/10/31/las-servidumbres-mineras-figura-obsoleta/

[114] M. Huaco, 'Acuerdo previo entre empresas y comunidades viene vulnerando derecho a la consulta previa', Servindi (28 November 2013), at: https://www.servindi.org/actualidad/96972

3. Conflicts related to consultations and FPIC in the mining sector

Chile and Peru witness high numbers of conflicts related to mining. Social conflicts involving Indigenous Peoples are shaped by the historical, socio-economic and political contexts in which indigenous communities experience the development of mining. In the present context, litigation has become a common defense strategy for indigenous communities.

This chapter reviews the landscape of mining-related social conflicts and litigation, systematizing documented conflicts and litigation related to consultation and FPIC in the period between 2010 – 2020 in Chile and Peru. Details of all conflicts and their relation to FPIC are listed in Annex 8. This chapter provides an overview of the linkages between these conflicts and litigation cases, with the questions of who needs to be consulted, when, how and the corresponding outcomes resulting from the consultation. Existing publicly available sources categorize social conflicts differently depending on different definitions of conflict, different classifications of conflict causes and views on whether they explicitly involved Indigenous Peoples. The selection of social conflicts and litigation cases was based on three criteria: a) involvement of Indigenous Peoples and/or indigenous lands, and/or b) Indigenous claims to and/or explicit reference to the right to prior consultation and the principle of FPIC and c) involvement of the mining sector. For reasons of consistency, cases were selected from the official database of Chile's and Peru's National Human Rights Institutions—the Instituto Nacional de Derechos Humanos (INDH) of Chile and the DP of Peru as well as from cases registered at national and sub-national courts. Other sources, such as the Latin American Observatory of Mining Conflicts (OCMAL) and the Environmental Justice Atlas (EJAtlas), include additional cases based on different definitions and methodologies. These two, sources are used to triangulate information on the cases registered by the INDH in Chile and the DP in Peru.[115] Complementary data stems from court documents, newspapers, academic publications, and national and international human rights organizations. This review does not conduct in-depth causal analysis of each conflict and litigation case.

3.1 Conflicts in Chile

In its latest update from February 2020, the INDH registered 22 (latent and active) conflicts linked to mining and indigenous lands, among which 11 cases were identified to relate to FPIC and prior consultations.[116] Additionally, three court cases relate to FPIC and mining, though they are not listed in the INDH as they may not involve social conflict in the sense of mobilizations and protests. The conflicts in Chile can be broadly classified into four different types – recognizing that in most of these conflicts several causes are intertwined.

[115] The EJAtlas county only eight cases of mining-related social conflicts in Peru in total, no clear reference to whether these involve indigenous peoples or not. OCMAL counts eight cases of mining conflicts since 2010 but without reference to whether they involve indigenous peoples. Furthermore, OCMAL refers to consultation as source of conflict but it covers cases where non-indigenous communities demand public consultation and consent. For Chile, the EJAtlas counts 10 cases in total and OCMAL counts 17 since 2010.

[116] INDH, Mapa de Conflictos Socioambientales en Chile, 2020. at: https://mapaconflictos.indh.cl/#/

1. Conflicts related to the procedure of the consultation: for instance, a citizen participation took place, but not an indigenous consultation conducted in accordance with C169.

2. Conflicts related to a lack of consultation: the project was classified as only needing an environmental declaration (not an EIAS) and thus not involving any consultation, or the project was classified as not having "significant impacts" on Indigenous Peoples and therefore consultation did not take place.

3. Conflicts related to the question of who should be consulted: Indigenous Peoples were classified as not living within the area of influence or not being directly affected and thus excluded from the consultation.

4. Conflicts related to the consequences of the consultation: observations by Indigenous Peoples made in the consultation appear to not have been considered or not appropriately addressed in the approval of the environmental license (RCA)

It is important to note that all conflicts emerge due to environmental concerns, in particular water. For instance, Indigenous Peoples often request the annulment or correction of an environmental license together with a renewed consultation, arguing the environmental license fails to consider certain environmental impacts and/or falls short on mitigation measures. These environmental concerns are mostly related to the sustenance of livelihoods, such as agriculture. For details, please consult Annex 8.

3.2 Conflicts in Peru

Since 2004, the DP records the monthly number of social conflicts and their main characteristics. As of April 2021, it recorded 79 mining-related social conflicts. Over the past decade, 22 cases are related to prior consultation and FPIC. Conflicts can be broadly grouped into three different types:

1. Conflicts related to lack of consultation: for instance, conflict is related to the lack of consultation for a mining concession or an environmental license.

2. Conflicts related to EIAS: for instance, communities mistrust the EIAS, arguing that the EIAS does not include the real dimension of impacts. This often goes hand in hand with the claim that EIAS were already finished without allowing for a dialogue or for real influence.

3. Conflicts related to the question of who is indigenous: e.g., communities were not consulted or excluded from consultation based on the argument that they are not indigenous.

Similar to Chile, the sources of conflicts related to consultation and FPIC in Peru are based on socio-environmental concerns, especially concerns about water usage, pollution that would jeopardize agriculture-based livelihoods, the distribution of benefits, and breaches of contracts and agreements between stakeholders. Most of these conflicts are judicialized. Three projects (Yagku Entsa, Atuncolla, Jatucachi) were temporarily paused because of a court ruling in favor of the indigenous petitioners, two projects were halted over administrative ways (St. Ana and Afrodita), and three projects were halted because of social protests (Conga, Tia Maria, Rio Blanco). For details, please consult Annex 8.

4. Toward implementing FPIC in practice: solution-oriented cases from Canada

This chapter presents different empirical cases of consultation and negotiation processes with Indigenous Peoples in relation to mining projects in Canada. The selected cases showcase innovative approaches in which indigenous parties took different paths to participate in decision-making and express – or withhold – their consent. These cases are solution-oriented in the sense that they were carried out in a way that can be considered as approximating international standards of FPIC. They do not constitute "best practice" blueprints; instead, they exemplify the range of initiatives Indigenous Peoples can take, and thus, can provide input on what is possible in practice for improving consultation and negotiation processes with Indigenous Peoples. The cases thus allow to take stock of "where things are at" in terms of implementing FPIC on the ground, and to identify potential leverage points to overcome the challenges to implementing FPIC in accordance with international standards.

The selection of these cases was based on suggestions from renowned experts on indigenous rights in Canada, consultations and IBA negotiations.[117] From a wider set of suggestions, three cases were selected due to availability of information, especially from indigenous sources. In addition, the Voisey's Bay case was selected because it remains influential, referenced by experts and indigenous activists. This chapter draws mainly on case documentation made available by the involved agencies (including letters and statements from indigenous organizations) and information available on the websites of indigenous organizations. Complementary data is drawn from academic literature, grey material, from publications commissioned by indigenious organizations, six interviews with experts and representatives from government agencies as well as written comments received from three stakeholders.[118] The views presented in this chapter do not represent the views of the referenced indigenous organizations.

Canada does not have an official, formally adopted definition or operationalization of FPIC (overview of legal framework, see Annex 9). From a strictly legal perspective, Indigenous Peoples' right to consultation on mining and the principle of FPIC are embedded in:

- the State's duty to consult, which applies everywhere in Canada (can be undertaken by provincial governments) and derives from common law;
- potential consultation requirements under provincial/territorial mining legislation (i.e. Ontario's new Mining Act) and/or under provincial environmental legislation (i.e., British Columbia's new En-

[117] Suggestions were provided by Martin Papillon and Ginger Gibson, the final case selection received positive feedback from Ciaran O' Faircheallaigh and David Szablowski.

[118] A total of seventeen requests for interviews with indigenous organizations, companies and agencies were made by email and phone. Nine responses were received, six of which led to a semi-structured interview. Written comments were received for the Sivumut and NICO cases.

vironment Assessment Act) and federal environmental legislation
- potential consultation requirements provided by historical treaties and land claim agreements signed between Indigenous Peoples and the Crown (details are specific to each treaty).

This chapter describes the four cases, focusing on who was consulted, when, how and what followed from the consultation outcomes. Secondly, the chapter presents main lessons derived from the solution-oriented case studies.

To better understand the Canadian regulatory framework, it is useful to keep in mind some general points about the sources of Canada's legal framework for Indigenous Peoples' rights, consultations and FPIC in the context of mining:

1. Canada is a federal State consisting of ten provinces[119] and three territories[120] with substantial autonomy from the federal government. These **subnational jurisdictions** have their own legal frameworks that coexist and sometimes intertwine.[121] In Canada, **mining activities are largely regulated at the level of provincial/ territorial jurisdictions**, through their respective laws, regulations and case law.

2. Canada also has legal frameworks at the **federal level.** Often, federal laws and regulations on a given topic are complementary to laws and regulation on the same topic at provincial level. For instance, environmental affairs – including Environmental Impact Assessments – are regulated at both federal and provincial level. Other issues fall almost completely within federal jurisdiction, which is the case of **Indigenous Peoples' affairs.**

3. The decisions of the Supreme Court of Canada (SCC) provide guidance to understand the extent of Indigenous Peoples' rights under the Federal legislation and common law. Each new case will define the details of how something is regulated.

4.1 Voisey's Bay project – Innu and Inuit of Labrador

The Voisey's Bay project is an open-pit nickel mine that produces concentrates of nickel, copper, and cobalt in the province of Newfoundland and Labrador.[122] Voisey's Bay Nickel Company (VBNC) staked its mining claims in 1994.

Staking a claim: In all Canadian provinces and territories, mining proponents must have an exploration title that allows them to access the land and conduct exploration activities on the land. To acquire such a title, proponents must **stake a claim.** The level of requirements to obtain an exploration title varies from one province/territory to another but is typically low. Governments must grant the claim – the exploration title – if the proponent fulfils all requirements.[123] The duration and validity of this title varies from one jurisdiction to another. An exploration title is in itself not an authorization to start exploration works.

Mining lease: If proponents holding a valid exploration title find a mineral deposit, they can apply for an exploitation title – **a mining lease.** It grants the exclusive right to mine mineral resources within the area claimed before. Mining legislations usually require that proponents submit a detailed mining and reclamation plan prior to the approval of mining leases.

[119] From West to East: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, New Brunswick, Nova Scotia and Prince Edwards Island.

[120] Yukon, the Northwest Territories and Nunavut.

[121] This stems from the country's history, as Canada grew progressively when provinces and territories joined the Confederation. For example, the provinces of Alberta and Saskatchewan were created in 1905; Newfoundland and Labrador joined the Confederation in 1949 and Nunavut was attached to Northwest Territories in 1999.

[122] See Vale, 'Voisey's Bay', at: http://www.vale.com/canada/en/aboutvale/communities/voiseysbay/pages/default.aspx.

[123] See S. Thériault, 'Aboriginal Peoples' Consultations in the Mining Sector: a Critical Assessment of Recent Mining Reforms in Québec and Ontario', in A. Juneau and M. Papillon, Aboriginal Multilevel Governance, 2016, p. 143-162.

Exploration and subsequent mine development were owned and operated by VBNC, since 1996 by Inco Newfoundland and Labrador (INCO) and since 2007 by Vale. The Voisey's Bay project is located in the Labrador region in the province of Newfoundland and Labrador, on the Kapukuanipant-kauashat or Emish territory of the Innu and the Tasiujatsoak territory of the Inuit.

TRIGGERS

In October and December 1996, VBNC registered the **exploitation project** (mine and mill) for an **environmental assessment.**[124] The Voisey's Bay project was intertwined with a decades-long negotiation of a comprehensive land claim agreement between indigenous and governmental parties, which remained unresolved at the time of the project registration. The governmental parties wanted mineral development to proceed prior to settling land claims while Indigenous Peoples held that land claims had to be settled prior to approving the environmental certificate and the project.

The recognition of Indigenous Peoples and their rights varies across Canadian provinces and territories. The main legal sources for Indigenous Peoples' rights in Canada are the **Constitutional Act**, 1982 and the **treaties or land claim agreements** signed or to be signed between First Nations and the State, and Federal statutes.

The Constitutional Act, 1982, recognizes **Aboriginal and treaty rights.**[125] *"All levels of government – federal, provincial, territorial, municipal and Indigenous – are obliged to respect Aboriginal and treaty rights and can be held accountable by the courts for failures to respect these rights. Canadian courts have determined that Aboriginal and treaty rights are group and site specific, meaning that different Indigenous groups may have different rights."*[126]

Aboriginal rights are collective rights that pre-existed the assertion of Crown sovereignty. They are recognized by Canadian courts on a case-by-case basis and following legal tests defined by the Supreme Court of Canada (SCC). Aboriginal rights include: 1) "Aboriginal title", which is the right to occupy, use and manage the land held under such title, and 2) "Activity-rights", which include rights such as fishing or hunting. Inuit, Métis and First Nations enjoy ancestral rights because they are officially recognized by the Constitution, although the legal status of groups within these peoples also depends on the existence of treaties signed with the State.[127]

Treaty rights derive from **historic and modern treaties.** Historic treaties were negotiated in most of central and western Canada until 1923. Their purpose was to settle Indigenous peoples' title to the land in exchange for monetary compensations and specific rights defined in the treaty. In 1973, the Supreme Court of Canada recognized that the Aboriginal title may have survived the assertion of Crown sovereignty in areas where no historic treaties were negotiated (Calder et al. v. Attorney-General of British Columbia). This decision led to the negotiation of a new round of "modern treaties", or comprehensive land claims agreements. Twenty-six such modern treaties, some including self-government provisions with jurisdictional authority on the land, have been negotiated since 1975, mostly in the northern territories. Mining projects in areas covered by a modern treaty generally fall under a specific regulatory regime established through the treaty, which often contains impact assessment and consultation requirements. Treaty rights established through both historic and modern treaties are protected under section 35 of the Constitution Act, 1982.

[124] See Government of Newfoundland and Labrador, 'Voisey's Bay Chronology', The Economy 2018, at: https://www.budget.gov.nl.ca/budget98/economy/voiseys_bay_chronology.htm.

[125] For a description of Aboriginal rights, see S. Grammond, 'Terms of coexistence: Indigenous peoples and Canadian law', 2013.

[126] Government of Canada, 'Common core document forming part of the reports of States parties Canada. HRI/CORE/CAN/2019', at: https://undocs.org/HRI/CORE/CAN/2019.

[127] I. e. Inuit enjoy the rights provided by the Constitution and by the four land claims agreements that they have signed with federal and provincial governments. Under these agreements, Inuit acquired titles to certain blocks of land. See: Government of Canada.'Inuit', at: https://www.rcaanc-cirnac.gc.ca/eng/1100100014187/1534785,48701.

Indigenous participation took place within a joint federal and provincial environmental impact assessment process. The Indigenous communities affected also negotiated Impact Benefits Agreements (IBAs) with the project proponent. Both processes were undertaken in different stages over several years, pushed forward by mobilization and litigation by the Indigenous Peoples.[128] The provincial and federal governments discharged the project in 1999 from further environmental assessments. Still, they made the final approval for starting operations contingent on the signing of IBAs between the company and the potentially affected Indigenous Peoples. It took the signing of IBAs, an Environmental Management Agreement, and, most significantly, the ratification of a comprehensive land claim agreement in 2002, for the project to receive final approval. Construction started that same year and production began in 2006.

Impact Benefit Agreements (IBAs) are private agreements subject to contract law, usually voluntary[129] and often protected by confidentiality provisions.[130] IBAs typically contain provisions on economic benefits (employment provisions, economic and business development provisions, financial provisions), mitigation of social and environmental impacts, use of traditional knowledge (in the benefit of Indigenous communities). IBAs can contain provisions by which Indigenous communities commit to not oppose the project (in the benefit of the proponent).

They do not relieve mining proponents from their obligations under federal, provincial or territorial laws. Access to surface land does not legally depend on the signature of an IBA. However, by signing an IBA, proponents ensure that impacted indigenous communities are "on board" with the project and will not block access to the land.

Proponent usually sign IBA with indigenous representatives recognized under Canadian law (i.e., authority designed by a land claim agreement). Other representatives of an Indigenous nation can be part of the IBA. IBAs are usually signed at the exploitation stage, after exploitation rights have been acquired. However, consultation and negotiation between proponents and impacted indigenous communities are likely to start before granting a mining lease. Most of the negotiation occurs during an EIA process but proponents are encouraged to begin engaging with Indigenous communities as early as possible.

Many IBAs have satisfied both negotiating parties and included strong provisions to protect Indigenous Peoples' rights. These positive outcomes are generally made possible when the proponent sees its interest in securing Indigenous support for the project. However, Indigenous peoples can also be under pressure to negotiate unfavorable IBAs, especially when the project has already received government approval.[131] Disparity between mining corporations and Indigenous Peoples in terms of negotiating power may undermine the free and informed nature of consent given through IBA. Furthermore, IBA[132] negotiations tend to be premised on the likely approval of the project, further increasing power asymmetries.

WHO

The project is located on Aboriginal lands of the Innu and Inuit of Labrador. In 1977, Innu and Inuit communities had filed land claims over shared and delimited areas on the easternmost coast of Labrador to both the Provincial Government of Newfoundland and Labrador and the Federal government of Canada.

[128] When VBNC initially refused to negotiate with them, the Innu occupied the mine site and closed down exploration activities. Later VBNC advanced with the construction of transport infrastructure for the project without corresponding environmental assessment, blockades and litigation by Innu and Inuit stopped the works. The Innu Nation also initiated a lawsuit against the Canadian government to challenge the releasing the project from the environmental assessment process prior to finalization of land claims and IBAs.

[129] IBAs are voluntary except in some parts of Nunavut and Nunatsiavut.

[130] A brief study of what are IBA and why they are signed can be found here: N. Kielland, 'Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements', Library of Parliament of Canada (15 May 2015), at: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201529E.

[131] See C. O´Faircheallaigh, C. 'Negotiations in the Indigenous World. Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

[132] See M. Papillon, and Rodon, T. 'Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada'. Environmental Impact Assessment Review 62 (2017), p. 216 24.

At the time when VBNC submitted the project for the environmental assessment, the land claims remained unsettled for both the Innu and the Inuit of Labrador. This was also prior to the major Supreme Court issued decisions establishing the common law duty to consult under Canadian law. Therefore, there were no clear legal obligations to engage in consultations or negotiations with the affected communities, let alone obtain their consent.[133]

The Innu of Labrador comprises approximately 2400 members living in two communities, represented by the Innu Nation.[134] The Labrador Inuit comprise 5200 members living in five communities. Their representative body is the Labrador Inuit Association (LIA), now Nunatsiavut Government.[135] Through litigation and protests, the Innu Nation and LIA demanded their participation as representative bodies of the Innu and Inuit of Labrador in the environmental assessment process and that the project should not proceed until their land claims were settled and IBAs negotiated. In 1997, the Federal and Provincial Governments signed a Memorandum of Understanding (MoU) with the Innu Nation and LIA outlining the environmental assessment process and establishing an Environmental Assessment Panel (EAP) jointly appointed by all four parties.[136] The EAP then included two members nominated by the Innu and Inuit.[137] Innu and Inuit communities participated in the assessment process through public hearings, Indigenous women groups also made specific submissions to the Panel.[138]

The Environmental Impact Assessment process in Canada is regulated at both federal and provincial level. Regulation varies substantially across provinces/territories. The Impact Assessment Agency of Canada (IAAC) is the main body responsible for conducting EIA under federal law. If EIA processes are also triggered at both levels, a joint review panel agreement may define a common process to avoid duplication.[139]

Under the new federal ***Impact Assessment Act***, the IAAC and review panels should include during the whole EIA process Indigenous Peoples whose rights are likely to be affected by the project (Article 155 [b]).[140] The Act contains several provisions ensuring the participation of Indigenous Peoples and that authorities take into account their views, knowledge as well as the adverse impacts on their rights recognized by Article 35, Constitution Act, 1982. The federal government promotes a flexible methodology regarding the assessment of impacts.[141]

The Impact Assessment Act defines a **project's impact** on Indigenous Peoples as: impact on *"(i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance"*, and as *"any change occurring in Canada to the health, social or economic conditions of the Indigenous Peoples of Canada"* (Article 2). If a project causes such changes to Indigenous Peoples, it

133 See C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

134 See more information at the website of Innu Nation, at: https://www.innu.ca/

135 After ratification of the Labrador Inuit Land Claims Agreement in 2004, the ILA became the Nunatsiavut Government. See Nunatsiavut government, 'The Path to Self-Government. How we got to where we are today', at: https://www.nunatsiavut.com/government/the-path-to-self-government/

136 See C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

137 IAAC, 'Voisey's Bay Mine and Mill Environmental Assessment Panel Report, Appendix C: Memorandum of Understanding', at: https://iaac-aeic.gc.ca/archives/pre-2003/5EA5DD6D-1/default_lang=En_n=0A571A1A-1_offset=22_toc=hide.html

138 D. J. Cox, 'The Participation of Aboriginal Women at Voisey's Bay Mine. A Thesis Submitted to the School of Graduate Studies in Partial Fulfilment of the Requirements for the Degree Master of Arts' at: https://macsphere.mcmaster.ca/bitstream/11375/12954/1/fulltext.pdf.

139 There are different types of EIA processes: (1) EIA by a "responsible authority": the Agency, the National Energy Board or the Canadian Nuclear Safety Commission; (2) EIA by review panel (panel of individuals appointed by the Minister of the Environment and supported by the Agency. See Government of Canada, 'Crown consultation with Indigenous peoples in federal impact assessment', at: https://www.canada.ca/en/impact-assessment-agency/programs/aboriginal-consultation-federal-environmental-assessment.html.

140 For an overview of the federal EIA process and the role of each stakeholder at each phase of the process, visit Government of Canada, 'Public Participation in Impact Assessment. Fact Sheet', at: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/public-participation-impact-assessment-fact-sheet.html.

141 "Each assessment of impacts on rights will be unique, tailored to the particular Indigenous rights-holding community, specific project, specific area or location, and timing". See Government of Canada, 'Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples', at: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-assessment-potential-impacts-rights-indigenous-peoples.html.

can proceed *"if the change is not adverse and the council, government or other entity that is authorized to act on behalf of the Indigenous group, community or people and the proponent have agreed that it may be done"*. (Article 7[4]).

In parallel, the Innu Nation and LIA were engaged in starting IBA negotiations with VBNC and INCO. The Innu Nation first entered an agreement with VBNC for setting up the Innu Task Force on Mining Activities in preparation of negotiations. The Innu Task Force was composed of three representatives from each of its two communities; it held one-on-one interviews with community members, small group discussions, information sessions and open community meetings. Subsequently, the Innu Nation and LIA set up negotiation teams for the IBAs, the teams comprised core personnel including Innu Nation and LIA members, plus additional experts when required. [142]

WHEN

The Innu and Inuit of Labrador participated in two separated processes for the Voisey's Bay project: the environmental assessment and IBA negotiation.

