

WHAT DOES IT TAKE TO MAKE LOCAL CONSULTATION A SUCCESS?

INPUT PAPER IV: LATIN AMERICAN REGION

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This Paper has been prepared for the **Expert Workshop on Practical Approaches to Ensuring the Full and Effective Participation of Indigenous Peoples in REDD+: Assessing Experiences and Lessons to Date**, to be held in Weilburg, Germany, on 10-12 September 2013. This paper contains five case studies on local FPIC and participatory processes from the Latin American region, ranging from the infrastructure and natural resources governance sector to a private REDD+ project case: Case 1 deals with a road construction through the National Park TIPNIS in Bolivia (2012); Case 2 with an intent to develop a REDD+ pilot project in Guna Yala, Panama (2012/13); Case 3 with Gas fields Explorations in Charagua Norte, Bolivia (2009/10); Case 4 with the creation of the Regional Conservation Area “Maijuna”, Peru (2013); and Case 5 with a road construction project in Colombia (2005-09).

ABSTRACT AND PRINCIPAL FINDINGS

The principal findings of this paper are:

- *Pre-conditions for dialogue:* All the cases studied show that a precise legal framework on FPIC/consultation of Indigenous Peoples (IP) was necessary for all the parties to engage in the process; it was not sufficient that ILO Convention 169 had force of constitutional law. Conditions for dialogue need to be assessed and worked on at every stage of the consultation process (Case 1: prior social conflict caused several affected communities to refuse the consultation; Case 4: favorable conditions rendered the process almost unnecessary for some communities). It should be assessed whether participation rules applying to REDD+ are sufficiently precise and context-specific.
- *Representativeness and legitimacy:* A sound prior knowledge of affected IP is of paramount importance:
 - Lack of proper prior information on IP could jeopardize efficiency of consultation (Case 4). Existing information based on land titling to communities is insufficient.
 - It is necessary to distinguish between representative institutions and decision-making bodies (Case 1: indigenous organizations represent the communities, but it is the meeting of communities' representatives that takes the final decision). Hence, coordination, information sharing and consensus building may involve different institutions. Also, decisions may be taken by several indigenous institutions (Case 2: a political and a spiritual institution take position; local communities deliberate before their representatives attend general meeting).
 - Engaging directly with local communities may be necessary to provide full information to the affected People, whatever the scope of the measure, although communities may not have the final competency to decide on the matter. Proper information at community level is a challenge in REDD+ national processes.
 - Consulting only part of the communities and allowing for a decision to be taken without considering legitimate institutions may cause lasting negative social impacts and jeopardize legitimacy of the project (Case 1: consultation meetings were sometimes held only with families that wanted to participate, fostering division inside the communities).
 - Consulting on a measure with broader (or narrower) geographical impacts may not necessarily entail engaging with different indigenous institutions (Case 2: The Guna General Congress had to decide on a project that would only have affected part of the communities. On the other hand, national representative institution COONAPIP could not take binding decisions on measures that would impact the Guna territory; Case 3: the national and regional organizations were involved in a local consultation process, which improved assessment capacity and legitimacy).
 - Dealing with REDD+ plans, programs and projects would not necessarily involve three different levels of indigenous institutions. Engaging with the representative organization that has 'jurisdiction' over the geographic scope of the measure may be a starting point, but determining what institution will participate in which phase is a key point that should be discussed in pre-consultation meetings and agreed on in participation protocols with IP. Legitimacy would not be guaranteed by engaging with a specific organization, but rather by the process that leads to its identification. This would also allow for the IP to work on internal governance. Discussion on REDD+ should be an opportunity to clarify IP representative structures, as it would often be the first participation experience for IP.
- *Coordination:* Consultation protocols mutually agreed with representative institutions seem the best way to ensure legitimacy and ownership of the process since the beginning (Case 3: a common agreement on the protocol even helped resuming a process that started badly). Lack of prior coordination between authorities and IP can affect legitimacy and efficiency of the whole process. It also should increase predictability of agenda and costs for both parties. Indigenous representatives should fully participate in planning decisions about REDD+, since the challenge of legitimacy or adequacy could later paralyze the process.
- *Timely consultation:* Consultation shall occur when potential impacts on IP are identified, but at a moment that allows for true influence on the content (i.e. sufficient 'reversibility'). In addition, several consultations may be necessary on the same measure, since approval should be obtained not only on the proposal, but

also on its impacts (Case 1: consultation of the project of a road construction did not make sense, because decision was already taken by the State. However, a second consultation process should be organized on the final lay-out of the road and its impacts). Ongoing participation in policy and programs designing is also necessary to avoid late or pointless consultation (see Case 1 and 5: decision already taken).