Pre-negotiations for the IBA started in 1995, outlining the framework for the negotiations and creating the indigenous Task Force that delivered its report in 1996. Between 1996 - 1998, further negotiations took place, however, without reaching a final agreement. The MoU of 1997 established the Voisey's Bay joint Environmental Assessment Panel, which included two members named by the Innu Nation and LIA.[143] It completed its "Voisey's Bay Mine and Mill Environmental Assessment Panel Report" in March 1999, issuing 107 recommendations, among them that the settlement of lands claims and the negotiation of IBAs should be preconditions for the development of the project.[144] The EAP's recommendations were not binding; the provincial and federal governments had final decision-making power over the authorization of the project. In 1999, both governments released the project from further environmental assessment requirements. While they endorsed some of the EAPs recommendations, they rejected making the project development contingent on settling land claims and reaching an IBA.[145] The Provincial Government then proceeded to negotiate project development agreements with the company that were suspended between 2000 and 2001 due to disagreements over the building of a smelter for processing ore from Voisey's Bay.

In 2001, negotiations resumed for an environmental agreement, for IBAs and, for the first time, for land claims provisions dealing directly with Voisey's Bay. After resuming negotiations in 2001, the Innu and Inuit ratified their separate IBAs in 2002, giving their consent to the project. After the ratification of the IBA, each indigenous organization reached an agreement with the Provincial and Federal Government on an Environmental Management Agreement. Subsequently, Newfoundland, INCO and VBNC signed a project development agreement at the end of 2002.

PROCEDURE AND ESTABLISHMENT OF CONSENT

Procedures and parties

The joint EAP started working in 1997 and submitted its final report in 1999. The Panel first defined the terms and guidelines for the EIAS.

The IBAs negotiations took place from 1995 – 2002, including pre-negotiations and agreements-in-principle. The Innu Nation first entered an agreement with VBNC in 1995 to receive funding for setting up the Innu Task Force on Mining Activities in preparation

[142] See C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

[143] See: IAAC, 'Voisey's Bay Mine and Mill Environmental Assessment Panel Report, Appendix C: Memorandum of Understanding', at: https://iaac-aeic.gc.ca/archives/pre-2003/5EA5DD6D-1/default_lang=En_n=0A571A1A-1_offset=22_toc=hide.html.

[144] C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016; A. Pike, and S. Powell, 'International Comparison of Solutions to Aboriginal Rights Issues Associated with Mineral Development: Free, Prior and Informed Consent – The Canadian Context', 2013, at: https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1366555_1.pdf.

[145] In response, the Innu Nation took legal action against the Federal Government. See: A. Pike, and S. Powell, 'International Comparison of Solutions to Aboriginal Rights Issues Associated with Mineral Development: Free, Prior and Informed Consent – The Canadian Context', 2013, at: https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1366555_1.pdf.

of negotiations. The Innu Task Force held one-on-one interviews with community members, small group discussions, information sessions and open community meetings.[146] Subsequently, the Innu Nation and LIA set up negotiation teams for the IBAs. Up to 1998, the IBA negotiations comprised 24 negotiation sessions over several days with the Innu Nation and 25 negotiation sessions with LIA.

Capacities of indigenous parties involved

Both indigenous organizations have been active since the early 1970s, building substantial technical capacity and negotiation experience through the years. They also had a mutual agreement in place, stemming from their land claim efforts, to recognize each other's interests.[147] This allowed both organizations to work together to drive forward their demands for participation. Their bargaining power came from using their combined experience in mobilization and litigation.

The IBA negotiations relied on company funding (VBNC), though according to the indigenous teams that did not affect them in pursuing their objectives in the negotiations.[148] For the work of the Environmental Assessment Panel, the Innu and Inuit obtained intervenor funding from Canada to hire technical experts to review the guidelines. No further information on funding and capacity available.

Matters of negotiation/Information available

Innu and Inuit participation in the environmental assessment – through their appointees in the EAP and their engagement in public hearings – allowed them to present their concerns and demands. A crucial matter was the need for land claims agreements and IBAs before authorizing mining operations. In its assessment report, the EAP recommended to evaluate in the assessment both the identification of negative impacts and also the degree of how the activities improve Indigenous communities.[149] It also took up a key demand by indigenous parties: to extend the life of the open pit mine to at least 20 to 25 years by reducing the annual production rate. A longer mine life increases employment and business opportunities for Innu and Inuit.[150]

The IBA was a self-contained agreement different from the environmental assessment and land claims agreements. VBNC adopted confidential and separate IBAs with Inuit and Innu. As a result of the negotiations, the IBAs responded to the priorities of Indigenous Peoples related to employment and training opportunities, support to the conservation and the promotion of indigenous knowledge and cultural practices, initiatives to promote indigenous businesses through the phases of the project, and the participation of independent indigenous monitors.[151] Some reported IBA provisions include:

- Economic benefits provisions: annual financial payments over the life of the project and additional amounts as share of increased sales profits from higher nickel prices.
- Employment and training provisions: minimum 25% but targeted 40-50% of Innu/Inuit employment in the project, education support through school awards and a scholarship fund, different employment training programs, cross-cultural and gender sensitivity trainings for the workforce, requirements for contractors related to indigenous training and employment.
- Business development provisions: minimum requirements and targets for the share of goods and services indigenous businesses (at least 51% Innu/Inuit ownership or substantial indigenous employment) can provide during construction and operations, simplified contracting procedures for smaller businesses, direct contract negotiations with qualified indigenous businesses instead of open tenders, revolving loan fund.

[146] C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

[147] Ibid.

[148] Ibid.

[149] R. B. Gibson. 'From Wreck Cove to Voisey's Bay: the evolution of federal environmental assessment in Canada'. Impact Assessment and Project Appraisal, Vol. 20, number 3, September 2002, pages 151–159, at: https://www.tandfonline.com/doi/pdf/10.3152/147154602781766654.

[150] IAAC, 'Voisey's Bay Mine and Mill Environmental Assessment Panel Report. 3 Project Need and Resource Stewardship', at: https://iaac-aeic.gc.ca/archives/pre-2003/5EA5DD6D-1/default_lang=En_n=0A571A1A-1_offset=4_toc=show.html.

[151] C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

- Environmental protection provisions: environmental monitoring partnership ensuring indigenous participation in all phases of the project's monitoring program, integration of traditional knowledge into monitoring program, funding for full-time Aboriginal monitors employed at Innu Nation and LIA, consultation and participation in closure plans, compensation for heritage and livelihood damages, winter shipping protocol and funding for negotiating a separate shipping agreement.[152]

This shipping protocol in the IBA with the Inuit is particularly relevant, as the impact of continuous shipping to transport the ore throughout the winter entailed breaking the ice cap, which serves as transport route for Inuit to conduct traditional hunting, fishing and harvesting activities.[153] The parties reached an agreement even though *"Many Inuit said that they would not support the project if it meant breaking ice. The issue threatened to be a deal breaker".*[154]

Path toward consent

From the beginning, Innu and Inuit organizations maintained that mining activities would only advance if their Aboriginal rights were secured with the settlement of their land claims.[155] This demand is key to the development of parallel negotiations for the Voisey's Bay project. When the mining project seemed unavoidable, negotiations shifted toward preparing IBA negotiations and ensuring Innu and Inuit involvement in the environmental assessment.[156] Despite the Innu and Inuit opposition to the project, they *"did have no choice but to negotiate directly with the companies involved" [...] They didn't want the project under no circumstances. However, if it was going to proceed, then they wished to participate in the benefits, receive compensation and minimize impacts".*[157] It is therefore debatable whether the IBAs and agreements in the environmental assessment process constituted free consent.

Innu and Inuit participation in the environmental assessment process did not explicitly aim at seeking their consent, nor was its procedure geared toward it. The Panel's recommendations were negotiated only among panel members.

The IBA negotiations did aim at securing Innu and Inuit consent to the project.[158] The Innu Nation and LIA engaged their member communities through their representatives in the negotiation teams. However, the confidentiality of IBA negotiations made it difficult for Indigenous peoples not at the negotiation table to introduce their demands, i.e., women organizations demanding quotas for training and hiring.[159] After the Innu Nation and LIA reached and signed agreements with VBNC and INCO, these had to be ratified by the communities through a voting process.[160]

OUTCOME

The results of the Environmental Assessment Panel contributed to the negotiation of the Environmental Management Agreement, which created the joint Environmental Management Board as consultation and management mechanism with indigenous participation.[161] After concluding the IBAs and the Environmental Management Agreement in 2002, Voisey's Bay began production in 2006. The implementation of IBAs is binding between the parties under private law, progress reports are confidential but both IBAs estab-

[152] Ibid.

[153] Vale Inco, 'Negotiating Agreements: Indigenous and Company Experiences: Presentation Of The Voisey's Bay Case Study From Canada', International Seminar On Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute resolution, 2008, at: https://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Vale_Inco_Canada_Voiseys_Bay_case_Moscow_Workshop.pdf.

[154] Vale Inco, 'Negotiating Agreements: Indigenous and Company Experiences: Presentation Of The Voisey's Bay Case Study From Canada', International Seminar On Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute resolution, 2008, at: https://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Vale_Inco_Canada_Voiseys_Bay_case_Moscow_Workshop.pdf.

[155] C. O'Faircheallaigh. 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

[156] Ibid.

[157] Ibid.

[158] Interview O'Faircheallaigh.

[159] D. J. Cox, 'The Participation of Aboriginal Women at Voisey's Bay Mine. A Thesis Submitted to the School of Graduate Studies in Partial Fulfilment of the Requirements for the Degree Master of Arts' at: https://macsphere.mcmaster.ca/bitstream/11375/12954/1/fulltext.pdf.

[160] A. Pike, and S. Powell, 'International Comparison of Solutions to Aboriginal Rights Issues Associated with Mineral Development: Free, Prior and Informed Consent – The Canadian Context', 2013.

[161] C. O'Faircheallaigh, 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

lish joint committees with indigenous and company membership to monitor implementation.[162]

In June 2005, the Labrador Inuit Land Claim Agreement was voted into law by the Canadian Parliament. In September 2009, the proponent and the Provincial government signed a Project Development Agreement that recognized the IBAs and related land claims.[163] In 2011, the Innu Nation and the federal and provincial government reached an Agreement-In-Principle on the Innu land claim; finalization of the land claim agreement is still ongoing.

4.2 The Sivumut project and the Inuit of Nunavik

The Sivumut project is part of the Raglan nickel mine located in northern Quebec, within the territory of the Inuit of Nunavik. The Raglan mine began operations in 1997, first owned by Falconbridge, then Xstrata, now Glencore. The Sivumut project consists of the expansion and extension of Raglan operations, including the continued use of existing infrastructures, the construction of five new mines, and the extension of roads and tailing storage facilities.[164] The Raglan mine including its Sivumut project is located in an area covered by a land claim agreement: the James Bay and Northern Quebec Land Claim Agreement (JBNQA) of 1975.[165] Additionally, in 1995, Falconbridge and the Inuit communities of Nunavik signed an IBA: the Raglan Agreement.[166]

The James Bay and Northern Quebec Land Claim Agreement (JBNQA) is the first modern land claim agreement. It covers a large area in north Quebec and was signed between the federal government, the government of Quebec, the Cree and the Inuit of northern Quebec. While the JBNQA **does not provide for indigenous consent** to projects on indigenous lands, it creates three co-management bodies responsible for environmental assessments. These bodies are tripartite (composed of representatives of Quebec, Canada and Cree governments) and bipartite (Québec and Cree and Québec and Inuit) depending on the territory covered by their mandate.[167] For projects under provincial jurisdiction on Inuit lands, the JBNQA established the Kativik Environmental Quality Commission (KEQC). KEQC must conduct **public** consultations open to individuals, groups, and communities, not exclusively to indigenous communities/groups. Indigenous participation is deemed to be satisfied through the composition of the KEQC and the public consultations it holds.[168]

TRIGGERS

To begin the Sivumut project, Glencore requested **the modification of the Raglan authorization certificate** in 2014. Seeking of Inuit consent for the Sivumut-Project took place within negotiations to amend and ratify the existing IBA. The Sivumut Sub-Committee had the mandate to review the Sivumut EIAS produced by Glencore and to developed new mitigation measures to address potential impacts caused by Ralgan's new development operations. The Sub-Committee negotiated a corresponding Annex to the IBA, which was ratified in 2017.

The Kativik Environmental Quality Commission (KEQC) is the key environmental authority in Nunavik. The KEQC evaluates all EIAS submitted by proponents and issues a recommendation on granting of environmental certificate. The final certification decision lies with the Ministry of Environment and Fight against

[162] C. O'Faircheallaigh, 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

[163] C. O'Faircheallaigh, 'Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada', 2016.

[164] Glencore Canada. 'Mine Raglan. En bref', n.d., https://www.glencore.ca/fr/raglan/who-we-are/at-a-glance.

[165] 'The James Bay and Northern Quebec Agreement (JBNQA)', 1975, at: http://www.naskapi.ca/documents/documents/JBNQA.pdf; Government of Canada. 'Interactive Map of Historic Treaties and Treaty First Nations in Canada', at: https://www.rcaanc-cirnac.gc.ca/eng/1380223988016/1544125243779.

[166] Glencore Canada, 'Le entante Raglan', n.d., https://www.glencore.ca/fr/raglan/who-we-are/raglan-agreement.

[167] Ministry of the Environment and the Fight against Climate Change, 'Environmental Assessment of Northern Projects. Overview', at: http://www.environnement.gouv.qc.ca/evaluations/mil-nordique/index-en.htm.

[168] KEQC, 'Procedure', at: https://www.keqc-cqek.ca/en/environmental-and-social-assessment/procedure/.

Climate Change (MELCC for its French name). The Ministry granted the environmental certification of the Sivumut project in 2017, imposing certain conditions.

WHO

The question of whom to consult – or in this case, who to negotiate with – was governed by the land claim agreement (JBNQA) and the existing IBA (Raglan agreement).

The JBNQA integrated Inuit views and knowledge under in the KEQC structure: *"Composed of four [Inuit] commissioners appointed by the Kativik regional administration and four appointed by the Ministry. [Commissioners] have a political past and are accountable: they report and meet with their communities. The Inuit Commissioners are very aware of what is happening at the local level. [...] They observe directly the positive and negative impacts of the mine on their territory."*[169] KEQC conducted public hearings in the two communities closest to the mine.

Under JBNQA, Makivik Corporation is the representative body of the Inuit of Nunavik dealing with its collective rights and administering financial affairs, such as funds from agreements and negotiations. Its mandate is to use these assets for social and economic development. Thus, members and staff of the Makivik Corporation represented the Inuit of Nunavik in all activities established by the Raglan Agreement, such as the Sivumut Sub-Committee.

The Sivumut Sub-Committee, formed in the context of the Sivumut project, comprised four members of the Inuit parties, including representatives of Makivik Corporation and of the communities Salluit and Kangirsujuaq. These two geographically isolated communities are closest to the project and are both signatories of the original Raglan Agreement.[170] The Committee also included four representatives from Glencore.

WHEN

The work of the Sivumut Sub-Committee on amending the IBA was separate from the KEQC's evaluation of the EIAS, but it ran partially in parallel. In December of 2014, the relevant provincial Ministry had informed KEQC of the plans for the Sivumut project and in April 2015, KEQC issued its guidelines for the preparation of the EIAS.[171] Glencore submitted its corresponding EIAS in December 2015 to the Ministry, which KEQC began evaluating in May 2016.[172] The Sub-Committee started its work in April 2016 and finished in January 2017.

It communicated its recommendations to the Raglan Committee (IBA implementation Committee), which forwarded the proposed amendments and Annex to the respective parties for signing.[173] Glencore, Makivik Corporation and the Kangiqsujuaq and Salluit communities, as well as respective Landholding Corporations, signed the amendments to the Ralgan Agreement in January 2017. Then, the IBA parties shared the signed amendment and recommendations with the KEQC.[174]

In July 2017, KEQC finished its analysis of the EIAS and the additional information submitted by the company in response to concerns raised by the communities and the Makivik Corporation.[175] KEQC decided to issue a recommendation for authorizing the project with conditions.

PROCEDURE AND ESTABLISHMENT OF CONSENT

Procedures and parties

Inuit participation and seeking of Inuit consent took place within the Sivumut Sub-Committee, as representatives of communities closest to the mine, company representatives and Makivik representatives and consultants jointly reviewed the EIAS, co-developed mitigation measures and used these to draft the IBA

[169] KEQC interviewee.

[170] Comments from Salluit and Makivik members.

[171] See KEQC, 'Completed Projects, Raglan Mine Phases II and III', at: https://www.keqc-cqek.ca/ik/projets/projet-minier-raglan-phases-ii-et-iii/.

[172] Ibid.

[173] Written comments 1

[174] Stakeholder comments. Also see Gwich'in Council International (GCI) /Firelight Group, 'Impact assessment in the Arctic: Emerging practices of Indigenous-led review', 2018.

[175] See KEQC, 'Project Sivumut Decision', 2017, at: https://www.keqc-cqek.ca/wordpress/wp-content/uploads/2015/02/20170705_Projet-Sivumut_D%C3%A9cision-CQEK-juillet-2017-EN.pdf.

amendment.[176] The Makivik Corporation transferred the resulting comments on the EIAS to the environmental authority. Following the rules established in the Raglan Agreement, the Sivumut Sub-Committee's worked from April 2016 until January 2017. *"During the EIAS review and negotiation process, there was a great deal of face-to-face contact, with six in-person meetings of the Sivumut Sub-Committee between July and November 2016 to facilitate the development of relationships across the table."*[177]

Capacities of indigenous parties involved

The Makivik Corporation hired experts to assist it with the technical review of the EIAS and negotiations on mitigation measures. Furthermore, the Inuit parties had gathered experience in engaging with a changing mining company: *"The IBA with Raglan was the first time we had a chance to negotiate with a mining company so we were inexperienced at the time. [...] Ownership of the mine has changed hands several time. It was a concern of the Inuit party that the spirt of the Raglan Agreement not be lost – even though the mine has a new owner. The Inuit who are busy monitoring the impacts of mining or trying to create businesses to work on site – also have had to educate each new owner of their obligations under the Raglan Agreement – which is a challenge all by itself."*[178]

Matters of negotiation/information available

The Sub-Committee's work focused on the EIAS contents that were of key interest to the Inuit parties. *"The Inuit parties chose a discrete set of chapters to review, carving out the areas that were of key interest. [...]. [They] were successful in changing some of the provisions the company has planned for the expanded project, including agreeing to an updated set of mitigations on environment, employment and training, and business, and enhanced financial payments. In exchange the parties signed an agreement for the company to operate the Sivumut project and an agreement on winter shipping."*[179] The resulting mitigation measures were used to finalize the IBA amendment, in which Glencore also committed to improve community infrastructure, improved communications, and economic development measures.[180]

Path toward consent

Under the JBNQA no consent is required. The signing of the amendment may be understood as an expression of consent from Makivik Corporation (and thus the Inuit of Nunavik) to the Sivumut project, in line with its mandate *"to speak on behalf of the Inuit of Nunavik"*.[181] According to former Makivik President Jobie Tukkiapik, "[the] Sivumut Project, supported by the amendments we signed on January 27th, will provide a major boost to the economic development in Nunavik [...] Additional capital will flow to the communities of Salluit and Kangiqsujuaq, as well as to the entire Nunavik region. Inuit will benefit from the jobs created at the mine, and the potential to create small businesses to provide services to the mine."[182]

OUTCOME

The results of the Sivumut Sub-Committee contained in the amended IBA are binding to the IBA parties, namely Glencore, Makivik Corporation and the communities Kangiuqsujuaq and Salluit. Compliance with the IBA is enforceable by law. The KEQC decided to recommend the project's approval for the preparation and development of the Sivumut project under twelve conditions. These conditions relate largely to environmental monitoring and mitigation measures and provide additional information before phase III of the project.[183] The KEQC referred its decision to the Ministry, which authorized the Sivumut project in July 2017 by issuing a modification of the Raglan authorization certificate.[184] The KEQC recommendations and results of the Sivumut Sub-Committee's proceedings were

[176] See Gwich'in Council International (GCI) /Firelight Group, 'Impact assessment in the Arctic: Emerging practices of Indigenous-led review', 2018.

[177] Ibid.

[178] Stakeholder comments.

[179] See See Gwich'in Council International (GCI) /Firelight Group, 'Impact assessment in the Arctic: Emerging practices of Indigenous-led review', 2018.

[180] See Makivik Corporation, 'Makivik Press Release. Highlights from 2017', 2018, at: https://www.makivik.org/historic-year-makivik-corporation/.

[181] See Makivik Corporation, 'Corporate', 2018, at: https://www.makivik.org/corporate/

[182] See Makivik Corporation, 'Makivik Press Release. Highlights from 2017', 2018, at: https://www.makivik.org/historic-year-makivik-corporation/.

[183] See KEQC, 'Project Sivumut Decision', 2017, at: https://www.keqc-cqek.ca/wordpress/wp-content/uploads/2015/02/20170705_Projet-Sivumut_D%C3%A9cision-CQEK-juillet-2017-EN.pdf.

[184] See Ministère de l'Environnement et de la Lutte contre les changements climatiques, 'Modification Certificat d'autorisation, Projet minier Raglan -Projet de phase II et III Poursuite des opérations minières à l'est de Katinniq', at: http://www.environnement.gouv.qc.ca/evaluations/projet/maj/2017/3215-14-019.pdf.

included in the modification of the project certificate; thereby they became enforceable as part of the formal environmental compliance framework.

4.3 The KGHM/ Ajax mine and Stk'emlúpsemc te Secwépemc Nation (SSN)

The Ajax project is a planned open-pit copper and gold mine in British Columbia, with an estimated mine lifespan of 23 years and owned by KGHM Ajax Mining Inc. (KAM), a joint venture with 80% ownership by Polish KGHM and 20% by Canadian Abacus.[185] The project area is adjacent to Kamloops City and lies within what the Stk'emlúpsemec te Secwépemc Nation (SSN) and the Nlaka'pamux Nation call their traditional territories.[186]

TRIGGERS

KAM submitted the project's EIAS for exploitation in 2016, after completing its feasibility study in 2012.[187] The EIA process fell under the Federal (IAAC) and provincial authorities (British Columbia Environmental Assessment Office- BCEAO). The agencies conducted a joint environmental assessment and consulted the SSN before deciding on the issuance of the certificate. While participating in the State-led environmental assessment, the SSN also conducted their own assessment of the mining project based upon which they withheld consent. The assessment results of the SSN were taken into account by the federal and provincial governments, who denied Ajax the environmental certification. In 2020, KAM is considering re-application for an environmental assessment certificate.