- *Information:* Since information is key to be able to take a position, the way affected IP access information and assess it requires specific attention (Case 3: capacity of IP to benefit from external and internal experts and generate their own information was critical for agreeing on risks assessment. Case 2: Uncertainty surrounding the international REDD+ framework generates mistrust). Accessibility, adequacy and quality of information about REDD+ and its impacts to IP is still an ongoing challenge.
- *Consensus building:* Prior identification of IP's way of life, values and aspirations is needed to engage in consensus building, taking into account the long absence of the State in their territories as well as long-existing incomprehension and conflicts. (Case 1: needs identification; Case 3: impact assessment in light of communities' Life Plans). Needs should be channeled and ongoing participation should be fostered. REDD+ proposals may go against spiritual values of IP; engaging initial discussions on large financial profits may be inappropriate (Case 2: difficulty to give environmental services a cost and to trust a mechanism that would generate high incomes). Discussion on co-benefits from REDD+ (e.g. biodiversity protection, forest governance, land rights) could be a better starting point.

RESUMEN Y PRINCIPALES CONCLUSIONES

El presente documento contiene cinco estudios de caso sobre procesos locales de Consentimiento Libre, Previo e Informado y mecanismos participativos de la región latinoamericana, que van desde el sector de gobernanza de infraestructura y recursos naturales hasta el caso de un proyecto privado de REDD+: el caso 1 trata de la construcción de una carretera a través del Parque Nacional TIPNIS en Bolivia (2012); el caso 2 se refiere a un intento de desarrollar un proyecto piloto de REDD+ en Guna Yala, Panamá (2012/2013); el caso 3 trata de exploraciones en campos gasíferos en Charagua Norte, Bolivia (2009/2010); el caso 4 se refiere a la creación del Área de Conservación Regional Maijuna en Perú (2013); y el caso 5 describe un proyecto de construcción de carretera en Colombia (2005-2009). Las principales conclusiones son las siguientes:

- *Prerrequisitos para el diálogo:* Todos los casos estudiados demuestran que es necesario contar con un marco legal preciso para el Consentimiento Libre, Previo e Informado/ la consulta de los pueblos indígenas, pues sólo así todas las partes logran participar en el proceso; no resulta suficiente que el Convenio 169 de la OIT se incorpore a la normativa constitucional. Es necesario evaluar y perfeccionar las condiciones para el diálogo en cada etapa del proceso de consulta (caso 1: un conflicto social previo hizo que varias de las comunidades afectadas se rehusaran a participar en la consulta; caso 4: las condiciones favorables hicieron que el proceso fuera casi innecesario para algunas comunidades). Debería evaluarse si las reglas de participación que se aplican a REDD+ son suficientemente precisas y específicas para el contexto.
- *Representatividad y legitimidad:* Es de importancia crucial contar con sólidos conocimientos previos sobre los pueblos indígenas afectados:
 - La falta de información previa correcta y completa sobre los pueblos indígenas puede poner en peligro la eficiencia de la consulta (caso 4). La información existente basada en la titulación de las tierras de las comunidades es insuficiente.
 - Es necesario distinguir entre instituciones representativas e instancias de decisión (caso 1: las organizaciones indígenas representan a las comunidades, pero la decisión definitiva sólo se toma en la reunión de los representantes de las comunidades). Por lo tanto, para establecer la coordinación, compartir información y llegar a un consenso puede ser necesario involucrar a distintas instituciones. Además, las decisiones pueden ser tomadas por varias instituciones indígenas (caso 2: una institución política y otra espiritual establecen sus propias posiciones; las comunidades locales deliberan antes de que sus representantes acudan a la reunión general).
 - Puede ser necesario tratar directamente con comunidades locales para proveer una información completa al pueblo afectado, sin importar el alcance de la medida. Sin embargo, las comunidades