The duty to consult and the Haida spectrum:

The Crown's **duty to consult** under common law is the closest legal equivalent to FPIC in Canada, although it is contested whether the requirements defined under this duty match FPIC standards.[188] The modern form of the duty to consult has been developed by the Supreme Court of Canada in several landmark decisions, notably: Haida Nation v. British Columbia (2004), Taku River Tlingist First Nation v. British Columbia (2004), Mikisew Cree First Nation v. Canada (2005), Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council (2010) and Tsilhqot'in Nation v. British Columbia (2014). Accordingly, the Crown has the duty to consult and under some circumstances accommodate indigenous communities when their rights – asserted or recognized under section 35, Constitution Act, 1982 – could be adversely impacted by a measure taken by the Crown. **Consultation requirements vary according to a spectrum** outlined in the Haida decision, depending on the strength of the Aboriginal rights claim as well as the potential negative impact of the project on those rights. At the lowest end of the spectrum, the Crown may only be required to inform the concerned Indigenous group of the potential negative impact of a measure, while at the higher end, the Crown may have a duty to substantively **accommodate** Indigenous concerns before authorizing a project.[189] In Tsilhqot'in Nation, the Supreme Court further established that once the Aboriginal title to the land is recognized, the Crown must obtain the consent of the concerned indigenous group before authorizing a project. If consent is withheld, infringement of the Aboriginal title is only justified for compelling reasons and national interest. In the context of mining projects, consultations are likely to occur during governmental environmental impact assessment (EIA) processes. Land claim agreements can provide for different requirements regarding consultation and EIA processes.

[185] See KGHM, 'Ajax. Project assumes the construction of an open-pit copper and gold mine in Canada', at: https://kghm.com/en/our-business/projects-under-development/ajax.

[186] See KAM. 'Executive Summary', at: https://projects.eao.gov.bc.ca/api/public/document/5887e0d9f64627133ae5b20b/download/Executive%20Summary.pdf; KAM. 'Project Overview', at: https://projects.eao.gov.bc.ca/api/public/document/5887e0d8f64627133ae5b203/download/Ch02_Project%20Overview.pdf.

[187] The provincial environmental authority, the BCEAO, issued guidelines for the EIAS in 2015, after receiving related feedback from local governmental and indigenous organizations.

[188] See J. Patzer, 'Indigenous rights and the legal politics of Canadian coloniality: what is happening to the free, prior and informed consent in Canada?', The International Journal of Human Rights, 2019, 23:1-2, p. 214.

[189] Haida Nation v British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, paras. 24 and 41.

WHO

The Tk'emlúps te Secwépemc band and the Skeetchestn band formed the Stk'emlupsemc te Secwepemc Nation (SSN) in 2007, with the SSN Joint Council as their representative body.[190] The SSN and its bands are not part of any historic or modern treaty and have therefore not settled land claims yet. They assert Aboriginal rights and titles over what they call their traditional territory, including Lake Pípsell and the Ajax project area. Formally, the SSN ground their assertion of Aboriginal rights and titles on two historic documents demonstrating consistent and traditional land ownership and tenure: the Memorial to Sir Wilfried Laurier (1910) and the Memorial to Frank Oliver (1911).

The BCEAO evaluated whom to consult and to what extent in the EIA process relative to the strength of the Aboriginal rights' claims of the involved Nations and the dimensions of the project's impact, under the Haida decision. They found that SSN has a strong claim for Aboriginal rights and title and that consultation requirements fell into the highest end of the duty to consult spectrum.[191] The BCEAO also consulted the two bands of the Nlaka'pamux Nation[192] – through participation in a Working Group – and subsequently concluded that the potential impacts on the rights of the bands of the Nlaka'pamux Nation were duly *"avoided, minimized or otherwise accommodated"*.[193]

The SSN own Review Panel, convened by the Joint Council of the SSN was composed of the *"elected Chiefs and Councillors as well as 26 individuals made up of Elders, youth and individuals who are appointed by their family."*[194] The inclusion of youth ensured a long-term view: the SSN *"must also look to the future, we must understand impacts on our children, their children and generations to come"*.[195]

WHEN

Resulting from its duty to consult, the BCEAO conducted the State-led consultation before issuing its guidelines for EIAS elaboration and during the review of the EIAS. Additionally, the BCEAO ordered the proponent to also consult with SSN before (pre-application) and during (application period) the EIAS review.[196] The SSN, however, evaluated the federal-provincial EIA process as being inadequate for *"not fully or properly assess the impacts on Pípsell and our people"*,[197] and therefore undertook their own project assessment process in parallel.

SSN submitted its Pípsell Report, its SSN Review Panel Recommendations and the SSN Decision Declaration (SSN Decision Package) to the BCEAO and the IAAC in February 2017, in line with the established decision cycle to allow for its consideration by the relevant provincial and federal authorities before they decided on the environmental certificate for the Ajax project.

190 The Joint Council is the representative body although the Joint Council also has an Executive Board. But the body is the Joint Council. See SSN, 'Framework', at: https://stkemlups.ca/framework/.

191 See BCEAO, 'Order under Section 11. In the matter of the Environmental Assessment Act S.B.C. 2002, c.43 (Act) and an environmental asessment of the Ajax Project (Proposed project)', 11 January 2012, at: https://projects.eao.gov.bc.ca/api/public/document/5887e0acf64627133ae5b142/download/Section%2011%20Order%20dated%20January%2011%2C%202012%20and%20signed%20by%20Chris%20Hamilton%20%28EAO%29%20for%20the%20proposed%20Ajax%20Mine%20Project.pdf.

192 See BCEAO, 'Ajax Mine Project. Recommendations of the Executive Director with respect to the application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43', 20 November 2017, at: https://projects.eao.gov.bc.ca/api/public/document/5a32ceeb4cb5340019a72791/download/Ajax_Recommendations%20of%20the%20Executive%20Director__20November_FINAL.pdf.

193 The EIAS submitted by KAM finds that residual impacts on both bands, Ashcroft and Lower Nicola Indian Band, are eligible. The joint report by BCEAO and CEAA also notes that Ashcroft entered a confidential benefit agreement with KAM. See BCEAO, 'Ministers' Reasons for Decision, Ajax Mine Project, Proposed by KGHM Ajax Mining Inc.', 13 December 2017, at: https://projects.eao.gov.bc.ca/api/document/5a32ceeb7ac1060019ca0d3c/fetch.

194 See SSN, Joint Council Decision Document, at: https://stkemlups.ca/files/2013/11/3-2017.03.04-SSN-Joint-Council-Decision-Document.pdf.

195 See SSN, 'Honouring Our Sacred Connection to Pipsell- SSN Pipsell Decision Video', Vimeo (31 March 2017), at: https://vimeo.com/210983969.

196 There was no company-indigenous negotiation although the company did reach out to SSN through written communication and meetings. Consultation under the Crown's duty to consult was conducted by BCEAO who integrated the company in the information exchanges and meetings. See BCEAO, 'Order under Section 11. In the matter of the Environmental Assessment Act S.B.C. 2002, c.43 (Act) and an environmental asessment of the Ajax Project (Proposed project)', 11 January 2012, at: https://projects.eao.gov.bc.ca/api/public/document/5887e0acf64627133ae5b142/download/Section%2011%20Order%20dated%20January%2011%2C%202012%20and%20signed%20by%20Chris%20Hamilton%20%28EAO%29%20for%20the%20proposed%20Ajax%20Mine%20Project.pdf.

197 Chief Ron Ignace in: SSN, 'Honouring Our Sacred Connection to Pipsell- SSN Pipsell Decision Video', Vimeo (31 March 2017), at: https://vimeo.com/210983969.

PROCEDURE AND ESTABLISHMENT OF CONSENT

Procedures and parties

The consultation procedure consisted of a project review autonomously conducted by the SSN through its appointed Review Panel between 2016 and 2017. The results were subsequently submitted to the authorities deciding over the environmental certificate.

To carry out the project assessment, the Review Panel collected information from the communities' own voices. Throughout a 5-day hearing in May 2016, the Review Panel received and assessed information from over 80 presenters and subsequently entered an almost 10-month long deliberation process.[198] In addition, the SSN received, and reviewed information documents provided by KAM and BCEAO. In February 2017, the Panel finalized the Pípsell Report with recommendations to the SSN Joint Council, who then took the final decision in March 2017.

Capacities of indigenous parties involved

In addition to the Review Panel and SSN leaders, the SSN hired external experts who conducted complementary studies to assess all the project's potential impacts. SNN requested BCEAO to adapt the timeframe of the EIA process to facilitate indigenous participation.[199] In September 2016, after intense negotiations and following SSN's continued request throughout 2015, the BC Minister of Mines and Energy and the SSN signed the Ajax Mine Project Government-to-Government Framework Agreement, which contained an Environmental Assessment Collaboration Plan between SSN and BCEAO. This agreement sought to improve timelines, information flows, and feedback loops and secure adequate funding from BCEAO and the project proponent.[200]

Matters of negotiation/Information available

Special attention was given to interdependent and cumulative environmental impacts on the whole SSN territory as well as on impact mitigation measures and benefits. SSN aimed at orienting the process of the project assessment at the *"the principle of Walking on Two Legs – Secwépemc and Western knowledge, with information provided both in oral and written format."*[201] The Review Panel concluded that the mining project would degrade grasslands, affect hunting and fishing activities, and lead to a loss of medicinal plants for traditional use and irreversible changes to the Pípsell cultural heritage landscape.[202] The results also indicated that the cultural impacts of the projects' changes to the Pípsell area could not be mitigated, as their spiritual and religious connection to this sacred area is irreplaceable[203]: *"Numerous impacts were not and cannot be monetized including the adverse impact on our cultural heritage as well as impact on the environment."*[204]

Path toward (withholding) consent

Based on the results from the review process, the SSN Joint Council decided that: *"SSN does not give its free, prior and informed consent to the development of the lands and resources at Pípsell for the purpose of the Ajax Mine Project. The Ajax Mine Project in its proposed location at Pípsell is fundamentally in opposition to the SSN land use objective for this sacred site."*[205]

According to the SSN, the project assessment process allowed for an *"informed decision-making by the SSN Communities in a manner which is consistent with our laws, traditions, and customs and assesses project im-*

[198] First Nations Energy and Mining Council, 'Recent experience with Indigenous-Led Assessments: a BC perspective', 2019, at: http://fnemc.ca/wp-content/uploads/2015/07/recent-experience-with-indigenous-led-assessments-a-bc-perspective.pdf.

[199] For a collation of challenges faced by SSN, see for example SSN, 'Letter Re: Consultation Procesesses & Timelines',17 December 20015, at: https://projects.eao.gov.bc.ca/api/public/document/59d7c801beb804001946ac64/download/Letter%20from%20Stk%E2%80%99emlupsemc%20te%20Secwepemc%20Nation%20to%20EAO%20and%20CEAA%20re%20timelines%20and%20processes%2C%20dated%20December%2017%2C%202015.pdf.

[200] Funding also was provided by the mining proponent. Furthermore, see BCEAO, 'Ajax Mine Project Government to Government Framework Agreement', at: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/eao-mous-and-agreements/eao-government-to-government-framework-for-ajax-mine.pdf.

[201] See SSN, 'Honouring the Vision of Our Ancestors', 2013, at: https://stkemlups.ca/files/2013/11/SSN_4Pager-v13-12.02-WEB.pdf.

[202] See SSN, 'Honouring Our Sacred Connection to Pípsell', 2013, at: https://stkemlups.ca/files/2013/11/2017-03-ssnajaxdecision-summary_0.pdf.

[203] See SSN, 'Joint Council Decision Document', at: https://stkemlups.ca/files/2013/11/3-2017.03.04-SSN-Joint-Council-Decision-Document-.pdf.

[204] Ibid.

[205] Ibid.

pacts in a way that respects our knowledge and perspectives."[206] Thus, consent seeking consisted of an internal deliberative process at the level of the two SSN communities and their leadership.

OUTCOME

The SSN Decision Package submitted to the BCEAO and the IAAC had no formally binding character and Canada does not grant veto power to Indigenous Peoples. However, the SSN Decision Package contained comments and observations that had to be considered within the State's fulfilment of its duty to accommodate. The BCEAO and the IAAC determined that the project would have residual and significant adverse effects on indigenous heritage, traditional land and natural resource use, and that it would have *"adverse impacts to SSN's asserted Aboriginal title"*.[207]

Duty to accommodate: The goal of the duty to consult is less to ensure that Indigenous Peoples agree to the project but to make sure that "the honor of the Crown" is maintained and to "effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (Haida para. 45). For this, the Crown may have the duty to accommodate Indigenous Peoples.

The duty to accommodate Indigenous Peoples arises when consultations suggest that there is indeed a right protected by Article 35 of the Constitutional Act that may be adversely affected by the measure. Accommodation aims to "avoid irreparable harm or to minimize the effects of infringement" on the rights protected under Article 35 and entails "seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation" (Haida, para. 45). Accommodation usually involves mitigation and/or compensation measures. Accommodation does not entail veto power and it does not need to satisfy indigenous demands (Taku River, para. 43-45). If Indigenous Peoples reject the measure, the Crown shall balance indigenous concerns and societal interests (Haida, para. 45).

The BC Ministers[208] took up these findings in their decision against issuing the environmental certification for the project.[209] The provided reasons centered around two arguments: On the one hand, unacceptable risks of multiple residual (not sufficiently mitigated) and cumulative adverse effects on Kamloops City. On the other, significant adverse effects to indigenous heritage, traditional use of land and resources, and adverse impacts on SSN asserted Aboriginal rights and titles. It cannot be determined whether the decision would have been the same without the first argument. Nevertheless, the protection of indigenous rights – particularly the recognition of indigenous knowledge – seems to have weighed in both the provincial and federal authorities' decisions. The federal Ministers also rejected the application for environmental certification, arguing that *"the environmental effects were simply too great, in particular, to the current use of lands and resources for traditional purposes by Indigenous Peoples. This decision was made based on sound science, consultations with Indigenous Peoples and engagement with Canadians."*[210]

Without environmental certification, the project could not proceed. It must be noted, however, that in 2020, KGHM announced it was contemplating to resubmit its application for environmental certification.[211] No information is available on whether KGHM has adjusted the project design.

[206] Ibid.

[207] See BCEAO, 'Ajax Mine Project. Recommendations of the Executive Director with respect to the application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43', 20 November 2017, at: https://projects.eao.gov.bc.ca/api/public/document/5a32ceeb4cb5340019a72791/download/Ajax_Recommendations%20of%20the%20Executive%20Director__20November_FINAL.pdf.

[208] Minister of Environment and Climate Change Strategy and the Minister of Energy, Mines and Petroleum Resources.

[209] See See BCEAO, 'Ministers' Reasons for Decision, Ajax Mine Project, Proposed by KGHM Ajax Mining Inc.', 13 December 2017, at: https://projects.eao.gov.bc.ca/api/document/5a32ceeb7ac1060019ca0d3c/fetch.

[210] See Government of Canada, 'News Release. Government of Canada Announces Decision on Ajax Mine Project', 27 June 2018, at: https://iaac-aeic.gc.ca/050/evaluations/document/123179.

[211] See T. Branigan, 'KGHM hires new superintendent as bid to revive Ajax mine ramps up', Kamloops This Week (02 September 2020), at: https://www.kamloopsthisweek.com/news/kghm-hires-new-superintendent-as-bid-to-revive-ajax-mine-ramps-up-1.24196668.

4.4 The NICO project – Tłı̨cho Government

Fortune Minerals discovered in 1996 the NICO cobalt-gold-bismuth-copper deposit in the Mackenzie Valley in the Northwest Territories.[212] Fortune Mineral's NICO project consists of exploration works and subsequently a planned underground and later open-pit mine, concentrator plant, camp facilities, tailings and waste rock management area, water treatment facilities and an all-weather access road.[213] The company had applied for a water license and a land use permit for its planned open pit mine. The EIA process in question was thus for exploitation.[214] The NICO project overlaps with lands and jurisdiction of the Tłı̨cho Nation.

Recognition of Tłı̨cho rights: The 1998 Mackenzie Valley Resource and Management Act (MVRMA) mandates that approval of projects wholly or partly on Tłı̨cho lands requires the consent of the Tłı̨cho Nation.[215] The MRVMA established the Mackenzie Valley Environmental Impact Review Board (the Board). This State-indigenous co-management board is responsible for the environmental impact assessment process required for projects in the Mackenzie Valley. The MVRMA established three stages of assessment: the preliminary screening, the environmental assessment and environmental impact review.[216]

In 2003, the Tłı̨cho Lands Claims and Self-Government Agreement (hereinafter, the Tłı̨cho Agreement) was signed between the Tłı̨cho Nation, the Government of the Northwest Territories (GNWT) and the Government of Canada. It is a successor to the historical Treaty 11 of 1921 between the Dogrib (Tłı̨cho) First Nation and the government of Canada and its negotiation began in 1997.[217] The Tłı̨cho Agreement "provides and defines certain rights relating to lands, resources, and self-government. Some of the highlights of the agreement include creation of the Tłı̨cho Government, ownership of 39,000 km^2 of land and a share of mineral royalties from the Mackenzie Valley".[218]

TRIGGERS

After receiving Fortune Mineral's application for water license and land use permit in 2009, the Federal Ministry of Indian and Northern Affairs of Canada referred the application along with the whole project to the Mackenzie Valley Review Board (the Board) for environmental assessment (stage two of assessment according to MVRMA).[219] The reason was that the Ministry estimated that the project itself might have significant adverse environmental effects.[220] From scoping until final decision-making, the Tłı̨cho Nation participated through the Tłı̨cho Government

[212] See Fortune Minerals Limited, 'Annual Report 2004', 2005, at: https://s1.q4cdn.com/337451660/files/doc_financials/2004AR.pdf.

[213] See Mackenzie Valley Review Board, 'Report of Environmental Assessment and Reasons for Decision (corrected) EA0809-004 Fortune Minerals Limited NICO Project', 25 January 2013, at: http://reviewboard.ca/upload/project_document/NICO%20Report%20of%20EA%20and%20Reasons%20for%20Decision%20%28corrected%29.PDF.

[214] In parallel, the company was progressing with getting its exploration work underway, for which it must have already have the necessary permits, otherwise it would not be able to conduct exploration. The deposit was well characterized, which is why the company could start requesting permits and enter the EIA process for exploitation while not having finished exploration work.

[215] See Gwich'in Council International (GCI) /Firelight Group, 'Impact assessment in the Arctic: Emerging practices of Indigenous-led review', 2018.

[216] See Mackenzie Valley Review Board, 'About us', 25 January 2013, at: https://reviewboard.ca/about. The MRVMA stipulates three stages of environmental assessment, the proponent may not know if it will have to go all the way until stage 3, for which a detailed impact study and review by expert third parties is required – so the EIAS evolves as it goes through these stages. The company therefore starts early, in anticipation of further studies and amendments.

[217] See Tłı̨cho Government, 'Chronology', at: https://www.tlicho.ca/cec-assembly/our-story/chronology.

[218] See Tłı̨cho Government, 'Our Story', at: https://www.tlicho.ca/government/our-story.

[219] To ensure that environmental impacts are assessed before they happen, the Section 118 of the MVRMA requires that no irrevocable actions be taken before requirements by the boards are met. This means that no authorizations or permits can be issued before the preliminary screening is conducted. See also Mackenzie Valley Board (2004), Environmental Impact Assessment Guidelines.

[220] See Indian and Northern Affairs, 'Letter', 27 February 2009, at: http://reviewboard.ca/upload/project_document/EA0809-004_NICO%20Referral%20Letter_1236030121.PDF.

in the environmental assessment for the project conducted between 2009 and 2013 by the Mackenzie Valley Environmental Impact Review Board. The Tłı̨cho Government provided input to the work of the Board. Furthermore, considering the Tłı̨cho Agreement, the Tłı̨cho Government took part in the final decision on the recommendation of the Board.

The Board recommended the approval of the project and the Tłı̨cho Government, and the relevant federal Ministers endorsed that recommendation with an agreed-upon modification in 2013.

WHO

The Tłı̨cho Government is the Tłı̨cho self-government organization, established under the Tłı̨cho Agreement.[221] It has governing jurisdiction within Tłı̨cho lands and has powers to pass and enforce laws, own and manage resources and receive tax revenues.[222] The MVRMA delineates the decision-making powers of the Tłı̨cho Government concerning land and water management and during environmental assessment processes.[223]

The Tłı̨cho Government participated in the EIA process through its elected leadership and the staff of its Kwe Beh Working Group. It manages the Tłı̨cho Government involvement in EIA processes, among other tasks, and consists of ten Tłı̨cho and external experts.[224]

The Mackenzie Valley Environmental Impact Review Board consists of nine members appointed in equal numbers from nominations by the federal and territorial governments and the indigenous treaty organizations. The Review Board conducted public hearings in two Tłı̨cho communities and the City of Yellowknife. During the public hearings conducted by the Board, a two-hour window was allotted for youth and women to speak. During this window, 17 women spoke of their concerns regarding the project and its impacts.[225]

WHEN

Participation took place through the environmental assessment. The Board was responsible for determining the scope of the EIAS and its review in coordination with the proponent and relevant indigenous parties, while the Tłı̨cho Government as well as the relevant Ministers had the final decision on whether to adopt, reject or refer the recommendation back to the Review Board.

In parallel to this process, the Government of the Northwest Territories (GNWT), through their Environment and Natural Resources Department, conducted public consultations for the NICO project.[226] Furthermore, the Tłı̨cho Government and the company conducted IBA negotiations.

PROCEDURE AND ESTABLISHMENT OF CONSENT

Procedures and parties

The Review Board began the environmental assessment in March 2009[227] and concluded in January 2013 with a recommendation to grant the application.[228] The Tłı̨cho Government participated actively throughout the whole process submitting additional information, attending meetings and approving contents of the Board's report.[229] It also *"issued a range of technical reports for consideration by the Review Board, adding new knowledge rather than simply peer review-*

[221] See Mackenzie Valley Resource Management Act, at: https://laws-lois.justice.gc.ca/eng/acts/m-0.2/page-1.html

[222] See Tłı̨cho Government, 'Our Story', at: https://www.tlicho.ca/government/chiefs-executive-council-assembly/our-story/about-tlicho, and 'Government', at: https://www.tlicho.ca/government.

[223] See Mackenzie Valley Resource Management Act, at: https://laws-lois.justice.gc.ca/eng/acts/m-0.2/page-1.html.

[224] See Tłı̨cho Government, 'Kwe Beh Working Group', at: https://tlicho.ca/cec-assembly/committees/kwe-beh-working-group.

[225] See J. Kuntz, 'Tłı̨cho Women and Traditional Knowledge in the Environmental Assessment of the NICO Project proposed by Fortune Minerals Limited', 2016.

[226] A record of some consultation activities between February 2009 to October 2012 can be accessed in the following link: http://reviewboard.ca/upload/project_document/EA0809-004_GNWT_IR_response_regarding_Tlicho_Government_consultation_.PDF.