- pueden no poseer la competencia para decidir el asunto en forma definitiva. La información correcta a nivel de las comunidades representa un desafío en los procesos nacionales de REDD+.
- Consultar sólo a una parte de las comunidades y permitir que se tome una decisión sin considerar a las instituciones legítimas puede causar impactos sociales negativos duraderos y poner en peligro la legitimidad del proyecto (caso 1: las reuniones de consulta se realizaban a veces sólo con las familias que deseaban participar, con lo cual se fomentó la discordia al interior de las comunidades).
 - Consultar sobre una medida con impactos geográficos más amplios (o más limitados) no necesariamente implica tratar con distintas instituciones indígenas (caso 2: el congreso general de los guna debía decidir sobre un proyecto que sólo habría afectado a una parte de las comunidades; por otro lado, la institución representativa a nivel nacional COONAPIP no podía tomar decisiones vinculantes sobre medidas que impactarían sobre el territorio guna. Caso 3: las organizaciones nacionales y regionales se involucraron en un proceso de consulta local, lo cual mejoró la capacidad de evaluación e incrementó la legitimidad del proceso).
 - El manejo de planes, programas y proyectos de REDD+ no necesariamente requeriría tratar con tres niveles distintos de instituciones indígenas. Entablar conversaciones con la organización representativa que tiene 'jurisdicción' sobre el ámbito geográfico de la medida puede ser un punto de partida, pero determinar qué institución participaría en cuál de las fases es un aspecto clave que debería discutirse en las reuniones previas a la consulta y acordarse en los protocolos de participación con los pueblos indígenas. El negociar con una organización específica no es garantía de legitimidad, sino lo importante es más bien el proceso que lleva a su identificación. Esto permitiría también que los pueblos indígenas trabajen en su gobernanza interna. La discusión sobre REDD+ debería constituirse en una oportunidad para aclarar las estructuras representativas de los pueblos indígenas, ya que a menudo podría tratarse de la primera experiencia de participación de un pueblo indígena.
- *Coordinación:* Los protocolos de consulta acordados conjuntamente con instituciones representativas parecen ser la mejor manera de asegurar la legitimidad y apropiación (*ownership*) del proceso desde su inicio (caso 3: un acuerdo conjunto sobre el protocolo incluso ayudó a restablecer un proceso que había comenzado mal). La falta de coordinación previa entre autoridades y pueblos indígenas puede afectar la legitimidad y eficiencia de todo el proceso. La coordinación previa también debería incrementar la predictibilidad de la agenda y los costos para ambas partes. Los representantes indígenas deberían participar plenamente en las decisiones de planificación de REDD+, dado que el desafío de la legitimidad o adecuación podría paralizar el proceso en fecha posterior.
 - *Consulta oportuna:* La consulta debe tener lugar cuando se han identificado los potenciales impactos sobre los pueblos indígenas, pero en un momento en que éstos puedan ejercer una verdadera influencia sobre el contenido (por ejemplo, suficiente 'reversibilidad'). Adicionalmente, es posible que se requieran varias consultas sobre una misma medida, dado que debería obtenerse la aprobación no sólo de la propuesta, sino también de sus impactos (caso 1: la consulta sobre el proyecto de construcción de la carretera no tenía sentido, dado que la decisión ya había sido tomada por el Estado; sin embargo, se debería organizar un segundo proceso de consulta sobre la ruta final de la carretera y sus impactos). La participación continua en la concepción de políticas y programas también es necesaria para evitar consultas tardías o vanas (véase los casos 1 y 5: la decisión ya había sido tomada).
 - *Información:* Dado que la información es clave para poder adoptar una posición, se requiere prestar atención específica al modo en que los pueblos indígenas afectados acceden a la información y la evalúan (caso 3: la capacidad de los pueblos indígenas de aprovechar la asesoría de expertos externos e internos y generar su propia información fue crítica para el acuerdo sobre evaluación de riesgos; caso 2: la incertidumbre en torno al marco internacional de REDD+ generó desconfianza). La accesibilidad, la adecuación y la calidad de la información sobre REDD+ y sus impactos para los pueblos indígenas representan todavía un desafío no resuelto.
 - *Generación de consenso:* Tomando en cuenta la larga ausencia del Estado en los territorios indígenas, al igual que la incomprensión y los conflictos de larga data, es necesario identificar previamente el modo de vida, los valores y las aspiraciones de los pueblos indígenas antes de buscar la generación de un consenso (caso 1: necesidad de identificación; caso 3: evaluación de impactos a la luz de los planes de vida de las

comunidades). Deberían canalizarse las necesidades de los pueblos indígenas y fomentar su participación permanente. Las propuestas de REDD+ pueden ser contrarias a los valores espirituales de los pueblos indígenas, y el entablar discusiones iniciales sobre importantes ganancias financieras puede resultar inapropiado (caso 2: dificultad de asignar un costo a los servicios ambientales y confiar en un mecanismo que generaría altos ingresos). La discusión de los potenciales beneficios adicionales de REDD+ (por ejemplo, la protección de la biodiversidad, la gobernanza forestal, los derechos de propiedad de la tierra) podría ser un mejor punto de partida.

RESUME ET PRINCIPALES CONCLUSIONS

Ce document présente cinq études de cas sur le consentement préalable, donné librement et en connaissance de cause (CPLCC) et sur les processus de participation en Amérique latine, allant de la gouvernance de l'infrastructure et des ressources naturelles à un cas de projet REDD+ privé. Le cas 1 concerne la construction d'une route à travers le parc national TIPNIS en Bolivie (2012) ; le cas 2 une intention de réaliser un projet pilote REDD+ à Guna Yala, Panama (2012/2013) ; le cas 3 des explorations de gisements de gaz à Charagua Norte, Bolivie (2009/2010) ; le cas 4 la création de la zone protégée régionale « Maijuna », Pérou (2013) ; et le cas 5 un projet de construction de route en Colombie (2005-2009). Les principales conclusions sont les suivantes.

- *Conditions préalables au dialogue* : tous les cas étudiés montrent qu'un cadre juridique précis sur le CPLCC/la consultation des populations autochtones est nécessaire pour que toutes les parties s'engagent dans le processus ; le fait que la convention 169 de l'OIT a valeur de loi constitutionnelle ne suffit pas. Les conditions du dialogue doivent être évaluées et améliorées à chaque stade du processus de consultation (cas 1 : en raison d'un conflit social antérieur, plusieurs communautés concernées ont refusé de participer à la consultation ; cas 4 : les conditions favorables ont rendu le processus presque inutile pour certaines communautés). Il importe de déterminer si les règles de participation applicables au programme REDD+ sont suffisamment précises et spécifiques au contexte.
- *Représentativité et légitimité* : il est primordial d'avoir une bonne connaissance préalable des populations autochtones concernées.
 - Le manque d'informations appropriées sur les populations autochtones risque de compromettre l'efficacité de la consultation (cas 4). Les informations existantes basées sur la délivrance de titres de propriétés aux communautés est insuffisante.
 - Il est nécessaire de faire une distinction entre institutions représentatives et organes décisionnels (cas 1 : les organisations autochtones représentent les communautés, mais c'est la réunion des représentants des communautés qui prend la décision finale). Par conséquent, la coordination, le partage des informations et l'établissement d'un consensus peuvent concerner différentes institutions. Par ailleurs, des décisions peuvent être prises par plusieurs institutions autochtones (cas 2 : une institution politique et une institution spirituelle prennent position ; les communautés locales délibèrent avant que leurs représentants assistent à l'assemblée générale).
 - Il peut être nécessaire d'engager directement le dialogue avec les communautés locales pour fournir toutes les informations nécessaires aux populations concernées, quelle que soit l'importance de la mesure, bien qu'au final les communautés puissent ne pas être compétentes pour prendre une décision sur la question. L'acquisition d'informations appropriées au niveau communautaire est un problème pour les processus REDD+ au niveau national.
 - Le fait de ne consulter qu'une partie des communautés et de permettre qu'une décision soit prise sans tenir compte des institutions légitimes peut avoir des conséquences sociales négatives durables et compromettre la légitimité du projet (cas 1 : des réunions de consultation n'ont parfois été organisées qu'avec les familles qui voulaient participer, ce qui a favorisé la division au sein des communautés).
 - La consultation concernant une mesure ayant des impacts géographiques plus larges (ou plus étroits) ne nécessite pas nécessairement l'engagement d'un dialogue avec différentes institutions autochtones (cas 2 : le congrès général de Guna a dû prendre une décision quant à un projet qui n'aurait eu d'incidence que pour une partie des communautés. Par contre, l'institution représentative au niveau national, la COONAPIP (coordination nationale des populations autochtones du Panama), ne pouvait