[227] See Mackenzie Valley Review Board, 'Letter', 02 March 2009, at: http://reviewboard.ca/upload/project_document/EA0809-004_additional_community_engagement_information.pdf.

[228] See Mackenzie Valley Review Board, 'Report of Environmental Assessment and Reasons for Decision (corrected) EA0809-004 Fortune Minerals Limited NICO Project', 25 January 2013, at: http://reviewboard.ca/upload/project_document/NICO%20Report%20of%20EA%20and%20Reasons%20for%20Decision%20%28corrected%29.PDF.

[229] See Gwich'in Council International (GCI) /Firelight Group, 'Impact assessment in the Arctic: Emerging practices of Indigenous-led review', 2018.

ing the knowledge about the project."[230] These reports covered issues such as traditional knowledge and land use, risk assessments, economic analysis of the project and a report on the transport options for the Whatì community, which included results from their own community hearings and assessment activities held between 2009 and 2012.[231]

Capacities of indigenous parties involved

Since the 1990s, the Tłı̨cho Nation has acquired experience in environmental review and assessment processes, and IBA negotiations with three diamond-mines. Those IBAs provided funds used to build capacities and, after the establishment of the Tłı̨choGovernment, to finance the Kwe Beh Working Group.[232]

The Tłı̨cho Government negotiated two sets of funds to strengthen its participation in the decision-making surrounding the NICO project: 1) funding for the environmental assessment from both the company and the federal government, 2) funding for IBA negotiations from the company. *"Both sets of financing were vital for review by technical staff, government preparation, and community engagement."*[233] To develop its information base, *"Tłı̨cho engaged a team of scientists and engineers, separate from the proponent (but financed by Fortune and the federal government), to evaluate the potential impact of the mine."*[234]

Matters of negotiation/information available

From early in the assessment process, the Tłı̨choGovernment highlighted the need to consider both traditional knowledge and western scientific methods in the assessment and conditions for project approval.[235] *"For example, public hearing dates were changed to accommodate the completion of key traditional knowledge studies and the Tłı̨cho Government required additional public hearings for community members to speak about the project."*[236]

In its Concluding Comment and based on its technical review work and the results of public hearings in Tłı̨cho communities, the Tłı̨cho Government identified six key areas of concern and lingering informational uncertainties: traditional knowledge, socio-economic effects, water quality, mine closure, caribous and the NICO project access road. In its Concluding Comments, the Tłı̨cho Government recommended 27 measures to mitigate adverse impacts on those six areas of concern.[237]

Path toward consent

The Tłı̨cho Agreement and MVRMA were foundational in setting the terms of engagement between the Tłı̨cho Government, Fortune Minerals and the federal and territorial government. MVRMA orders that the Review Board must consider traditional knowledge for conducting the assessment and developing its recommendation (i.e., Sections 115.1 and 144). Under Section 131, Tłı̨cho Government consent is required for approval of projects wholly or partly on or across Tłı̨cho Lands. The company also acknowledged that *"support of the Tłı̨cho people will be required in order for the Project to proceed to production"*.[238] The Tłı̨cho Government actively defended its right to consent, i.e., by initiating (and then withdrawing) judicial proceedings before the Supreme Court of Northwest Territories concerning how the Review Board was addressing the impact assessment of an access road for the project.[239]

The Tłı̨cho Government argued in its Concluding Comments that the significant public concern shown by the Tłı̨cho and the unacceptable risk of significant adverse impacts on the environment merited the Re-

[230] G. Gibson, 'Indigenous Decisions in EA: A case of free, prior, and informed consent in the NWT, Canada', (forthcoming).

[231] Mackenzie Valley Review Board, NICO Project - EA0809-004, Technical Reports, at: http://reviewboard.ca/node/434/documents/8-TR

[232] G. Gibson, 'Indigenous Decisions in EA: A case of free, prior, and informed consent in the NWT, Canada', (forthcoming).

[233] Ibid.

[234] Ibid.

[235] See Gwich'in Council International (GCI) /Firelight Group, 'Impact assessment in the Arctic: Emerging practices of Indigenous-led review', 2018.

[236] See J. Kuntz, 'Tłı̨cho women and the environmental assessment of the NICO Project proposed by Fortune Minerals Limited', at: https://dspace.library.uvic.ca/handle/1828/7514.

[237] See Tłı̨cho Government, 'Closing Comments', at: http://reviewboard.ca/upload/project_document/EA0809-004_Tlicho_Government_Closing_Comments.PDF.

[238] See Fortune Minerals, 'Letter', 15 January 2009, at: http://reviewboard.ca/upload/project_document/EA0809-004_additional_community_engagement_information.pdf.

[239] In June 2010, Tłı̨cho Government requested a ruling to the Supreme Court of Northwest Territories. A year later the Court denied the request. In February Tłı̨cho withdraw their appeal to the Supreme Court of Canada. Judgment of the case can be found in this link: http://reviewboard.ca/upload/project_document/EA0809-004_Reasons_for_Judgement_in_Tlicho_Government_and_MVEIRB_1307116237.PDF.

view Board to order the project to go through the next stage of assessment possible under the MRVM: the Environmental Impact Review. In the case in which the Review Board decided against the Environmental Impact Review, the Tłı̨cho Government recommended to discharge the project from further assessment only on the condition that measures be imposed to reduce the significance of adverse impacts.[240]

The Review Board concluded in its "Report of Environmental Assessment and Reasons for Decision" that an EIR was not necessary and that adverse impacts, albeit significant, could be mitigated. It adopted 13 of the Tłı̨cho Government's recommended measures, at least one for each area of concern, and adopted other mitigations to address the same areas of concern. Notably, the company's commitments, also contained in the Board's report, include gender-sensitive measures to eliminate gender barriers in access to labor and employment and measures to eradicate violence and harassment for indigenous women.[241]

After receiving the report, the Tłı̨cho Government as well as the responsible federal Ministers had to decide whether to adopt, reject or refer the recommendation back to the Review Board. This moment of decision-making constituted a historic milestone: *"We are now in a decision-making position alongside the Government of Canada for the first time in our history."*[242]

The Tłı̨cho Government first opted to consult and negotiate with the Review Board to modify one of the mitigation measures contained in the Board's report to address cumulative impacts on caribou herds. In June 2013, meetings and communication with all parties resulted in an agreed upon modification, the new wording *"represent[ed] consensus between Responsible Ministers, the Tlicho Government and the Review Board".*[243] Subsequently, the Tłı̨cho Government *"decided to adopt the Review Board's recommendation",* which was to approve the project subject to the implementation of measures specified in the report.[244]

OUTCOME

The responsible federal Ministers also adopted the Review Board's recommendation and with the decisions of both Federal and Tłı̨cho Governments, the NICO project was approved. The Tłı̨cho Government continued its negotiations for an IBA and an Access Agreement with the company, which should cover the objectives of the 14 measures that the Review Board did not recommend.[245]

In July 2016, the GNWT presented a project to the Board for the construction of the Tłı̨cho All-seasons Road.[246] During the NICO environmental assessment, the Tłı̨cho Government had expressed its concerns related to the road's impact of in- and out-migration on the remote community of Whatì. The Review Board conducted an environmental assessment process following similar steps to those used during the NICO process. Tłı̨cho Government and community members actively participated in the assessment and the hearings, and the Tłı̨cho Government was once again a decision-maker alongside the GNWT. The Review Board recommended approval of the road, subject to several measures to minimize negative effects on wildlife and on the Whatì community. The Tłı̨cho Government and the GNWT adopted the Board's recommendation and approved the project. In November 2019, the Tłı̨cho Government and Fortune Minerals signed an Access Agreement. This agreement specifies the conditions under which the company can build and use the road to access the NICO project across Tłı̨cho land. However, the company may conduct the activities detailed in the Agreement only once an IBA is concluded and signed.[247]

[240] See Tłı̨cho Government, 'Closing Comments', 2012.

[241] See Mackenzie Valley Review Board, 'Report of Environmental Assessment and Reasons for Decision (corrected) EA0809-004 Fortune Minerals Limited NICO Project', 25 January 2013, at: http://reviewboard.ca/upload/project_document/NICO%20Report%20of%20EA%20and%20Reasons%20for%20Decision%20%28corrected%29.PDF.

[242] See Tłı̨cho Government, 'Tłı̨cho Government to Decide on Fortunes NICO Mine in NWT', 2013, at: https://www.tlicho.ca/news/tlicho-government-decide-fortunes-nico-mine-nwt

[243] See Mackenzie Valley Review Board, 'Results of consultation on modification to measure 8', 2013, at: http://reviewboard.ca/upload/project_document/EA0809-004_Results_of_consultation_on_modification_to_measure__8.PDF.

[244] See Tłı̨cho Government, 'Letter from Tłı̨cho Government Grand Chief', 2013, at: http://reviewboard.ca/upload/project_document/EA0809-004_Letter_from_TG_Grand_Chief_to_MVRB_Chair.PDF.

[245] G. Gibson, 'Indigenous Decisions in EA: A case of free, prior, and informed consent in the NWT, Canada', (forthcoming).

[246] See Mackenzie Valley Review Board, 'Tłı̨cho All Season road - EA-1617-01', 2018-2020, at: http://reviewboard.ca/registry/ea-1617-01.

[247] See Tłı̨cho Government, 'Tłı̨cho Government and Fortune Minerals Update', 2019, at: https://www.tlicho.ca/news/tlicho-government-and-fortune-minerals-update-nov-29-2019.

4.5 Main takeaways from the solution-oriented case studies

1. Strong land rights are the steppingstone for meaningful consultation, negotiation and consent-seeking with Indigenous Peoples:

In Canada, indigenous land rights are protected by different yet complementary legal instruments – the Constitutional Act and rulings by the SCC, treaties and land claim agreements, laws by provincial/territories governments with significant autonomy, and case law. For instance, based on its land claim agreement and the MVRMA, the Tłı̨cho Government did not only contribute to the work of the environmental review board, for which it nominated half the members, but it was also involved in the final decision making. It must be acknowledged that despite this comparatively strong legal framework for the recognition of Indigenous land rights, only few Indigenous Peoples in Canada do have title or substantial treaty rights over the land. Yet the Ajax and Voisey's Bay cases show that the Indigenous peoples involved used the legal (and economic) uncertainty created by the potential recognition of their title by the courts to gain leverage in the decision-making process (through an IBA in one case, through a community impact assessment in the other). Together with the State's duty to consult, this provided a setting in which the SSN could meaningfully engage with the EIA process and exercise their self-determination. Furthermore, strong land rights strengthen the position of Indigenous Peoples when negotiation with mining companies, as the Sivumut case shows.

- Gives Indigenous Peoples legal protection of their land rights.
- Gives Indigenous Peoples leverage in the decision-making processes that may affect them, even if they lack formal land titles.
- Provides reasons for the State to facilitate meaningful consultation.
- Strengthens Indigenous Peoples' negotiation position with companies.
- Provides legal clarity for companies.

2. Articulating indigenous participation across EIA process, negotiations with company and land rights recognition:

Indigenous Peoples, the State and the company interact with each other in various processes related to a mining project and the land on which it is located. On the ground, EIA process, negotiations with company and land rights recognition (here, negotiation on land claims) overlap and cross-influence each other. All cases, especially the Voisey's Bay case, show that indigenous consultation and participation can be strengthened when the interdependence of these processes, is acknowledged and used to achieve greater coherence in protecting Indigenous Peoples' rights. Instead of running these processes in silos, Indigenous Peoples and the State can find ways of articulating the information exchange between these processes, and facilitate cross-involvement of all stakeholders with clearly delimited roles to enhance transparency.

- Improves access to relevant information for all parties.
- Improves transparency on each process and thereby may help to improve coherence between results of EIA process and negotiations with company.

3. Representatives both from regional organizations and from communities of affected areas included in consultation:

Indigenous Peoples participated in the consultation and the decision-making through their representative organization and representatives from affected communities. For instance, in the Sivumut case, the Inuit participated in the joint indigenous-corporate review through direct community representatives and through the Makivik Corporation. This allowed for a weighted participation: while the communities most closely located (and likely most affected) had a direct voice at the table, all Inuit communities in the Nunavik territory were represented through the Makivik Corporation. Through Makivik Corporation's administrative work, they may benefit from the Raglan Agreement in terms of jobs, awards of contracts, financial compensations, etc.

- may help to prevent problems emerging from the definition of "area of influence."
- strengthens the capacity of indigenous communities in consultations.

4. Timing and scope of the consultation:

In the solution-oriented cases, Indigenous peoples participation from the early stages of the project through project design, preparation of EIA guidelines, throughout the review of the EIAS and final decision-making on EIA results. Additionally, the EIA process timeframe was adapted to allow time for Indigenous Peoples' own project assessment and to receive and consider their results before decision-making.

- Helps create trust in the EIAS.
- Contributes to ensuring that all Indigenous Peoples affected by the project are included.
- Contributes to ensure that Indigenous Peoples can meaningfully influence and participate in decision-making.

5. Capacities for consultations:

In the solution-oriented cases, Indigenous Peoples had technical capacities, negotiation experience and means for enhancing their bargaining power (mobilization, litigation) at hand. This was possible thanks to previously gained knowledge and financial resources or through funding (from State or company) to pay for advice and experts.

- Helps assure Indigenous Peoples can assess project's impact, participate in developing mitigation and benefit-sharing measures, and do not feel pressured.
- Helps create trust in the consultation process.

6. Respecting indigenous decision-making:

Company and governments acknowledge the need to seek Indigenous Peoples' consent before the final authorization of a project. A factor contributing to this is the strong legal protection of Indigenous Peoples rights at multiple levels (see point 1). While in NICO, decision-making on the EIA process directly involved indigenous organization, in the cases of Voisey's and Sivumut, final authorization was contingent on finalizing an IBA. Both approaches built indigenous decisions into the decision-making cycle for a project.

- Facilitates ownership and sustainability of agreements.
- Provides leverage to Indigenous Peoples as an essential stakeholder during the mining cycle.

5. Pathways toward a human rights-based approach to FPIC: recommendations

This chapter presents feasible pathways for change to strengthen and better align consultations and FPIC on mining projects with international standards in Chile, Peru, and countries with similar conflicts. It summarizes recommendations based on the existing corpus of recommendations issued by national and international human rights bodies, and based on insights from the presented solution-oriented case studies (in bold). Furthermore, it suggests measures that the German development cooperation (and similar international cooperation agencies) can undertake to implement these recommendations (with small blue triangles). A first set of recommendations was derived from the information stemming from grey literature and limitations identified in chapters 2 and 3, interviews[248], lessons drawn from chapter 4 and the authors' expertise on the subject. To seek feedback on these recommendations and suggested measures without being able to hold in-person validation workshops due to the Covid-19 pandemic, they were transferred into an online survey distributed among forty-one stakeholders. Survey addressees comprised former and current representatives of indigenous organizations, State agencies and German development agencies in Chile and Peru. Twenty-four responses were received and based on these; the original list was amended to yield the following, non-exhaustive list of recommendations and implementation measures.

It is important to note that institutional reforms and procedural improvements will only have a limited effect on strengthening consultation and FPIC as long as Indigenous Peoples continue facing a situation of social exclusion, poverty, lack of economic development opportunities, lack of access to basic services such as education, health and public transport, and insecure land and tenure rights. This creates a strong asymmetry between consulted indigenous communities, the consulting State and the proponent. Continued efforts for socio-economic inclusion of Indigenous Peoples are paramount for strengthening prior consultation and FPIC.

1. Support the finalization of demarcation, titling, restitution, and registration of traditionally occupied indigenous lands in the public registry of indigenous lands.

- Strengthen the capacities of national and sub-national government agencies (responsible for demarcation, titling, restitution, and registration of traditionally occupied lands).
- Strengthen coordination between different government agencies to make sure they have full knowledge of Indigenous Peoples' lands and resources overlapping or neighboring a mining project area and how this proximity alters Indigenous Peoples' cultural relationship with their territories (in Peru: Ministry of Agriculture, VMI and INGEM-

[248] Interviews were held with current and former officials of the VMI, DP and MINEM in Peru, of CONADI, Ministry of Mining, SEA and INDH in Chile.

MET, in Chile: between CONADI, SEA and SERNAGEOMIN)

- Facilitate cross-sectoral dialogues and a working space to assess possibilities for aligning the regulatory framework of land easements with the standards on prior consultation developed by the Inter-American Court on Human Rights.

- Enhance coherence and efficiency of various existing titling programs through fostering coordination among international donors.

- Provide technical assistance to improve the application of domestic law on land tenure and security in conformity with international standards.

2. Support developing methodologies and processes to improve the identification of Indigenous Peoples potentially affected by a project as well as the identification of impacts on Indigenous Peoples. In case of doubt about whom to consult, consultation processes should entail preparatory scoping, field research and dialogue with indigenous organizations that request inclusion.

- Support government agencies (Chile: SEA, Peru: MINEM, SENACE; VMI) in further developing methodologies that include Indigenous Peoples in scoping process, intercultural communication during early stages of consultations, and that are based on a human-rights approach, and include cumulative impacts.

- Support indigenous organisation in strengthen their processes of identifying and registering Indigenous Peoples and facilitate coordination with government agencies for developing a format to systematize these processes conducted by Indigenous Peoples themselves.

- Provide capacity building to staff at government agencies and courts (Peru: MINEM, SENACE; Chile: SEA, Environmental Tribunal) to foster the inclusion of Indigenous Peoples' knowledge(s), ontologies, and value systems when reviewing the EIAS and when preparing their final decisions.

3. Support ensuring Indigenous Peoples' participation in the political debates, technical assessments and decisions related to mining concessions on indigenous lands.

- Contribute to the eradication of barriers for participation of indigenous peoples in terms of available time, power asymmetries; access to education, methodologies of information, access to funding and experts' assistance.

- Facilitate multi-stakeholder dialogues to assess possibilities for aligning the regulatory framework for granting mining concessions with the standards on prior consultation developed by the Inter-American Court on Human Rights, CERD, and others.

- Promote the direct participation in public affairs of underrepresented indigenous peoples and organizations in regions prioritized for mining activities by the governments.

4. Support advancing the implementing of consultation and FPIC within the environmental assessment of mining projects.

- Facilitate inter-ministerial dialogue (in Peru: Ministry of Environment (MINAM), and MINEM) with the participation of national human rights bodies (such as Ombudsman offices) to assess feasible avenues for reforming regulatory frameworks to implement prior consultation in the environmental assessment process.

- Support initiatives to improve the operationalization of FPIC incorporating human rights-based approaches to the environmental assessment of mining projects by both countries in matters related to the bargaining power of Indigenous peoples, gender sensitive measures, the efficacy and opportunity of consultations (before or during the environmental assessment), among others.

- Facilitating knowledge exchange with government representatives from countries where prior consultation is linked to the environmental assessment process (i.e., in Chile, Canada, and Colombia).

5. Support the strengthening of capacities of indigenous communities and organizations for informed, meaningful and self-determined participation in consultation and negotiation processes. Capacity building should enable Indigenous Peoples to have a full understanding of their rights, to identify and assess the project's impact/EIAS, to participate in the development of mitigation and benefits-sharing measures, and to monitor the fulfilments of agreements and obligations of the proponent and the State in relation to safeguarding their rights.

- Support responsible government agencies (in Chile: SEA and CONADI, in Peru: MINEM and VMI, possibly others such as DP and SENACE) in offering independent funding for indigenous organizations and communities to be consulted so that they can opt to procure technical advisory.
- Support responsible government agencies (in Peru: VMI) and civil society in delivering local training for conducting preparatory activities with indigenous communities to strengthen their capacities for meaningful engagement in consultation processes.
- Engage directly with indigenous organizations from different levels (regional, national, subnational and local), and with their communities in mining areas to build understanding of training needs on the ground.
- Allocate funding activities to foster the engagement in FPIC discussions concerning mining rights of indigenous women, indigenous youth, indigenous with disabilities, and other underrepresented indigenous identities or organizations.
- Support indigenous organizations in advocacy activities related to the improvement of FPIC and economic projects to guarantee autonomy and independence from mining activities.
- Facilitate learning exchange between indigenous leaders, indigenous women, and support indigenous organizations in their work as multipliers of capacity-building activities.

6. Support ensuring that consultation agreements contain measures or safeguards agreed upon with consulted Indigenous Peoples to sufficiently mitigate or offset potential adverse effects on the environment and indigenous rights and allow for benefit sharing

- Support responsible government agencies (SEA, SENACE) in developing a methodology and guidance for assessing if mitigation measures are sufficient in terms of preventing impact of indigenous rights, incl. developing benchmarks to detect rights impact. Provide capacity building for agency staff to apply such methodology when overseeing the negotiations with proponent and Indigenous Peoples.
- Strengthen the mandate, capacities and resources of national human rights bodies, such as Ombudsman Offices for overseeing consultation processes and holding responsible agencies accountable if they fail to provide consulted indigenous communities with complete and relevant, information about the project, especially the precise location of its components, potential impacts and mitigation measures.[249]

7. Support and promote meaningful indigenous participation in environmental assessments from an early stage.

- Eradicate the barriers faced by marginalized communities to participating actively through their self-governance and their own mechanisms in environmental assessments.
- Integrate a gender and diversity sensitive approach during environmental assessment to guarantee the participation of multiple and intersecting identities of indigenous persons within indigenous communities and organizations.
- Improve capacities and institutional support of Indigenous Peoples so that they can take advantage of the different opportunities for participation during environmental assessment.

[249] See Defensoria del Pueblo, 'Report 003-2016-DP-AMASPPI-PPI sobre el proceso de consulta previa del proyecto de exploración minera La Merced', 2016, at: https://cdn.www.gob.pe/uploads/document/file/1191892/Informe-N-003-2016-DP-AMASPPI-PPI-La-Merced20200803-1197146-y5i4qr.pdf.

- Ensure participation, consultation and consent in the formulation and implementation of amendments to environmental law to Indigenous Peoples rights.

8. Support ensuring that scheduling, duration and procedures of consultation provide enough time for informed review and free internal deliberation by Indigenous Peoples to allow for a meaningful and culturally adequate consultation.

- Train government representatives from Chile and Peru in intercultural competences, intercultural communication, conflict prevention and conflict transformation.
- Support learning exchange for agency staff with government representatives from other countries where consultation on mining projects successfully takes place over the course of several months (such as Canada)
- Strengthen agency staff, awareness and translation resources to systematize project information and present it in a participatory and culturally adequate manner to Indigenous Peoples.

9. Support monitoring and oversight of State and proponent's performance in relation to fulfilling consultation agreements and complying with mitigation of impacts on indigenous rights.

- Facilitate inter-ministerial dialogue with the participation of National Human Rights Institutions to find ways to strengthen the oversight and enforcement possibilities for consultation agreements.
- Strengthen coordination between responsible agencies and oversight bodies such as the Environmental Superintendence to share all relevant information facilitating oversight.
- Facilitate dialogue between government agencies and indigenous organizations on the potential development/improvement of transparent and accessible tools to monitor compliance with consultation agreements.

10. Strengthen due diligence in mineral supply chains connecting mines in producing countries with manufacturers in Europe

- Work with German and European industries to strengthen awareness, regulation and tools for human rights due diligence, responsible business conduct, and corporate accountability to foster mining practices that are respectful of Indigenous Peoples' rights.

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Annexes

ANNEX 1. INTERNATIONAL SOURCES AND STANDARDS ON PRIOR CONSULTATION AND FPIC			
	UNDRIP (2007)	**ILO C169 (1989)**	**I/A COURT H. R. (2001-2020)**
Document Category	**Non-binding international instrument**	**Binding international treaty**	**Binding regional jurisprudence**
Target stakeholders	**Signatory States**	**Ratifying States**	**States who have ratified the American Convention of Human Rights**
TRIGGERS	**Consultation:** - for legislative or administrative measures that the state may adopt that could affect Indigenous Peoples (article 19 and others) - for approval of any project affecting their lands/territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (article 32.2) - for using their lands or territories for military activities (article 30) **Consent:** - relocation of Indigenous Peoples (article 10) - storage or disposal of hazardous materials within indigenous territories (article 17.2)	**Consultation:** - legislative or administrative measures that may affect Indigenous Peoples directly (article 6) - before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands (article 15.2) - whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community (article 17) **Consent:** - relocation of Indigenous Peoples (article 16.2)	**Consultation:** - all development and investment plans (including exploration and exploitation plans) within indigenous territory (Saramaka People v. Surinam) **Consent:** - large-scale development/major development project/large-scale investment projects that that would have a major impact within indigenous territory/impact large parts of their territory (Saramaka People v. Surinam)
WHO	- Indigenous Peoples concerned **Indigenous territories** - right to own, use, develop and control the lands, territories and resources Indigenous Peoples have traditionally owned, occupied used, or otherwise acquired. - States must legally recognize and protect such lands, territories and resources	- Communities whose social, cultural and economic conditions distinguish them from other sections of the national community - descend from the populations which inhabited the country at the time of colonialization - retain some or all of their own social, economic, cultural and political institutions - Self-identification as indigenous is fundamental criterion **Indigenous territories** - rights of ownership and possession of Indigenous Peoples over the lands which they traditionally occupy - Governments shall take the necessary steps to identify such lands and to guarantee effective protection of their rights of ownership and possession	- Communities whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions **Indigenous territories** - Right to their ancestral territories (territory traditionally occupied and used by the Indigenous Peoples) - State must delimit, demarcate, and grant collective title over the territory of the members of indigenous people, in accordance with their customary laws, and through consultations with the indigenous people concerned, without prejudice to other tribal and indigenous communities.
WHEN	Prior to any of the measures mentioned above	Prior to any of the measures mentioned above	- at the early stages of a development or investment plan, which includes prior to approving exploration and exploitation plans

ANNEX 1. INTERNATIONAL SOURCES AND STANDARDS ON PRIOR CONSULTATION AND FPIC			
	UNDRIP (2007)	**ILO C169 (1989)**	**I/A COURT H. R. (2001-2020)**
Document Category	**Non-binding international instrument**	**Binding international treaty**	**Binding regional jurisprudence**
Target stakeholders	**Signatory States**	**Ratifying States**	**States who have ratified the American Convention of Human Rights**
PROCEDURE	- must be in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent. - provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. (article 32.1)	- through appropriate procedures and in particular through their representative institutions - with a view to ascertaining whether and to what degree their interests would be prejudiced - Indigenous Peoples must receive appropriate benefits and receive fair compensation for damages	- be in good faith the objective of reaching an agreement (no coercion, no corruption of community leaders, no undermining of social cohesion of indigenous communities) - culturally appropriate procedures according to indigenous customs and traditions, (taking into account indigenous decision-making processes and internal organization) - include/be based on EIAS so that Indigenous Peoples are aware/truly informed of environmental and health risks and projects´ impact - continuous dialogue/information exchange - Indigenous Peoples must receive appropriate benefits
OUTCOME	Indigenous Peoples have the right to redress if their territories have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. (redress involves restitution or compensation).	If “consent for relocation withhold, relocation shall take place only following appropriate procedures [...] which provide the opportunity for effective representation of the peoples concerned” and providing compensation	No activities can be implemented that may affect the traditional territory as long as effective consultation is not guaranteed. Any activity on indigenous territories must be stopped until effective consultation is conducted

ANNEX 2. REQUIREMENTS OF INDUSTRY STANDARDS		
	International Finance Corporation (IFC) Performance Standard 7 on Indigenous Peoples (2012)	**International Council on Mining and Metals – ICMM, Mining & Indigenous Peoples Position Statement (2013)**
TRIGGERS	**CONSULTATION:** - for any projects with adverse impacts to Indigenous Peoples, Consultation process commensurate with project´s risk, adverse impact and concerns raised by affected communities. **FPIC/CONSENT:** - Impacts on lands and natural resources subject to traditional ownership or under customary use. Such adverse impacts may include impacts from loss of access to assets or resources or restrictions on land use resulting from project activities. - relocation is unavoidable - significant project impacts on critical cultural heritage are unavoidable. Critical cultural heritage is cultural heritage that is internationally and/or legally recognized	**CONSULTATION:** - Any projects located on lands traditionally owned by or under customary use of Indigenous Peoples, consultations commensurate with the scale of the potential impacts and vulnerability of impacted communities. **FPIC/CONSENT:** - new projects and changes to existing projects that are likely to have significant impacts on indigenous communities, including where relocation and/or significant adverse impacts on critical cultural heritage are likely to occur.
WHO	**No universally accepted definition of "Indigenous Peoples, but for purpose of Performance standard:** - distinct social and cultural group characterized by: - Self-identification as members of a distinct indigenous cultural group - Collective attachment to/special relationship with habitats/ancestral territories and to the natural resources therein, even if they have lost collective attachment (due to e.g. resettlement, dispossession). - distinct customary cultural, economic, social, or political institutions - distinct language or dialect - all communities of Indigenous Peoples within the project area of influence who may be affected by the project, to be determined by an environmental and social risks and impacts assessment process - involve indigenous representative bodies and organizations - focus inclusive engagement on those directly affected as opposed to those not directly affected	**Groups that exhibit the commonly accepted characteristics of Indigenous Peoples (e.g defined in ILO 169)** - owners of formal title to land or recognised legal interests in land or resources - claimants for ownership of land or resources - customary owners or occupants of land or resources - users of land or resources for livelihood or cultural purposes - members of host communities whose social, economic and physical environment may be affected by mining and associated activities.
WHEN	Consultation should begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise	Agree on appropriate engagement and consultation processes as early as possible during project planning

ANNEX 2. REQUIREMENTS OF INDUSTRY STANDARDS		
	International Finance Corporation (IFC) Performance Standard 7 on Indigenous Peoples (2012)	**International Council on Mining and Metals – ICMM, Mining & Indigenous Peoples Position Statement (2013)**
PROCEDURE	**Informed Consultation and Participation (ICP) should be:** - based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and understandable format - involve representative bodies and organizations (e.g., councils of elders or village councils), as well as members of affected communities - provide sufficient time for indigenous decision-making processes - free of external manipulation, interference, coercion, or intimidation - enable meaningful participation, where applicable - in-depth exchange of views and information - organized and iterative - documented in plan, including time-bound implementation plan for mitigation & compensation mechanism (Indigenous People Plan) **FPIC:** - builds on and expands the process of free, prior, informed consultation (ICP) - established through good faith negotiation - document mutually accepted process and evidence of agreement - FPIC does not require unanimity and may be achieved even when individuals or groups within the community explicitly disagree	- Culturally appropriate, consistent with their traditional decision-making processes - be based on good faith negotiation - be based on social and environmental impact assessments that should be participatory and inclusive - documented in a plan that identifies representatives, agreed consultation processes and protocols, reciprocal responsibilities and agreed avenues of recourse in the event of disagreements or impasses occurring, and definition of what would constitute consent **FPIC:** FPIC doesn´t mean veto rights to individuals or sub-groups nor requires unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). - if no agreement possible, avenues of recourse should be sought, e.g. mediation or advice from mutually acceptable parties - if consent is not forthcoming despite the best efforts of all parties, government determines what shall be done and ICMM members decide whether they remain involved in project
OUTCOME	- Outcome of successful good faith negotiation is an agreement, which must be documented In Guidance document: if parties cannot reach agreement, they should seek mediation/advice from mutually acceptable third parties (GD)	- if no agreement possible, avenues of recourse should be sought, e.g. mediation or advice from mutually acceptable parties - if consent is not forthcoming despite the best efforts of all parties, government determines what shall be done and ICMM members decide whether they remain involved in project

ANNEX 3. EXAMPLES OF INDIGENOUS PROTOCOLS		
	Kachi Yupi – Atacama and Kolla peoples (Argentina)[250]	**Protocolo Autónomo – Arhuaco people (Colombia)[251]**
TRIGGERS	**Consent:** All administrative or legislative acts or measures that may directly or indirectly affect one or more communities, incl. projects affecting their lands and natural resources, extractive activities, subsoil activities, research, etc.	Infrastructure and public service works, reparation programmes and activities, peace process activities within the Black Line territory of the Sierra Nevada de Santa Marta. Activities contravening the Origin Law *Seyn Zare* are forbidden and cannot be consented. Mining is forbidden within the territory as it invariably affects the order and *kunsamu* of soil, no consent is possible and it is therefore not consultable.
WHO	Communities of the Atacama and Kolla Peoples of the territory of the Salinas Grandes Basin and the Guayatayoc Lagoon, represented through the General Assembly of the Salinas Grandes Basin and the Guayatoyoc Lagoon	The Arhuaco people represented by the Arhuaco branch of the Indigenous Confederation Tayrona (CIT), the *Cabildos* of the Arhuaco and Kogi-Malayo-Arhuaco reserves, the Elders, the Arhuaco Assembly
WHEN	Before approval and/or execution of the measure (all preliminary tasks, assessments, exploration, etc) in order to seek FPIC. During implementation, to guarantee communities' control/supervision and participation in benefits. If the measure is a process, each phase should be consulted and consented before advancing to the next phase. After implementation, to evaluate its results, obtain reparations for non-compliance or compensation for potential damages.	Before the consultation, a preliminary contact between proponent and Arhuaco authorities is required to obtain necessary information about the project and establish whether it is consultable or not. This stage requires an autonomous environmental, social, cultural and spiritual impact assessment conducted from the perspective of the Arhuaco.
PROCEDURE	Consent is the debated conformity or consensus by the community, taking into account the interests at stake and the immediate relationship with culture, identity, land, water, salt and the Guayatayoc Lagoon. Consultation to seek consent is binding and communities have the possibility to withhold their consent. No activity related to the measure or project can begin before reaching necessary consent. Consent given to one phase does not imply consent to the next phases or the measure/project as a whole. Consent must be freely given and sought with good faith and culturally adequate mechanisms, communities must have obtained complete, pertinent and understandable information.	If a project is deemed consultable, an internal consultation is conducted in which Arhuaco elders, spiritual authorities and the Assembly decide on their participation in the State-led (external) consultation process. The internal consultation requires information from a project's State-regulated environmental impact assessment. If the potential impacts are deemed irreparable, consent for conducting the external consultation process is withheld. If potential impacts can be mitigated, corresponding demands will be carried into the external consultation. If the internal consultation consents to conducting the external consultation, a pre-consultation is conducted to define the process (timeframe, funding, etc.). Purpose of the external consultation is to agree on mitigation measures, this determines consent to the project.
OUTCOME	The decisions reached as a result of the consultation procedure will be binding and mandatory for the State and individuals. Any legislative or administrative measure adopted omitting prior consultation will be null and have no value.	Project implementation only after Arhuaco authorities issued declaration of consent. Through permanent, intercultural dialogue, proponent must keep Arhuaco authorities informed about implementation and mitigation. Arhuaco authorities monitor compliance.

[250] Kachi Yupi: https://farn.org.ar/wp-content/uploads/2020/06/Kachi-Yupi-Protocolo-Consulta-Previa-Comunidades-Salinas-Grandes-y-Laguna-de-Guayatayoc-Dic-2015-1.pdf. Resolution by the Argentinian Ombudsman Office: http://www.dpn.gob.ar/documentos/20160520_30864_556826.pdf.

[251] Arhuaco, Protocolo Autónomo Pueblo Arahuaco, at: https://www.hchr.org.co/files/eventos/2017/PROTOCOLO-AUTONOMO-PUEBLO-ARHUACO.pdf.

ANNEX 4. LEGAL CONSULTATION REQUIREMENTS IN RELATION TO MINING PROJECTS IN CHILE					
SOURCE	**TRIGGERS**	**WHO**	**WHEN**	**PROCEDURE**	**OUTCOME**
Jurisprudence of the Inter-American Court of Human Rights applies (see Annex 1)					
National jurisprudence/Landmark cases[252]					
EL MORRO CASE (SUPREME COURT, ROL N° 11.299-2014)	Environmental impact assessment of El Morro copper mining project (exploitation phase)	All members of all communities within area of influence as collective right holders of the land where the project was located.	Before issuing the RCA. No further specifications	An informative meeting and few letters were sent.[253]	RCA was invalidated because not all communities had been consulted
PAGUANTA CASE (SUPREME COURT, ROL 11.040/2011)	Environmental assessment of mineral prospection project Paguanta (exploration phase)	All communities within the area of influence	Before issuing the RCA. No further specifications	Not specified	RCA was invalidated because right to consultation was affected. (Indigenous community of Cultane was affected by limitation of road they used to access town in times of religious festivities, but not consulted.)
Federal laws and regulations					
Indigenous Law 19.253, Indigenous Protection, Promotion and Development	**Consultation:** Not specified **Consent:** Excavation of historic burial sites for scientific purposes requires consent (art. 29)	Descendants of people that existed in the national territory since pre-Colombian times, who preserve their own ethnicity and culture tied to land. Recognizes 9 Indigenous Peoples[254] (art. 1). Individuals can be recognised as indigenous (art. 2). The status of being indigenous is accredited by means of a certificate granted by CONADI (art.3)	The State must listen to Indigenous Peoples and organisations when dealing with matters related to them (art. 34). No further specifications	Not specified	Not specified
Decree 66, Regulation of the Indigenous Consultation	**Consultation:** Administrative or legislative matters that may directly affect Indigenous Peoples (art. 2), including the RCA of projects or activities submitted to the SEIA and which require prior consultation (art. 8) **Consent:** Not specified	Indigenous Peoples and their freely chosen representatives as recognized by ILO C169 and Law 19.253, depending on the scale of expected direct affectation (art. 5, 6). CONADI provides technical assistance to identify Indigenous Peoples	Consultations must be prior, this means early and giving the affected Indigenous Peoples the opportunity to meaningfully influence the measure, this being "always before the administrative measure is emitted" (art. 11)	The aim of consultations is to reach an agreement or consent regarding the measures that may directly affect Indigenous Peoples (art. 2). Consultations must follow the principles of good faith, cultural appropriateness, and flexibility (art. 9-10) **Procedure:** (1) Joint elaboration of the consultation plan; (2) Dissemination of information of the consultation process; (3) Internal deliberation process of Indigenous Peoples; (4) "Dialogue" between Indigenous Peoples and State representatives; (5) Classification and communication of the results, which concludes the consultation process.	The duty to consult may be considered as fulfilled even if no agreements are reached (art. 3)

[252] There are over dozens of Appeals Court and Supreme Court rulings related to indigenous peoples and consultation issues, this table focusses on landmark rulings that developed the right to consultation related to mining.

[253] A. Tomaselli, A. El impacto del extractivismo sobre pueblos indígenas en el norte de Chile y estrategias jurídicas, 2017. En Congreso El Extractivismo en América Latina: Dimensiones Económicas, Sociales, Políticas y Culturales (238-259), Sevilla: Universidad de Sevilla.

[254] Mapuches,Aimaras, RapaNui/Pascuenses, Atacameñas, Quechuas, Collas, Diaguitas,Changos, Kawashkar/Yámana

ANNEX 4. LEGAL CONSULTATION REQUIREMENTS IN RELATION TO MINING PROJECTS IN CHILE					
SOURCE	**TRIGGERS**	**WHO**	**WHEN**	**PROCEDURE**	**OUTCOME**
Federal laws and regulations					
Law 19300, General Environment Act	**Consultation:** Not specified Consent Not specified	Not specified	Not specified	The State has the duty to allow access to environmental information and tend to the protection of indigenous as stipulated by international treaties (art. 4) No further specification	Not specified
Decree 40, Regulation of the SEIA	**Consultation:** Projects or activities that generate or present some of the effects, characteristics or circumstances indicated in art. 7, 8 y 10 of this degree (art. 85) Art 7: Resettlement of human groups or significant changes to their livelihood systems and traditions Art 8: Location and environmental value of territory (protected people and protected areas) Art 10: Changes to cultural heritage **Consent:** If relocation only possible with freely given consent and with full knowledge of the facts. When your consent cannot be obtained, relocation should only take place under adequate procedures (art. 7)	Indigenous Peoples and their freely chosen representatives as recognized by ILO C169 and Law 19.253. Only Indigenous Peoples that may be directly affected, through their representative institutions (art. 85), no further specifications	Before SEA decides on the requested RCA (art. 61). The consultation may last as long as the project evaluation process in the SEIA. If an EIS undergoes changes during its assessment and prior consultation was "considered" for it, a new consultation begins (art. 92)	Prior consultation must be conducted in good faith, informed, with culturally appropriate mechanisms, with the possibility to influence the environmental evaluation, and aiming to reach agreement or consent. The proponent may participate in the consultation if the parties agree on it and with the purpose to inform about the project (art. 84). Proponent may negotiate agreements before or during the environmental assessment, these must be informed and do not condition the RCA (art. 17)	After issuing the RCA, SEA will meet with the consulted indigenous groups to inform about the RCA and how their observations were considered (art. 61). The Environmental Superintendent oversees compliance with all contents of the RCA (art. 106) Failure to reach it does not imply affectation to the right to consultation (art.85) If no consent given to relocation, relocation can only take place under adequate procedures (art. 7)
Mining law & regulation	Not specified	Not specified	Not specified	Not specified	Not specified
Water Code	Not specified	Not specified	Not specified	Not specified	Not specified

ANNEX 5. LEGAL CONSULTATION REQUIREMENTS IN RELATION TO MINING PROJECTS IN PERU					
SOURCE	**TRIGGERS**	**WHO**	**WHEN**	**PROCEDURE**	**OUTCOME**
Jurisprudence of the Inter-American Court of Human Rights applies (see Annex 1)					
National jurisprudence/Landmark cases					
EXP. N° 03343-2007-PA/TC, 2009 (CORDILLERA ESCALERA)	Oil and gas activities in the Conservation area Cordillera Escalera where indigenous communities live	Indigenous Peoples (native and peasant communities with ethnic identity)	Before any project that may affect the health or natural habitat of native communities (para. 35)	ILO C169 is a constitutional parameter. Consultation according to ILO C169	Not specified
EXP. N° 0022-2009-PI/TC, 2010 (Tuanama Tuanama 1)	Legislative Process to establish Legislative Decree 1089 that establishes the Temporary Regime Extraordinary of Formalization and Titling of Rural Properties.	Indigenous Peoples on whose territory activities take place and adjacent peoples if they could be affected (para. 23)	Administrative and legislative measures directly related to Indigenous Peoples or that change their legal status (para. 21, 22). State duty to consult (para. 34)	Prior consultation as intercultural dialogue with good faith. Aim of reaching agreements as orientation (para. 24)	Consensus reached between the parties is binding (para. 25) Consultation does not grant veto power, failure to reach agreement does not make the measure inadmissible.
Exp. N° 00025-2009-PI/TC, 2011 (Tuanama Tuanama 3)	Legislative Process to establish Law 29338, Law on water resources	Indigenous Peoples, no specification	Before state-measures that directly affect collective rights (para. 21, 25). Measures since entry into force of ILO C169 (para. 23)	Not specified	Not specified
Federal legislation and regulation					
Indigenous Affairs					
Law 29785 (Prior Consultation Law) section 2	**Consultation:** Administrative and/or legislative measures, including plans and programs, that can directly affect or modify the collective rights of indigenous or native peoples (art. 2) **Consent:** Not specified	Indigenous or native peoples whose collective rights may be directly affected (art. 5) Identification of Indigenous Peoples as per art. 7. They participate through their representative organizations.	Before adopting the measure. No further specification.	Aim to reach agreement or consent and adoption of measures respectful of their rights (art. 3) Consultation must be prior, intercultural, of good faith, flexible, free of coercions, of reasonable duration and informed (art. 4)	State makes final decision about measure, considering indigenous views and recommendations. Agreements are binding (art. 15)
SD 001-2012-MC (Regulation of Prior Consultation Law)	**Consultation:** Administrative measure that authorises start of a project if it may affect Indigenous Peoples, laws that may directly affect Indigenous Peoples (para. 3i,j) **Consent:** Not specified	Indigenous or native peoples whose collective rights may be directly affected and/or who are in the geographic area where measure will be executed or that may be affected by it (art. 7)	Before an administrative or legislative measure, no further specification. Indigenous Peoples may request prior consultation (para. 9)	Aim is to reach an agreement or obtain consent on the proposed measures through intercultural dialogue (para. 5). Process can end before dialogue if indigenous parties express their agreement to the measure (para. 19.4) Intercultural, gender-balanced and gender sensitive, participatory and flexible methodology, 13, 28.8	Agreements are binding but no enforcement mechanism specified. If no agreements reached, State decides and may issue the measure but has to protect indigenous rights (para. 23)

ANNEX 5. LEGAL CONSULTATION REQUIREMENTS IN RELATION TO MINING PROJECTS IN PERU					
SOURCE	**TRIGGERS**	**WHO**	**WHEN**	**PROCEDURE**	**OUTCOME**
Federal legislation and regulation					
Mining legislation & regulation					
Ministerial Resolution 403-2019-MINEM/DM	**Consultation:** strative measures of the mining sub-sector **Consent:** Not specified	The responsibility of identifying the indigenous communities involved in the prior consultation rests with the MINEM	After the submission of an environmental assessment for review, before the authorization to start exploration and/or exploitation activities, before granting technical permits for beneficiation concessions or mineral transport (art. 3)	Not specified	Office of Social Management conducts consultation and makes a decision, which is then approved by General Director of Mining. No further specification.
Environmental legislation & regulation					
General Environmental Act	**n.a.**	n.a.	n.a.	n.a.	n.a.
Water Resources Law, Law 29338	Indigenous participation in water resource management **Consent:** Not specified	Indigenous Peoples, no further specification	Before hydraulic infrastructure projects, nor further specification	Not specified	Not specified

ANNEX 6. PRIOR CONSULTATIONS ON MINING IN CHILE – FINISHED AND PENDING AS PUBLICLY INFORMED BY SEA[255]					
Regions	**Companies (highlighting ICMM members)**	**Title of the project**	**Indigenous Peoples consulted**	**Dates of consultation Outcome of consultation**	**Dates of licensing Outcome of licensing**
Finished consultations					
Tarapacá	Teck	Quebrada Blanca mining project.	Human groups belonging to the Indigenous Peoples settled in the localities of Huatacondo, Chiclla, and Copaquire and Tamentica.	Consultation (July 2015 to August 2016) Separate agreements with the indigenous Quechua Community of Huatacondo, and Chiclla. Disagreement with the indigenous Aymara group of Copaquire and Tamentica	Licensing (July 2014 to September 2016) RCA approved by SEA
Tarapacá	Teck	Quebrada Blanca mining project Phase 2	Human groups belonging to the Indigenous Peoples settled in the localities of Huatacondo, Chiclla, and Copaquire and Tamentica.	Consultation (April 2017 to July 2018) Separate agreements with the indigenous groups, except for the indigenous Aymara association of Salar de Coposa (AIASC).	Licensing (October 2016 to August 2018) RCA approved by SEA
Tarapacá	Compañía Minera Cerro Colorado Ltda.	Operational-Continuity CompañíaCerroColorado	Indigenous associations and communities quechuas Mamiña Unida, Iquiuca, Quipisca and aymaras communities Cancosa and Parca	Consultation (July 2014-September 2015) Separate agreements with all six indigenous groups.	Licensing (July 2013-today)
Tarapacá	Compañía Minera Paguanta S.A,	Paguanta Prospecting Soundings	Indigenous Aymara Community of Cultane	Consultation (June 2013-January 2014) SEA conducted a process of consultation to comply with a judicial order to do so.	Licensing (January 2013-October 2014) SEA denied the licensing in March 2014 but granted it in October 2014.
Antofagasta	Minera El Delfin S.A.	Copper Sulfate Pentahydrate Plant	Atacamenian (Likan Antai) Community of Peine	Consultation (March 2015 to November 2017) On November 2017, SEA communicated the closure of the process after the retirement of the indigenous organisation.	Licensing (February 2016 to March 2019) The company discontinued from the environmental process
Antofagasta	Minera Escondida Limitada	Monturaqui project	Atacamenian (Likan Antai) Community of Peine	Consultation (August 2017 to February 2020) On February 2020, SEA communicated the closure of the process after the retirement of the indigenous organisation.	Licensing (February 2017 to February 2020) The company discontinued from the environmental process
Antofagasta	RT Sulfuros	State-Owned Enterprise CODELCO Chile	Atacamenian (Likan Antai) Community of San Francisco de Chiu-Chiu and other organisations of Calama	Consultation (August 2013-January 2016) SEA communicated the closure of the process, despite the opposition of the indigenous organisations.	Licensing (May 2013-January 2016) RCA approved by SEA

[255] SEA provides a list of the EIAs presented by proponents online at https://seia.sea.gob.cl/pci/proyectos_en_pci.php.These data was organised selecting the mining projects and identifying data with further research of the documents of each EIA publicly available.

ANNEX 6. PRIOR CONSULTATIONS ON MINING IN CHILE – FINISHED AND PENDING AS PUBLICLY INFORMED BY SEA[255]					
Regions	**Companies (highlighting ICMM members)**	**Title of the project**	**Indigenous Peoples consulted**	**Dates of consultation Outcome of consultation**	**Dates of licensing Outcome of licensing**
Finished consultations					
Atacama	Arqueros project	Laguna Resources Chile Limitada	Indigenous Colla Communities Geoxcultuxial, Pai Ote, Comuna Diego de Almagro	Consultation (January 2013-June 2013) The company adopted agreements with the communities that were included in the environmental study.	Licensing (December 2011-July 2013) RCA approved by SEA
Atacama	Cerro Casale mining project optimisation	Norte Abierto SpA	Indigenous Colla Communities Pai Ote, and Rio Jorquera y afluentes	Consultation (November 2011-January 2013) The company adopted agreements with the communities that were included in the environmental study.	Licensing (July 2011-January 2013) RCA approved by SEA
Atacama	El Morro Project	Sociedad Contractual Minera El Morro	Diaguita Agricultural Community Los Huascoaltinos	Consultation (March 2013-October 2013) SEA concluded the consultation despite the insistence of the indigenous organisation to extend the process.	Licensing (March 2011-October 2013) RCA approved by SEA, but later annulled by the judiciary
Atacama	Salares Norte Project	Minera Gold Fields Salares Norte SpA	Indigenous Colla Community Comuna Diego de Almagro	Consultation (April 2019-July 2019) Indigenous organisation retired from the process	Licensing (July 2018-December 2019) RCA approved by SEA
Atacama	Rajo Inca Project	State-owned Enterprise CODELCO	Indigenous Colla Community Comuna Diego de Almagro, Geoxcultuxial, Chiyagua de Quebrada El Jardín	Consultation (June 2019-February 2020) The indigenous organisation and the company reached agreements that were noted by SEA.	Licensing (October 2018-February 2020) RCA approved by SEA
Atacama	Arqueros project upgrade	Laguna Resources Chile Limitada	Indigenous Colla Communities Comuna Diego de Almagro, and Runa Urka	Consultation (January 2019-January 2020) Company and indigenous organisations reached some agreements included in the environmental study.	Licensing (July 2018-June 2020) RCA approved by SEA
Atacama and Antofagasta	Blanco Project	Minera Salar Blanco Sociedad Anonima	Indigenous Colla Community Comuna Diego de Almagro	Consultation (December 2018-February 2020) The indigenous organisation and the company reached agreements that were noted by SEA.	Licensing (September 2018-February 2020) RCA approved by SEA

Pending consultations as of June 2021

Up to June 2021, three mining projects were still in process (two related to exploitation activities and one exploration) in areas that possibly could directly impact on the collective rights of nine Atacameanian, Aymara and Collas Indigenous Groups:[256]

Regions	Companies (highlighting ICMM members)	Title of the project	Indigenous Peoples consulted	Dates of consultation Outcome of consultation	Dates of licensing Outcome of licensing
Pending consultations					
Antofagasta	Compañía Minera Zaldívar SpA	Operational Continuity Compañía Minera Zaldívar	Atacamenian (Likan Antai) Community of Peine Other two Atacamenian (Likan Antai) communities (Camar and Socaire) have required to be incorporated	Consultation (July 2018-today) SEA denied two requests for inclusion of two Atacamenian (Likan Antai) communities	Licensing (June 2018-ongoing)
Antofagasta and Tarapacá	Compañía Minera Doña Inés de Collahuasi SCM	Infrastructure Development and Improvement of Productive Capacity of Collahuasi	Human groups belonging to the Indigenous Peoples settled in the localities of Chiclla, Yabricollita y Caya, Copaquire and Tamentica.	Consultation (October 2019-today)	Licensing (January 2019-ongoing)
Atacama	Fenix Gold Limitada	Fenix Gold exploration project in Cerro Maricunga	Collas (Indigenous Community Comuna de Copiapó, Indigenous Community Pastos Grandes, and Indigenous Colla Community Sol Naciente)	Consultation (April 2021-today)	Licensing (April 2020-ongoing)

[256] The details and updates of these cases in progress of all the mining consultations implemented can be traced in the following link: https://www.minem.gob.pe/descripcion.php?idSector=3&idTitular=8757 and https://consultaprevia.cultura.gob.pe/proceso?title=&netapa=All&departamento=All&entidadespromotoras=All&tema=88.

ANNEX 7. PRIOR CONSULTATIONS ON MINING IN PERU – FINISHED AND PENDING AS PUBLICLY INFORMED BY THE MINEM[257]

Regions and provinces	Companies	Title of the project	Dates of environmental permits	Indigenous Peoples consulted	Dates of consultation Outcome of consultation	Outcome of the mining authorisation
Finished consultations						
Ancash Huaylas	SMC Toropunto LTD.	Toropunto exploration	Environmental declaration (January 2015)	Peasant Quechua Community of Santa Rosa de Quikakayán	Consultation (September-October 2015) Accelerated approval on October 24, 2015.	Company requested to initiate mining activities in April 2015. The General Directorate of Mining approved the initiation of mining exploration activities in March 2016.
Ancash Aija	ICMM Member Barrick Misquichilca S.A.	La Merced exploration	Environmental declaration (July 2015)	Peasant Quechua Community of Quilla Ayllu	Consultation (May-June 2016) Accelerated approval on June 11, 2016	Company requested to initiate mining activities in August 2015 The General Directorate of Mining approved the initiation of mining exploration activities in August 2016.
				Peasant Quechua Community of Llactun	Consultation (May-June 2016) Dialogue on June 14, 2016, with the subsequent approval	
Ancash Recuay	ICMM Member Anglo American	Corcapunta exploration	Environmental declaration (February 2016)	Peasant Quechua Community of Llacllin	Consultation (August-November 2016) Abandonment of the process	Company requested to initiate mining activities in March 2016. The General Directorate of Mining approved the initiation of mining exploration activities in January 2017.
				Peasant Quechua Community of Huacyon	Consultation (August-September 2016) Accelerated approval on September 24, 2016	
	Milpo S.A.A.	Guadalupe exploration	Environmental declaration (October 2015)	Peasant Quechua Community of Pararin	Consultation (October-January 2017) Dialogue on January 29, 2017, with the subsequent approval	Company requested to initiate mining activities in March 2016. The General Directorate of Mining approved the initiation of mining exploration activities in April 2017.
Apurimac Abancay and Antabamba	Tumipampa S.A.C.	Tumipampa Sur exploration	Environmental declaration (March 2018)	Peasant Quechua Community of Pachaconas	Consultation (October 2019-May 2020) Dialogue in April 2020 with the subsequent approval.	Company requested to initiate mining activities in April 2018. The General Directorate of Mining approved the initiation of mining exploration activities in July 2020.

[257] The MINEM provides a list of all the mining consultations online at http://www.minem.gob.pe/_area.php?idSector=3&idArea=192&idTitular=8702&idMenu=sub8689&idCateg=1590, while the VMI provides other list of consultation cases at https://consultaprevia.cultura.gob.pe.These data was organised extracting and categorizing the available data.

ANNEX 7. PRIOR CONSULTATIONS ON MINING IN PERU – FINISHED AND PENDING AS PUBLICLY INFORMED BY THE MINEM[257]

Regions and provinces	Companies	Title of the project	Dates of environmental permits	Indigenous Peoples consulted	Dates of consultation Outcome of consultation	Outcome of the mining authorisation
Finished consultations						
Apurimac Antabamba	Anabi S.A.C.	Anama exploration	Environmental declaration (March 2015)	Peasant Quechua Community of Huaquirca	Consultation (August 2016 -April 2017) The Ministry of Mines and Energy terminated the process in May 2014 after the abandonment of the process. The Ministry of Mines and Energy denied the request to reopen the process in September 2017.	Company requested to initiate mining activities in July 2015. The General Directorate of Mining approved the initiation of mining exploration activities in July 2018.
Apurimac Antabamba	Minera Ares S.A.C.	Huacullo exploration	Environmental declaration (February 2018).	Peasant Quechua Community of Chilloroya	Consultation (November 2020-January 2021) Accelerated approval on January 10, 2021.	Company requested to initiate mining activities in February 2020.
Apurimac Aymaraes	ICMM Member Barrick Misquichilca S.A.	Misha exploration	Environmental declaration (March 2015)	Peasant Quechua Community of Cotarusi	Consultation (November-December 2015) Accelerated approval on December 30, 2015.	Company requested to initiate mining activities in January 2015. The General Directorate of Mining approved the initiation of mining exploration activities in December 2015.
Apurimac Grau	Anthony Mining S.A.C.	Chacapampa exploration	Environmental declaration (April 2017)	Peasant Quechua Community of Chacapampa	Consultation (April-June 2019) Without data of the results of the consultation after the internal discussion of the community on June 29, 2019.	Company requested to initiate mining activities in June 2017. The General Directorate of Mining approved the initiation of mining exploration activities in October 2019.
Arequipa Castilla	Ares S.A.C.	Ares exploration	Environmental declaration (January 2015)	Peasant Quechua Community of Orcopampa	Consultation (March-April 2018) Accelerated approval on April 22, 2018.	Company requested to initiate mining activities in January 2017. The General Directorate of Mining approved the initiation of mining exploration activities in May 2018.

ANNEX 7. PRIOR CONSULTATIONS ON MINING IN PERU – FINISHED AND PENDING AS PUBLICLY INFORMED BY THE MINEM[257]

Regions and provinces	Companies	Title of the project	Dates of environmental permits	Indigenous Peoples consulted	Dates of consultation Outcome of consultation	Outcome of the mining authorisation
Finished consultations						
Ayacucho Lucanas	Apumayo S.A.C	Apumayo exploration	Environmental declaration (October 2014)	Peasant Quechua Community of Para	Consultation (August-September 2016) Abandonment of the process on September 2, 2016	Company requested to initiate mining activities in July 2015. The General Directorate of Mining approved the initiation of mining exploration activities in January 2017.
				Peasant Quechua Community of Chaviña	Consultation (August-October 2016) Dialogue with consent denied on October 25, 2016	
		Apumayo exploration	Environmental licensing (April 2016)	Peasant Quechua Community of Para	Consultation (August-September 2016) Abandonment of the process on September 2, 2016	Company requested to initiate mining activities in April 2016. The General Directorate of Mining approved the initiation of mining exploitation activities in January 2017.
				Peasant Quechua Community of Chaviña	Consultation (September-October 2016) Accelerated approval on September 27, 2016	
Ayacucho Lucanas	Fresnillo S.A.	Pilarica Phase 2 Exploration	Environmental declaration (February 2016)	Peasant Quechua Community of Santa Cruz de Pichigua	Consultation (April-June 2016) Dialogue with subsequent approval on July 18, 2019	Company requested to initiate mining activities in June 2018. The General Directorate of Mining approved the initiation of mining exploration activities in September 2019.
		Pucacruz Exploration	Environmental technical file (November 2018)	Annex Raquina	Consultation (January-July 2020) Dialogue on July 22, 2020, with the subsequent approval	Company requested to initiate mining activities in December 2018. The General Directorate of Mining approved the initiation of mining exploration activities in August 2020.
	Pucará Resources S.A.C.	Lourdes Exploration	Environmental declaration (June 2019)	Peasant Quechua Community of Para	Consultation (February-July 2020) Accelerated approval on July 21, 2020	Company requested to initiate mining activities in July 2019. The General Directorate of Mining approved the initiation of mining exploration activities in August 2020.
	Nexa Resources S.A.C.	Mónica Lourdes Exploration	Environmental declaration (May 2014)	Peasant Quechua Community of San Andrés	Consultation (February-August 2020) Accelerated approval on August 21, 2020	Company requested to initiate mining activities in December 2018. The General Directorate of Mining approved the initiation of mining exploration activities in October 2020.

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Regions and provinces	Companies	Title of the project	Dates of environmental permits	Indigenous Peoples consulted	Dates of consultation Outcome of consultation	Outcome of the mining authorisation
Finished consultations						
Ayacucho Parinacochas	Ares S.A.C.	Zona Pablo UMPallancata Exploitation	Environmental study modification (November 2017)	Peasant Quechua Community of Santa Cruz de Pallancata	Consultation (October-December 2019) Accelerated approval on December 8, 2019	Company requested to initiate mining activities in March 2018. The General Directorate of Mining approved the initiation of mining exploitation activities in March 2020.
		Pablo Sur Exploration	Environmental declaration (2019)			Company requested to initiate mining activities in April 2019. The General Directorate of Mining approved the initiation of mining exploration activities in January 2020.
		Cochaloma Exploration	Environmental declaration (2019)			Company requested to initiate mining activities in April 2019. The General Directorate of Mining approved the initiation of mining exploration activities in January 2020.
Ayacucho Parinacochas	Ares S.A.C.	Puquiopata exploration	Environmental declaration (November 2014)	Peasant Quechua Community of Sauricay	Consultation (October-December 2016) Accelerated approval on December 20, 2016	Company requested to initiate mining activities in October 2015. The General Directorate of Mining approved the initiation of mining exploration activities in January 2017.
Cusco Calca	Minera FOCUS S.A.C.	Aurora exploration	Environmental declaration (September 2014)	Peasant Quechua Community of Parobamba	Consultation (September-October 2015) Accelerated approval on October 11, 2015.	Company requested to initiate mining activities in October 2014. The General Directorate of Mining approved the initiation of mining exploration activities in November 2015.
Cusco Chumbivilcas	Hudbay Perú S.A.C.	Pampacancha Open Pit Exploitation	Environmental study modifications of exploitation activities in the mining unit Constancia (From 2015 up to this day).	Peasant Quechua Community of Chilloroya	Consultation (November 2020-April 2021) Accelerated approval on October 11, 2015.	Company requested to initiate mining activities in February 2020.
Cusco Paruro	KA ORO S.A.C.	Jasperoide exploration	Environmental declaration (January 2019)	Peasant Quechua Community of Hacca	Consultation (August-October 2020) Accelerated approval on October 17, 2020	Company requested to initiate mining activities in February 2019. The General Directorate of Mining is still evaluating the request after.

ANNEX 7. PRIOR CONSULTATIONS ON MINING IN PERU – FINISHED AND PENDING AS PUBLICLY INFORMED BY THE MINEM[257]

Regions and provinces	Companies	Title of the project	Dates of environmental permits	Indigenous Peoples consulted	Dates of consultation Outcome of consultation	Outcome of the mining authorisation
Finished consultations						
Huancavelica Castrovirreyna	Antaraes Perú S.A.C.	Panteria exploration	Environmental declaration (August 2016)	Peasant Quechua Community of Cajamarca	Consultation (May-June 2017) Accelerated approval on June 10, 2017	Company requested to initiate mining activities in August 2016. The General Directorate of Mining approved the initiation of mining exploration activities in July 2017.
	ICMM Member Sumitomo Metal Mining Perú S.A.	Capillas Central exploration	Environmental declaration (June 2017)	Peasant Quechua Community of Cochapampa Capillas	Consultation (August-October 2017) Accelerated approval on October 1, 2017	Company requested to initiate mining activities in June 2017. The General Directorate of Mining approved the initiation of mining exploration activities in October 2017.
Puno Azángaro	Solimana S.A.	Antaña exploration	Environmental declaration (February 2018)	Peasant Quechua Community of Checca Pupuja	Consultation (November-December 2018) Accelerated approval on December 13, 2018	Company requested to initiate mining activities in March 2018. The General Directorate of Mining approved the initiation of mining exploration activities in January 2019.
				Peasant Quechua Community of Huayllacunca	Consultation (November-December 2018) Dialogue on December 19, 2018, with the subsequent approval	
				Peasant Quechua Community of Mercedes		
Puno Carabaya	Bear Creek Mining S.A.C.	Corani exploitation	Environmental licensing (September 2013)	Peasant Quechua Community of Chaconiza	Consultation (March-April 2018) Accelerated approval on April 25, 2018.	Company requested to initiate mining activities in December 2017. The General Directorate of Mining approved the initiation of mining exploration activities in May 2018.
				Peasant Quechua Community of Quelcaya	Consultation (February-April 2018) Accelerated approval on April 26, 2018	
Puno Lampa	Kaizen Discovery Perú S.A.C.	Pinaya exploration	Environmental declaration (February 2017)	Peasant Quechua Community of Pinaya	Consultation (February-June 2018) Dialogue in May and June 2018 with some agreements and disagreements of the mining activities.	Company requested to initiate mining activities in April 2017 The General Directorate of Mining approved the initiation of mining exploration activities in July 2018.

Up to June 2021, five mining projects were still in process (three related to exploitation activities and two explorations) in areas that possibly could directly impact on the collective rights of nineteen Quechuas peasant communities:[258]

Regions	Companies (highlighting ICMM members)	Title of the project	Indigenous Peoples consulted	Relevant dates
Pending consultations				
Apurimac Antabamba	Fresnillo Perú S.A.	Santa Domingo Exploration	Peasant Quechua Community of Antabamba Peasant Quechua Community of Curanco	Request to initiate operations (January 2021). Environmental study modification of exploitation activities (October 2018). Consultation (April 2021-today).
Apurimac Cotabambas	Las Bambas S.A.	Chalcobamba Open Pit Exploitation	Peasant Quechua Community of Huancuire	Request to initiate operations (February 2019). Environmental declaration (February 2018). Consultation (November 2020-today).
Cusco Espinar	Antapaccay Mining Company	Antapaccay mine expansion exploitation of the area Tintaya-Integration Coroccohuayco	Thirteen quechua peasant communities: Alto Huarca, Huini Corocohuayco, Huarca, Huisa, Suero y Cama, Huisa Collana, Huano, Alto Huancané, Bajo Huancané, Tintaya Marquiri, Cala, Pacopata, and Anta Collana.	Environmental study modification of exploitation activities (November 2019). Consultation (December 2019-today).
Moquegua Sánchez Cerro	Buenaventura S.A.A.	San Gabriel exploitation	Peasant Community of Santa Cruz de Oyo, Maycunaca y Antajahua Peasant Community of Corire	Environmental study of exploitation activities (April 2017) and technical modifications (January 2018). Request to initiate operations (October 2017). Consultation with the Peasant Community of Santa Cruz de Oyo, Maycunaca y Antajahua (December 2019-today). The Ministry of Culture has required information related to the status of the consultation in relationship with the Peasant Community of Corire. MINEM included such community in the consultation (May 2021-today).
Pasco Daniel Alcides Carrión	Buenaventura Mining Company	Yumpag Carama Third Phase Explorration	Peasant Quechua Community of Huachus	Environmental study modification of exploration activities (December 2019). Request to initiate operations (March 2017). Consultation with the Peasant Community of Huachus (April 2021-today).

[258] The details and updates of these cases in progress of all the mining consultations implemented can be traced in the following link: https://www.minem.gob.pe/descripcion.php?idSector=3&idTitular=8757 and https://consultaprevia.cultura.gob.pe/proceso?title=&netapa=All&departamento=All&entidadespromotoras=All&tema=88.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

CHILE[259]

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Pascua Lama binational project/Compañía Minera Nevada SpA Barrick Gold (exploitation)	1996-2018	Risk to glaciers, water sources/ river, and agricultural livelihood of Diaguita people.	In 1996, Barrick Gold acquires land for the project. 2000, the company presented an EIAS, Environmental Impact Evaluation was conducted in 2001. RCA was granted with a condition to provide measures to protect glaciers. 2004: presentation of EIA Modification, start of citizen participation process. EIA Modification granted in 2006. After domestic court actions, Indigenous Peoples (Diaguita Indigenous Community) files petition at Inter-American Commission on Human Rights – OAS in 2007, petition admitted in 2009.[260] Indigenous Peoples argued that the "State granted environmental approval for execution of the Pascua Lama Mining project and the modifications thereto on the ancestral territory of the Diaguita Indigenous Community, without taking the community's views into account".[261] 2014: MoU between some communities and company that was controversial, generating internal community conflicts (bc only with 15 of the 28 involved communities).[262]	Project construction started in 2009 and suspended in 2013 by SMA, due to incompliance with RCA. 2012: Indigenous Peoples file a recurso de protección at Appeals Court of Copiapó, 2013: Court orders revision of variability of water quality vis a vis baseline[263] Throughout 2013-2015 a process of identifying, finding and reviewing sanctions on account of 33 environmental breaches by the company unfolded across environmental agencies and courts. In 2020, First Environmental Court confirmed the closure of the project due to environmental breaches.[264]

[259] All information based on: INDH, Mapa de conflictos, 2020. at: https://mapaconflictos.indh.cl/#/listado-conflictos, unless otherwise stated.

[260] Consejo para la Innovación en el Desarrollo de Chile. Resumen ejecutivo informe final proyecto: Evaluación de los conflictos socioambientales de proyectos de gran tamaño con foco en agua y energía para el período 1998 – 2015, at: https://www.cnid.cl/wp-content/uploads/2017/04/Resumen-Ejecutivo-Evaluacion-de-Conflictos-Socioambientales.pdf.

[261] IAHCR. Report no. 141/09, petition 415-07, admissibilitydiaguita agricultural communities of the huasco-altinos and the members there of Chile, 30 December 2009, at: http://www.cidh.oas.org/annualrep/2009eng/chile415.05eng.htm#_ftn2.

[262] Consejo para la Innovación en el Desarrollo de Chile. Resumen ejecutivo informe final proyecto: Evaluación de los conflictos socioambientales de proyectos de gran tamaño con foco en agua y energía para el período 1998 – 2015, at: https://www.cnid.cl/wp-content/uploads/2017/04/Resumen-Ejecutivo-Evaluacion-de-Conflictos-Socioambientales.pdf, A. Webbe. A Problematic Process: The Memorandum of Understanding between Barrick – Gold and Diaguita Communities of Chile, at: https://media.business-humanrights.org/media/documents/files/documents/barrick_mou_pascua_lama_eng_15sep1015.pdf.

[263] First Environmental Tribunal of Chile, Rol D-011-2015, at: https://www.1ta.cl/wp-content/uploads/Sentencia_R-5-2018_acum__R-6-2018.pdf.

[264] First Environmental Tribunal of Chile, Primer Tribunal Ambiental confirma clausura definitiva de Pascua Lama y mantiene multas de más de 7 mil millones de pesos, 17 Sep 2020, at: https://www.1ta.cl/primer-tribunal-ambiental-confirma-clausura-definitiva-de-pascua-lama-y-mantiene-multas-de-mas-de-7-mil-millones-de-pesos/.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)				
CHILE[259]				
Mining project/ Company	**Duration**	**Concerns raised by Indigenous Peoples**	**Conflict in relation to FPIC**	**Consequences of the conflict for project**
Optimisation Cerro Casale Exploitation Norte Abierto SpA, Barrick, Kinross Gold Co.	2001-2017	Concerns over the proximity of the mine to two national parks, dust pollution from unpaved stretches of the access road, damage to archaeological sites, cyanide storage, depletion of underground and pollutions of surface water sources.	In 2001: company presents for EIAS for developing an open pit to extract copper and gold, RCA approved in 2002. For changes in the project and of ownership, the company presented a (new) EIAS. In 2013, SEA granted the RCA,[265] after conducting a consultation with some of the communities within the environmental assessment.[266] Indigenous people file petition at Appeals Court of Copiapó requesting annulment of RCA, arguing that consultation process did not comply with the requirements of ILO Convention 169 and that their observation were not taken into account.	In 2013, the Appeals Court of Copiapó denies indigenous petition, arguing that consultation process was appropriate and there is no obligation to react to observations made during the consultation within the environmental assessment.[267] Committee of Ministers granted partially six reclamations related to the water usage in the RCA of the project, modifying specific environmental obligations. The company contested the amended RCA before the Environmental Tribunal, which granted the annulment of the modifications in 2017 in favour of company.[268]

[265] SEA, RCA 004/2013. https://seia.sea.gob.cl/archivos/RCA_CASALE_enero_2013.pdf.

[266] SEA, Letter of November 11, 2011. https://seia.sea.gob.cl/archivos/OBS_PROYECTO_CMC.pdf; Letter of November 10, 2011. https://seia.sea.gob.cl/archivos/Observaciones_Pai-Ote_a_EIA_Casale.pdf.

[267] Plataforma Urbana, Corte de Copiapó rechaza recurso de protección contra Cerro Casale, 3 May 2013, at: https://www.plataformaurbana.cl/archive/2013/05/03/corte-de-copiapo-rechaza-recurso-de-proteccion-contra-cerro-casale/.

[268] Second Environmental Tribunal of Chile, Rol-72-2015, at: https://www.tribunalambiental.cl/wp-content/uploads/2014/07/R-72-2015-12-06-2017-Sentencia.pdf.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

CHILE[259]

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Cerro Colorado and Pampa Lagunillas Compañía Minera Cerro Colorado Ltda., BHP Billiton (continuation/ expansion)	2005-ongoing[269]	Over-extraction of water resources from Pampa Lagunilla, dust pollution in Parca, affectations to a cultural heritage site in Quipisca and exclusion of Lirima and Cancosa communities from the consultation process	Exploration since the 80s, first conflicts emerged. Company made agreement with indigenous community of Cancosa in 1981. Cerro Colorado operates since 1992, which means that there was initially no environmental assessement in accordance with the Environmental Law from 1994. In 2002, indigenous community noted falling water table/drying of ecosystem, 2005 company was fined for water overextraction.[270] *Proyecto "Continuidad Operacional Cerro Colorado"* In 2013, the company presented an EIAS to continue exploitation activities until 2023. Consultation excluded some communities. In 2015, the General Controller required the inclusion of the Indigenous Aymara Community of Cancosa in the consultation. After RCA approved in 2015, Asociación Indígena Agrícola San Isidro de Quipisca (AIASIQ) requested annulment of RCA and consultation at Environmental Court, arguing their observations in the consultation had not been addressed appropriately. *Proyecto "Adecuaciones en depósitos de lastre, caminos internos y campamento"* In 2020, Indigenous Association San Isidro de Quipisca presented a request to the Environmental Tribunal against the RCA granted to an environmental declaration, arguing no indigenous consultation had taken place, not taking onto account impacts on archeologic sites and human health related to the adaptations in ballast tanks, internal roads and camp.[271]	In 2019, Second Environmental Court of Santiago suspended the project ("Continuidad Operacional"). It required a new RCA that addresses the claims related to the scarcity of water resources and cumulative impacts related to climate change.[272] Court rejects indigenous claim, arguing they departed from their observations made in the consultation. Environmental agency argued they addressed observation appropriately.

[269] Second Environmental Tribunal of Chile, Tribunal acoge parcialmente reclamación de vecino contra resolución de calificación ambiental de proyecto minero Cerro Colorado, 11 February 2019, at: https://www.tribunalambiental.cl/tribunal-acoge-parcialmente-reclamacion-de-vecino-contra-resolucion-de-calificacion-ambiental-de-proyecto-minero-cerro-colorado/.

[270] Consejo para la Innovación en el Desarrollo de Chile. Resumen ejecutivo informe final proyecto: Evaluación de los conflictos socioambientales de proyectos de gran tamaño con foco en agua y energía para el período 1998 – 2015, at: https://www.cnid.cl/wp-content/uploads/2017/04/Resumen-Ejecutivo-Evaluacion-de-Conflictos-Socioambientales.pdf.

[271] Mineria Chilena, En estudio queda reclamación de asociación indígena en contra de proyecto minero Cerro Colorado, 4 December 2020, at: https://www.mch.cl/2020/12/04/en-estudio-queda-reclamacion-de-asociacion-indigena-en-contra-de-proyecto-minero-cerro-colorado/.

[272] La Tercera 2019, https://www.latercera.com/nacional/noticia/comunidades-indigenas-logran-tribunal-ambiental-paralice-mina-cerro-colorado-bhp/523067/, Second Environmental Tribunal of Chile, Rol-141-2017, 8 February 2019, at: https://www.tribunalambiental.cl/wp-content/uploads/2020/05/Anuario-2do-Tribunal-Ambiental-2019-1.pdf; https://www.tribunalambiental.cl/wp-content/uploads/2019/02/R-141-2017-08-02-2019-Sentencia.pdf.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

CHILE[259]

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
El Morro Exploitation Sociedad Contractual Minera El Morro, then Goldcorp, Teck	2008-2014	Risks to sacred ancestral land, risk of pollution of local river.	In 2008, the company presented an EIAS to develop an open pit to extract copper and gold. In 2011, SEA granted the RCA.[273] In early 2012, the Appeals Court of Antofagasta granted the request of the community to suspend the project for a lack of consultation in accordance with ILO 169.[274] In April 2012, the Supreme Court annulled the RCA. After the first Supreme Court ruling, SEA conducted a new consultation process in 2013 and subsequently granted a new RCA in 2013.[275] However, this consultation excluded other Diaguita indigenous communities, who also filed a constitutional protection recourse (amparo).	The Supreme Court granted the recourse of Indigenous Peoples in 2014 and annulled the RCA.[276] After the Supreme Court ruling in 2014, the company withdrew the project In 2016, Goldcorp revealed plans to redesign and merge El Morro with the Relincho project to develop the new project Nueva Union, currently in prospection stage.
Pampa Hermosa Sociedad Química Minera de Chile (SQM)	2008-ongoing	Environmental concerns, specifically the use of the aquifer Salar de Llamara.	In 2008, the company presented an environmental study to extract nitrates. Citizen participation took place, the RCA was granted in 2010. Indigenous Peoples argued that specific indigenous consultation in compliance with C 169 should have taken place. Environmental authority argued area of influence does not involve indigenous territory.	In 2016, Environmental authorities halted the administrative proceedings after finding technical insufficiencies related to the usage of water and the new nitrate plant. Indigenous people filed separate requests before the First Environmental Tribunal of Antofagasta to annul the compliance plan due to the lack of consultation.[277] In 2020, the Environmental Tribunal rejected the request.[278]
Catanave exploration Southern Copper Corporation,a subsidiary of Grupo Mexico	2009-2011	Company buying water rights from the Ticnámar community, conducting prospection on a portion of land for which the ownership is still under litigation.	EIAS submitted in 2009, RCA approved in 2010, amidst community protest. In 2011, the indigenous organisations initiated different judicial proceedings against the project "Exploration Minera Catanave" on the grounds of lacking prior consultation to seek their FPIC; arguing they were only informed about project within a citizen participation, but not consulted in compliance with C 169.	The Court of Arica dismissed the indigenous claim in 2011, arguing that the indigenous people were adequately consulted within the citizen participation. The Supreme Court confirmed that ruling in 2011.[279]

[273] SEA, RCA 049/2011 at: https://seia.sea.gob.cl/archivos/RCA_EIA_EL_MORRO_FINAL_Subir_al_sistemax.pdf.

[274] Portal minero, Por explotación de Proyecto "El Morro", Minera canadiense sufre revés judicial por no consultar a indígenas, 4 May 2012, at: http://www.portalminero.com/pages/viewpage.action?pageId=32539074.

[275] RCA 232/2013. https://seia.sea.gob.cl/archivos/RCA_EIA_EL_MORRO_22_10_13_Subir_al_Sistema_final.pdf.

[276] Diario Constitucional, CS revoca sentencia y acoge protección de comunidades diaguitas contra proyecto El Morro, 7 October 2014, at: https://www.diarioconstitucional.cl/2014/10/07/cs-revoca-sentencia-y-acoge-proteccion-de-comunidades-diaguitas-contra-proyecto-el-morro/.

[277] First Environmental Tribunal of Chile, En estudio quedó causa por reclamación de comunidades indígenas en contra de proyecto "Pampa Hermosa" de SQM, 6 May 2020, at: https://www.1ta.cl/en-estudio-quedo-causa-por-reclamacion-de-comunidades-indigenas-en-contra-de-proyecto-pampa-hermosa-de-sqm/; First Environmental Tribunal of Chile, 1TA admite Reclamaciones de Camar y Consejo de Pueblos Atacameños, 13 February 2019, at: https://www.1ta.cl/1ta-admite-reclamaciones-de-camar-y-consejo-de-pueblos-atacamenos/

[278] Fundación Terram, Primer Tribunal Ambiental rechaza reclamación de comunidades indígenas en contra de proyecto Pampa Hermosa de SQM, 28 October 2020, at: https://www.terram.cl/2020/10/primer-tribunal-ambiental-rechaza-reclamacion-de-comunidades-indigenas-en-contra-de-proyecto-pampa-hermosa-de-sqm/.

[279] Diario Constitucional, CS confirmó sentencia de la Corte de Arica que rechazó acción de protección interpuesta en contra de la resolución que calificó favorablemente un Estudio de Impacto Ambiental., 20 June 2011, at: https://www.diarioconstitucional.cl/2011/06/20/cs-confirmo-sentencia-de-la-corte-de-arica-que-rechazo-accion-de-proteccion-interpuesta-en-contra-de-la-resolucion-que-califico-favorablemente-un-estudio-de-impacto-ambiental/

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

CHILE[259]

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Los Pumas exploitation Minera Hemisferio Sur C.M.	2010-2015	Concerns about depletion and pollution of water resources, damage to cultural heritage and economic activities	RCA approved for the magnesium open-pit project in 2013.[280] The communities filed an appeal against the RCA for insufficient environmental assessment (only Declaration of Impact instead of EIAS) and lack of prior consultation during the environmental assessment.	Indigenous petition granted by the Appeals Court of Arica in 2013, based on the lack of consultation in compliance with C169 and breaches to environmental legislation in terms of tailings and proximity to National Park. Supreme Court reversed that ruling in 2014. In 2015, the Committee of Ministers reversed the RCA, finding that the information on the social/anthropological baseline and environmental and social impacts was insufficient. According to the Committee of Ministers, the project will no longer take place.[281]
Exploitation Salamanqueja Mine ENAMI leased to Pampa Camarones SpA, since 2017 owned by Minería Activa	2011-2015	Concerns about water pollution, affectation of agriculture, livestock farming and human health	Indigenous Aymara organisations oppose the copper project and the environmental assessment process for the environmental declaration, completed in 2011,[282] due to a lack of prior consultation during the environmental assessment.	Throughout 2013-2018, the company was sanctioned for not complying with environmental obligations and damaging archaeological heritage.[283] In 2018, a RCA was issued for a renewed project under new owners.[284]
Salar de Atacama, Litio extension SQM	2009-present	Concerns about water use for mining project, water consumption by increasing labour force, degradation of flora and fauna	Several complaints over time about lack of consultation. The environmental assessment for the project "Modificaciones y mejoramiento del sistema de pozas de evaporación solar en el salar de Atacama" involved a citizen partipation, during which Indigenous Peoples raised observations as well as the necessity for a proper indigenous consultation in compliance with C 169. Court action brought for missing consultation in the contract between Corfo and SQM, involving several court cases. Indigenous Peoples also filed complaint at Environmental Tribunal Antofagasta for not having been consulted in the approval of the compliance plan that SQM had to submit to the environmental authority due to environmental breaches.	Environmental Tribunal of Antofagasta ruled that compliance plan must be annulled, but that indigenous consultation is not necessary for the new compliance plan. SMA appealed in 2020 but desisted.

[280] SEA, RCA 050/2013. https://seia.sea.gob.cl/archivos/RE_N_50.PDF.

[281] Codeverde, Comité de Ministros revocó RCA de proyecto minero Los Pumas, de Arica y Parinacota, 18 May 2015, at: https://codexverde.cl/comite-de-ministros-revoco-rca-de-proyecto-minero-los-pumas-de-arica-y-parinacota/.

[282] SEA. RCA 033/2011. https://seia.sea.gob.cl/archivos/RCA_N_33_2011.PDF.

[283] Second Environmental Tribunal of Chile, Rol 25-2016, Tribunal concluyó que Pampa Camarones causó daño ambiental irreparable y la condenó a repararlo, at: https://www.tribunalambiental.cl/sentencia-d-25-2016-pampa-camarones/.

[284] SEA. RCA 005/2018. https://seia.sea.gob.cl/archivos/2018/05/18/RCA_PC.PDF.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

CHILE[259]

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Paguanta/ prospection/exploration Compañía Minera Paguanta S. A	2011-2016	Concerns about water use for mining project, loss of agricultural livelihoods due to expected water scarcity	RCA (environmental declaration) is granted in 2011, subsequently indigenous communities file at the Appeal Court of Iquique to request the annulment of the RCA, that project must be submitted through EIAS and that consultation in accordance with C169 is necessary. After Appeals Court rejects indigenous claim, Supreme Court grants their request in 2012. EIAS submitted in 2013 and RCA finally approved in 2014. Other Indigenous communities file complaint at Environmental Tribunal against RCA, requesting the annulment of the RCA and new EIA and a new consultation as they were allegedly excluded in consultation.	In 2015, The Environmental Tribunal dismissed the request after considering that all claims were attended during the environmental licensing.[285] Organisations appealed; case elevated to the Supreme Court.[286] In 2016, Supreme Court denied the petition, arguing no other Indigenous Peoples than the indigenous community of Cultane were directly affected.[287]
Caserones Lumina Copper exploitation	2008-2017	Environmental concerns, specifically water scarcity/water use	Within the environmental assessment, indigenous communities requested e.g., the expansion of the area has direct influence to all communities present on the access route to the mine, the recognition of the project´s social impact, and infrastructure to face chemical emergencies derived from the transport of toxic substances, the safeguard of the ancestral transit routes within the valley, a bypass, and the construction of a water desalination plant as well as better citizen participation. 2011: RCA approved under condition to modify electric transmission line, ccommunity agreement about transmission line	2013 –2015: environmental authority sanctions company for incompliance related to water management and transmission line In 2016, Santiago Environmental Court rejected t two claims filed by indigenous community against the Superintendency of the Environment (SMA) for decisions it made within the sanctioning procedure.

[285] Second Environmental Tribunal of Chile, Anuario 2015, at: https://www.tribunalambiental.cl/tribunal-ambiental-rechazo-reclamacion-contra-decision-del-comite-de-ministros-que-aprobo-el-proyecto-de-prospeccion-minera-paguanta/; https://www.tribunalambiental.cl/wp-content/uploads/2014/09/Anuario-2015-del-Tribunal-Ambiental-de-Santiago-1.pdf; Second Environmental Tribunal of Chile, 2 December 2015, at: https://www.tribunalambiental.cl/tribunal-ambiental-rechazo-reclamacion-contra-decision-del-comite-de-ministros-que-aprobo-el-proyecto-de-prospeccion-minera-paguanta/.

[286] FIMA,Ficha de jurisprudencia Paguanta, at: https://fima.cl/site/wp-content/uploads/2017/01/Ficha-de-Jurisprudencia.-Paguanta.pdf.

[287] Second Environmental Tribunal of Chile, Tribunal Ambiental realizó audiencia en reclamación de Pueblos Indígenas de Tarapacá relacionada con proyecto de prospección minera Paguanta, 28 April 2015, at: https://www.tribunalambiental.cl/tribunal-realiza-audiencia-en-reclamacion-de-pueblos-indigenas-de-tarapaca-contra-el-sea-miercoles-29-de-abril-a-las-1500-horas-tribunal/; https://www.tribunalambiental.cl/corte-suprema-confirmo-sentencia-del-tribunal-ambiental-que-rechazo-reclamacion-contra-aprobacion-de-proyecto-minero-paguanta/

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

CHILE[259]

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Legal cases (not registered in database for social conflicts)				
RT Sulfurost CODELCO División Rodomiro	2017-2020[288]		Inadequate consultation process during the environmental licensing. Community abandoned consultation process after their key request related to the storages of tailings and had not been met. RCA was granted. The community reclaimed that SEA should acknowledge the lack of consent, by annulling the RCA an ordering a new consultation.	In 2018, the Environmental Tribunal dismissed the request considering that the observations related to FPIC should be raised during the environmental licensing and did not affect the validity of the RCA.[289] The Supreme Court denied the appeal in 2020.[290]
Underground water exploration Zaldivar SpA	2019-2020		The Council and the community filed two reclamation recourses in 2019 against the decision of the General Water Directorate to authorize underground water exploration works without having prior consultation.	In 2019 and 2020 the Antofagasta Court of Appeals granted each reclamation, annulled the water work permit and ordered the Directorate to conduct a prior consultation with the Peine community.[291]
Prospection Norte Abierto Mine Caspiche District Norte Abierto Company	2020-ongoing		The community requests a consultation process considering that the impacts will affect collective rights, that project entails significant impacts and environmental declaration should be replace by EIAS.[292] In 2020, the community filed a complaint before the First Environmental Tribunal.	On November 2020, the First Environmental Tribunal of Antofagasta held a meeting virtually with the concerned parties.[293]

An additional conflict no listed above surrounds the mine Doña Inés de Collahuasi, owned by Compañía Minera Doña Inés de Collahuasi SCM (shared by Anglo American PLC, Glencore and by the conglomerate Japan Collahuasi Resources BV of Mitsui & Co., Ltd). Up until 2015, the INDH does not list it as a conflict involving indigenous lands, although Aymaras and Quechuas communities are involved.[294] In this case, there has also been a legal proceeding before the Environmental Tribunal related to FPIC and environmental damage.[295]

[288] https://www.tribunalambiental.cl/audiencia-r-157-158-2017-rtsulfuros/.

[289] https://www.tribunalambiental.cl/wp-content/uploads/2018/08/R-157-2017-17-08-2018-Sentencia.pdf; https://www.tribunalambiental.cl/wp-content/uploads/2019/06/Anuario-2018_Tomo-I_Tribunal-Ambiental-Santiago.pdf; https://www.tribunalambiental.cl/wp-content/uploads/2018/08/R-157-2017-17-08-2018-Sentencia.pdf.

[290] https://www.tribunalambiental.cl/corte-suprema-confirmo-sentencia-del-tribunal-ambiental-que-rechazo-reclamacion-contra-aprobacion-de-proyecto-minero-paguanta/; https://www.tribunalambiental.cl/wp-content/uploads/2020/06/CS_28195-2018_2TA_R-157-2017_Sentencia.pdf

[291] https://www.diarioconstitucional.cl/2020/11/06/corte-de-apelaciones-de-antofagasta-ordeno-consulta-indigena-ante-solicitud-de-exploracion-de-agua-por-minera/

[292] https://www.1ta.cl/comunidad-indigena-colla-asegura-que-aprobacion-de-proyecto-norte-abierto-minimiza-los-impactos-ambientales-y-debe-considerar-consulta-indigena/

[293] https://www.1ta.cl/comunidad-indigena-colla-asegura-que-aprobacion-de-proyecto-norte-abierto-minimiza-los-impactos-ambientales-y-debe-considerar-consulta-indigena/

[294] https://mapa.conflictosmineros.net/ocmal_db-v2/conflicto/view/111; INDH. Mapa de conflictos socioambientales en Chile 2015, p. 32.

[295] https://www.1ta.cl/primer-tribunal-ambiental-acoge-reclamacion-de-asociacion-de-coposa-en-contra-de-programa-de-cumplimiento-de-minera-collahuasi/

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

PERU

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Mine Afrodita Minera Afrodita S. A. C., Mining Company NDR Perú, and owners of the mining concessions	2008-ongoing	Contamination of rivers and negative impact on National Park and Natural Reserves, also problems with informal mining	On December 2009, the company presented an environmental declaration to the Mining Directorate of Amazonas for immediate approval, although the company lacked the authorisation to use the lands for mining activities.[296] In 2013 indigenous organisations filed an amparo suit against MINEM for authorising mining rights without consultation.[297] In 2016, the Mining Directorate of Amazonas granted a mining permit to Mine Afrodita to start exploitation. Indigenous organizations filed amparo for omission of consultation, requesting nullification of environmental declaration, mining plan and closure plan. In 2020, two indigenous communities in support of Afrodita that allegedly were created to just be included in consultation were recognized by the Provincial Government. Indigenous leader murdered after protesting against these measures.[298]	*Two judicial processes:* *Case: "Permits of GORE Amazonas & 'El Tambo' in the Cordillera del Cóndor"* In 2016, communities demand amparo for granting the area "el Tambo" to Afrodita without their consultation. In 2017: Consejo de Minería nullifies resolution that enabled Afrodita to start exploitation activities in Cordillera del Cóndor. Case gets archived. *Case: "Permits of GORE Amazonas & granting of mining concessions & authorization of mining permits"* In 2019, Décimo Juzgado Constitucional de la Corte Superior de Lima orders annulation of 111 mining concessions and some EIAS approved by INGEMMET & MINEM bc approved without prior consultation (ruling based on C 169).[299] The judicial proceedings are ongoing after the annulment of the judgment in favour of the indigenous organisations.[300] Up to August 2020, the Ministry of Energy and Mines has identified 87 mining environmental liabilities in the area administered by Afrodita Mine.[301] The company is responsible for remediating the liabilities, under the terms of the plan in 2009. Remediation activities are still pending.
Yagku Entsa Exploration Aguila Dorada SAC/exploration	2011-2020	Concerns about environmental contamination	Over the years, the members of the community San José de Lourdes demonstrated their opposition to any mining activity in the area.[302] The mining company argued that they had an agreement on the use of land with the representatives of one Native Community. In 2013, the Supayacu community filed an amparo recourse against the authorization of exploration activities due to lack of prior consultation in accordance with C169.	In 2020, the Fourth Chamber of the Superior Court of Lima granted an amparo requested by the Supayacu Community, nullifying the authorisation to conduct exploration activities.[303] Indigenous organisations and communities have been divided by negotiations promoted by the mining company.

[296] https://www.defensoria.gob.pe/modules/Downloads/informes/varios/2015/I.A.-Conflictos-por-Recursos-Hidricos.pdf.

[297] File 4037-2013-0-1801-JR-CI-10.

[298] https://www.servindi.org/actualidad-noticias/19/02/2020/hallan-muerto-awajun-tras-protestas-contra-invasion-minera.

[299] https://www.servindi.org/actualidad-opinion/18/05/2019/cien-concesiones-mineras-declaradas-nulas-por-falta-de-consulta-previa.

[300] Resolution 15, November 14, 2019. File 4037-2013-0-1801-JR-CI-10.

[301] http://www.minem.gob.pe/minem/archivos/ANEXO_RM238.pdf.

[302] https://www.defensoria.gob.pe/wp-content/uploads/2018/07/Reporte-de-conflictos-N-94.pdf.

[303] https://muqui.org/noticias/poder-judicial-ratifica-en-ultima-instancia-que-se-vulnero-derecho-a-la-consulta-previa-y-ordena-suspension-de-la-fase-de-exploracion-del-proyecto-minero-yagku-entsa/.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

PERU

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Santa Ana Bear Creek	2011-2016	Concerns about environmental contamination and loss of communal lands	In 2012, the peasant communities demonstrated their rejection to any mining activity in the area occurring without consultations. Their opposition to the project was inscribed in the broader protests against the project by other peasant communities, and agricultural and environmental groups. This opposition had escalated in 2011, known as the Aymarazo. In 2013, an indigenous women organisation gathered to define the priorities for Aymaras Women and included the issue of mining and consultations.[304]	In the broader context of the Aymarazo, the national government issued an SD declaring the project no longer of national interest and revoking the mining concession. The company sought and won international arbitration in 2014 (ICSID Case No. ARB/14/21). In exchange for compensation paid by the Peruvian State, it renounced its concession.
Antapaccay & Extension Coroccohuaycco Compañía Minera Antapaccay S.A./ Glencore (before Xstrata Tintaya)	2015–ongoing Conflict goes back to 2000 (that conflict was related to main mining project and about environmental concerns and about mining agreement, renegotiated in 2012/2013)	Concerns about environmental contamination, dislocation of communities, incompliance with mining agreement	Three different conflicts relate to the Extension Coroccohuayacco. One about the compliance with the mining agreement/compensations, the others related to matters of consultation. In 2019, communities protested against SENACE and its decision to approve the modification of the project's EIAS without prior consultation and for excluding them from a consultation started by MINEM that same month.[305] SENACE as well as NGOs pointed out the missing re-ubication plan for dislocating communities/missing consultation in accordance with C169.	In 2019, MINEM began prior consultation with 12 of the communities, after the approval of the EIAS. However, the communities had been demanding consultation for the elaboration/during the Modification of EIAS requested by the company for the Coroccohuayco project and approved by SENACE in December 2019. *Two judicial processes:* *"Caso C.C. de Huisa"* Communities filed an amparo in 2015 against MINEM for omission of prior consultation of project Antapaccay/Antapaccay Glencore. At Juzgado Mixto de Yauri. Hearing took place in 2017, awaiting sentence. *"Caso Comunidades afectadas por el proyecto Antapaccay"* La Communities filed an amparo in 2017 against MINEM for omission of prior consultation of project Antapaccay/Antapaccay Glencore. At Juzgado Mixto de Yauri. Hearing is pending.

[304] https://www.defensoria.gob.pe/wp-content/uploads/2018/07/Reporte-Mensual-de-Conflictos-Sociales-N-120-Febrero-2014.pdf.

[305] Directorial Resolution N° 196-2019-SENACE-PE/DEAR.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)				
PERU				
Mining project/ Company	**Duration**	**Concerns raised by Indigenous Peoples**	**Conflict in relation to FPIC**	**Consequences of the conflict for project**
Cañariaco Copper Candente Copper /exploration	2012-ongoing	Concerns about nvironmental contamination Contamination of Kañaris River	Since 2004, the company has been conducting exploration activities. In 2012, the representatives of the Peasant Quechua Community of San Juan de Cañaris opposed the expansion of mining activities in the Cañariaco project and denounced the lack of consultation.[306] The company informed that their activities were authorised by a notarised agreement between the company and the community.[307] The Ministry of Energy and Mines denied the possibility of indigenous consultation, questioning the indigeneity of the community.[308] Before the Congress, the Defensoría del Pueblo informed that the institution was evaluating to file a constitutional complaint related to the lack of consultation in this and other cases.[309]	The company restarted exploration activities in January 2013. During 2014, the company requested assistance to the Ministry of Culture to receive information related to the consultation process.[310] The government agreed to constitute a Dialogue Group with government, company and community representatives.[311] In 2019, the company announced that they would join the dialogue promoted by the State to attend the needs of the population.[312]
Cases in which it is contested whether these conflicts involve Indigenous Peoples; self-identification of communities involved in those conflicts is not consistently documented				
Tia Maria Southern Perú Copper Corporation (SPCC)	2009-ongoing	Concerns about water usage, groundwater pollution, environmental contamination, and risks to agriculture, mistrust in EIA	2009 submitted EIAS for which there was a citizen consultation process. After protests that EIAS the EIAS is evaluated by United Nations Office of Project Services (UNOPS) that then dismissed the EIAS for environmental deficiencies. 2013 new EIAS under conditions to address UNOPS observations, include social study and build desalination plant. Protests during public audience in 2013 and after EIA approval in 2014. The National government concluded that the population of Islay lacks indigeneity[313] and that therefore indigenous consultation process is not applicable. Issuance of construction permit in 2019 renewed protests.[314]	Confrontations between the police and the population of Islay re-emerge periodically, this had led to several deaths and injuries on both sided. Protest leaders have been stigmatised and criminalised over the years. The project is still on hold despite having an environmental license and agreements with the landowners.

306 https://www.defensoria.gob.pe/modules/Downloads/informes/anuales/Decimosexto-Informe-Anual.pdf.

307 https://www.candentecopper.com/news-releases/news-releases/2012/candente-copper-provides-clarifications-on-recent-community-consulta-in-peru/.

308 https://www.servindi.org/actualidad/102016#:~:text=A%20pesar%20de%20las%20pruebas,no%20es%20indígena%20sino%20campesina.

309 http://www2.congreso.gob.pe/Sicr/Prensa/heraldo.nsf/CNtitulares2/DB473D894BC00C0A05257B79006A6AD0/?OpenDocument. Access to the Peruvian Congress website may be blocked due to server and browser security settings.

310 http://cooperaccion.org.pe/canariaco-otro-proyecto-que-quiere-renacer-sin-licencia-social-boletin-amp-232-octubre-2018/.

311 Ministerial Resolution 002-2013-PCM.

312 Candente Copper, Comunicado de prensa, 2019, https://www.candentecopper.com/news-releases/comunicado-de-prensa/2019/candente-copper-corp-acepta-invitacion-para-unirse-al-grupo-de-desarrollo-del-distrito-kanaris/.

313 El Comercio. Ministro de Ambiente desestima consulta previa en Tia Maria, at: https://elcomercio.pe/peru/arequipa/tia-maria-ministro-ambiente-desestima-consulta-previa-351878-noticia/?ref=ecr.

314 Defensoría del Pueblo. Reporte Mensual de Conflictos Sociales N° 206 Abril -2021, at: https://www.defensoria.gob.pe/wp-content/uploads/2021/05/Reporte-Mensual-de-Conflictos-Sociales-N°-206-abril-2021.pdf.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

PERU

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
Majaz Empresa Minera Río Blanco Copper S.A., (prior: Monterrico Metals Plc)	2004-ongoing	Concerns about negative impacts on land and water resources in an area of moorland that provides ecosystem services and water to the communities.	The population opposed to the project requested consultation prior to granting rights to third parties that might affect indigenous communities.[315] Communities requested a consultation process before the enactment of the Law on Prior Consultation. Therefore, no consultation process was implemented. Company had obtained lands though some allegedly dubious community contracts. MINEM approves EA for exploration 2003-2006, despite several concerns. Company demands extension in 2007, but then desists that demand. In 2016, Peru and China make agreement on advancing that project, communities not consulted within that agreement.	Police used methods of force and violence against the population[316] during protests in 2005 and 2009.[317] Lawsuit against Monterrico company in London for involvement in violence and torture against local peasants in 2005. Final settlement didn't recognize liability, but company had to pay compensations. In 2012 new lawsuit against Peruvian Police for violence and torture in 2005. Communities continue to denounce that mining project does not have social license.
Conga Yanacocha	2012-ongoing	Concerns about drainage of lagoons, water usage, water contamination, tailings, risks to agriculture, mistrust in EIAS	EIA approval in 2010, citizen participation took place, but no consultation in accordance to C169. The population opposed project and EIAS, arguing the EIAS was not done well and they were not consulted. The National government responded against that claim concluding that the population was not Indigenous Peoples. Some members of Celendin and Bambamarca have presented claims before the Inter-American Commission on Human Rights requesting the right to consultation.[318]	Confrontations between the police and the population of Celendín and Bambamarca tend to re-emerge periodically, provoking deaths and injured people. The project is still in hold despite having an environmental license and agreements with the landowners.

Mining project/ Company	Duration	Latest court/ file	Cause/Claim	Resolution/status
Legal cases[319]				
BHP BILLITON **Caso Arboleda**	2011-ongoing	Constitutional Court/01129-2012-PA/TC	Nullify mining concessions granted to the company on Aymara territory and conduct prior consultation in line with C169 and Constitution.	Suit dismissed in lower courts in 2011, subsequent appeals by the claimant, elevated to Constitutional Court. Constitutional Court[320] ordered a new trial declaring null and void the judgments held by lower courts in 2018. A new trial started in lower courts.

[315] Defensoría del Pueblo. Reporte Mensual de Conflictos Sociales N° 206 Abril -2021, at: https://www.defensoria.gob.pe/wp-content/uploads/2021/05/Reporte-Mensual-de-Conflictos-Sociales-N°-206-abril-2021.pdf.

[316] Congreso de la República, Boletín de noticias, at: http://www.congreso.gob.pe/Docs/Otamdegrl/files/boletinjuridico/boletines_pdf/bs_27_febrero.pdf.

[317] https://www.business-humanrights.org/en/latest-news/responsabilizan-a-minera-majaz-por-torturas-contra-campesinos-de-ayabaca-y-huancabamba-perú/.

[318] IAHCR. Precautionary measure MC452-11 (Peru). http://www.oas.org/es/cidh/decisiones/pdf/2014/MC452-11-ES.pdf.

[319] All information based on: https://www.servindi.org/actualidad-noticias/27/06/2018/balance-del-litigio-constitucional-en-defensa-de-pueblos-indigenas, unless otherwise stated.

[320] Tribunal Constitucional del Perú, Proceso de Amparo 01129-2012-AA. https://tc.gob.pe/jurisprudencia/2019/01129-2012-AA%20Resolucion.pdf?fbclid=IwAR2_1-sKVKhWi49N1fhZyuiU81Ow-iPK9xeqpuuyx4MGtH2bAU-sE2jCZG4.

ANNEX 8. MINING-RELATED SOCIAL CONFLICTS AND LITIGATION IN CHILE AND PERU INVOLVING INDIGENOUS PEOPLES AND FPIC (2010-2020)

PERU

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
BHP BILLITON	2012-ongoing	Constitutional Court /2603-2014-AA (858-2012)	Suspend exploration and exploitation activities due to violation of rights contained in C169, conduct prior consultation, and nullify concessions granted over community territory.	Suit dismissed in lower courts in 2014, subsequent appeals by the claimant, elevated to Constitutional Court and awaiting progress. In 2019, Constitutional Court granted the inclusion of a business union to the process.[321]
Caso Llungo	2012-ongoing		Indigenous communities filed amparo against mining concessions made without their prior consultation.	The case is rejected by the Juzgado Especializado en lo Civil de Puno in 2013, which is seconded by the Primera Sala Civil of the Corte Superior de Justicia de Puno. Since 2014, the case is at the Constitutional Court, awaiting sentence.
BHP BILLITON **Caso Atuncolla**	2012-ongoing	Third Chamber of the Civil Superior Court of Puno 1846-2012	Nullify all administrative acts that were not consulted, and subsequent violations of constitutional rights, suspend current and future exploration and exploitation activities, conduct prior consultations.	In 2016, Sala Civil grants amparo, in 2017, State Attorney appeals, at Constitutional Court which is dismissed. 2018: Constitutional Court emits Resolution Nr. 57 requesting compliance with the prior ruling, annulment of mining concession, prior consultation for mining concessions necessary. Pending execution until December 2020.
Cemento Sur SA **Caso Chilla Bambilla y Chilla Pucara**	2014-ongoing	Second Chamber of the Civil Superior Court of Puno 048-2014	Nullify concessions granted to the company on Aymara territory and conduct prior consultation in line with C169 and Constitution.	Amparo claim dismissed in 2018, community appealed, and case elevated to the Civil Court Puno, awaiting sentence.
Aruntani SAC, Barrick Misquichilca SA, Minera del Norte, Fresnillo del Peru SAC **Caso Jatucachi**	2015-ongoing	Third Chamber of the Civil Superior Court of Puno 1832-2015	Nullify mining concessions granted to the company on Aymara territory and conduct prior consultation in line with C169 and Constitution.[322]	Tercer Juzgado Civil de la Corte Superior de Justicia de Puno granted amparo in 2017 declaring null and void the 13 mining concessions and ordering a consultation process. Case appealed at the Sala Civil de la Corte de Puno, awaiting sentence.
Caso Asacasi	2015-ongoing	Constitutional Court /3326-2017 AA (035-2017) (001-2016)	Systemic omission of right to consultation, request to nullify all administrative acts that were not consulted between 2004 and 2015, including all mining concessions granted on community land.	Amparo claim declared without merits in 2016 and after appeal 2017, appeal elevated to Constitutional Court awaiting processing.
Caso Palca Consorcio Minero Palcawanka S.A.C.	2018-ongoing	No information available	In 2018, Communities file amparo for omission of prior consultation for mining concessions and authorization of exploration activities within their ancestral territories.[323]	No information available.

[321] Tribunal Constitucional del Perú, Proceso de Amparo 02603-2014-AA. https://www.tc.gob.pe/jurisprudencia/2019/02603-2014-AA%20CTResolucion.pdf.

[322] Congreso de la República. Proyecto de ley de que modifica el articulo 2 de la ley 29785, Ley del derecho a la consulta previa a los pueblos indigenas u originarios, reconocido en el convenio 169 de la Organización internacional del trabajo (OIT), para implementar procesos de consulta previa, libre e informada para el otorgamiento de concesiones mineras en el territorio de los pueblos indígenas organizados en comunidades campesinas y comunidades nativas, at: https://leyes.congreso.gob.pe/Documentos/2016_2021/Proyectos_de_Ley_y_de_Resoluciones_Legislativas/PL0334520180912.pdf.

[323] Área de litigio constitucional y pueblos indígenas del IDL, Balance del litigio constitucional en defensa de PP.II. por omisión de consulta, at: https://www.servindi.org/actualidad-noticias/27/06/2018/balance-del-litigio-constitucional-en-defensa-de-pueblos-indigenas.

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PERU

Mining project/ Company	Duration	Concerns raised by Indigenous Peoples	Conflict in relation to FPIC	Consequences of the conflict for project
No information available	2013-2020	Constitutional Court/02196-2014-PA/TC	Omission of prior consultation of *acarreo* (mining activities near the river) on its territory	The Amparo recourse was granted at the first stage, then revoked at second stage. The Constitutional Court granted amparo and ordered the Municipality to consult the community before authorising acarreo.[324]

ANNEX 9. LEGAL CONSULTATION REQUIREMENTS RELATED TO MINING PROJECTS IN CANADA[325]

SOURCE	TRIGGERS	WHO	WHEN	PROCEDURE	OUTCOME
National jurisprudence/Landmark cases (aggregated)					
Duty to consult/common law *Haida Nation v. British Columbia,* 2004 *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), 2004 *Mikisew Cree First Nation v Canada* (Minister of Canadian Heritage), 2005 *Rio Tinto Alcan Inc. v. Carrier* Sekani Tribal Council, 2010 *Tsilhqot'in Nation v. British Columbia,* 2014	**Consultation:** Any measure that the Crown intends to undertake and that may adversely impact recognized or asserted Indigenous Peoples' rights protected under Art. 35, Constitution Act, 1982 Causal connection must exist between the measure and anticipated impacts on the rights of Indigenous Peoples **Consent:** Very serious issues Infringement on Aboriginal title	Indigenous Peoples who hold or claim to hold a right under Article 35 of Constitution Act, 1982. Consultation applies to all communities covered by treaty, irrespective of distance to project area.	Duty to consult can be fulfilled through Indigenous Peoples' participation in the EIA processes Duty to consult applied in the context of historical treaty rights. Consultation early in the planning stages, prior to a decision, to allow for integration of indigenous concerns Before "strategic, higher level decisions"	Scope of consultation commensurate with strength of indigenous rights and dimension of impact Good faith to provide meaningful consultation appropriate to the circumstances and that the good faith obligation also applies to Indigenous Peoples Procedures can be delegated to project proponents	Accommodation aims to "avoid irreparable harm or to minimize the effects of infringement" on the rights protected under Article 35 and entails "seeking compromise in an attempt to harmonize conflicting interests" Accommodation does not entail any veto power and it does not need to satisfy indigenous demands If Indigenous Peoples reject the measure, the Crown shall find a balance between indigenous concerns and societal interests
Mining legislation and regulation					
Federal level	n.a.	n.a.	n.a	n.a	n.a
Provincial level Mining activities are largely regulated at the level of provincial/territorial jurisdictions, through their respective laws, regulations and case law. Most mining regulations do not contain consultation provisions. e.g. Ontario's new Mining Act	Varies per province	Varies per province	Varies per province	Varies per province	Varies per province

[324] https://tc.gob.pe/jurisprudencia/2020/02196-2014-AA.pdf.

[325] To facilitate insights on the Canadian system while remaining within the scope of this study, the table provides two examples of provincial regulations. The example of the Ontario Mining regulation was chosen because it represents an innovation. Most mining legislations do not provide for consultation obligation at exploration stage. Reform of the Mining Act in Ontario followed consultation between the provincial authority and various stakeholders, including indigenous representatives. It also followed several conflicts between mining proponents and indigenous communities.

ANNEX 9. LEGAL CONSULTATION REQUIREMENTS RELATED TO MINING PROJECTS IN CANADA[325]					
SOURCE	**TRIGGERS**	**WHO**	**WHEN**	**PROCEDURE**	**OUTCOME**
Environmental legislation and regulation					
Federal level Canada Impact Assessment Act (S.C. 2019, c. 28, s. 1)	Varies depending on project impacts	Indigenous groups and bodies designated under federal legislation and land claim agreements that may be affected (Art. 12). No further specifications	Before (Article 12) and during environmental impact assessment process (Articles 21, 22). When making its decision if an impact assessment is required, IAAC must take into account "any adverse impact that the project may have on the rights of Indigenous Peoples under Article 35, Constitution Act, 1982" and any comments received from consulted Indigenous bodies and groups (Article 16(2)).	The impact assessment must take into account impacts on Indigenous Peoples' rights, "Indigenous knowledge with respect to the designated project", "considerations related to Indigenous cultures raised with respect to the designated project", and "any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body" (Article 22(1)). Assessment report is due 3 years after commencement (Article 19(1))	Consultation results must be considered during EIA process., In some cases project may only proceed if there is an agreement between proponent and Indigenous Peoples (Article 7(4)).
Provincial/territorial level EIA processes vary between jurisdictions and according to requirements under applicable treaties/ land claim agreements British Columbia's new Environment Assessment Act	Varies per province	Varies per province	Varies per province	Varies per province	Varies per province