- pas prendre de décisions contraignantes sur des mesures qui auraient eu une incidence sur le territoire de Guna ; cas 3 : les organisations nationales et régionales ont participé à un processus de consultation locale, ce qui a amélioré la capacité d'évaluation et la légitimité).
- Le fait d'avoir affaire à des plans, programmes et projets REDD+ ne nécessite pas nécessairement la participation de trois niveaux différents d'institutions autochtones. L'engagement d'un dialogue avec l'organisation représentative compétente concernant l'importance géographique de la mesure peut constituer un point de départ, mais la détermination de l'institution devant participer à un stade donné est un point clé qui doit être examiné lors de réunions préalables à la consultation et convenu dans les protocoles de participation des populations autochtones. Ce n'est pas l'engagement d'un dialogue avec une organisation spécifique qui garantit la légitimité mais bien plutôt le processus menant à son identification. Cela permet également aux populations autochtones de travailler sur les questions de gouvernance interne. Les discussions concernant REDD+ donnent l'occasion de clarifier les structures de représentation des populations autochtones, dans la mesure où ce serait souvent la première participation de ces dernières.
 - *Coordination*: les protocoles de consultation mutuellement convenus avec les institutions représentatives semblent être le meilleur moyen de garantir la légitimité et l'appropriation du processus dès le début (cas 3 : un accord mutuel sur le protocole a même contribué à reprendre un processus qui avait pourtant mal démarré). L'absence de coordination préalable entre les autorités et les populations autochtones peut avoir une incidence néfaste sur la légitimité et l'ensemble du processus. La coordination doit également accroître la prévisibilité du programme ainsi que les coûts pour les deux parties. Les représentants autochtones doivent pleinement participer aux décisions de planification concernant REDD+ dans la mesure où les problèmes de légitimité ou d'adéquation peuvent ultérieurement paralyser le processus.
 - *Consultation en temps opportun*: la consultation doit avoir lieu lorsque les impacts potentiels sur les populations autochtones ont été identifiés, mais à un moment qui permet de véritablement influencer le contenu (« réversibilité » suffisante). Par ailleurs, plusieurs consultations peuvent être nécessaires pour une même mesure car l'approbation doit être obtenue non seulement pour la proposition mais également pour ses impacts (cas 1 : la consultation concernant un projet de construction de route n'avait aucun sens puisque la décision avait déjà été prise par l'État. Toutefois, il faudrait organiser un deuxième processus de consultation quant au tracé définitif de la route et ses impacts). La participation continue à l'élaboration de la politique et à la conception des programmes est également nécessaire pour éviter les consultations trop tardives ou inutiles (voir les cas 1 et 5: décision déjà prise).
 - *Information* : puisque l'information est indispensable à toute prise de position, la façon dont les populations autochtones ont accès à l'information nécessite une attention particulière (cas 3 : la capacité des populations autochtones à tirer parti d'experts externes et internes et à produire leurs propres informations a joué un rôle essentiel pour l'accord sur l'évaluation des risques. Cas 2 : l'incertitude associée au cadre international de REDD+ suscite de la méfiance). Les questions d'accessibilité, d'adéquation et de qualité des informations concernant REDD+ et son impact sur les populations autochtones constituent encore un problème non résolu.
 - *Établissement d'un consensus* : il est nécessaire d'identifier le mode de vie, les valeurs et les aspirations des populations autochtones avant d'entamer le processus d'établissement d'un consensus, compte tenu de la longue absence de l'État dans leurs territoires ainsi que des longues périodes d'incompréhension et de conflits. (Cas 1: identification nécessaire; cas 3: évaluation de l'impact compte tenu des projets de vie des communautés). Il importe de canaliser les besoins et d'encourager la participation constante. Les propositions REDD+ peuvent aller à l'encontre des valeurs spirituelles des populations autochtones; l'engagement de discussions initiales sur d'importants profits financiers peut être inapproprié (cas 2: difficulté de donner un coût à des services de protection de l'environnement et d'avoir confiance dans un mécanisme générant d'importants revenus). Une discussion des avantages conjoints de REDD+ (par ex. protection de la biodiversité, gouvernance des forêts, droits fonciers) peut constituer un meilleur point de départ.

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I. INTRODUCTION

Input Paper IV will serve as an input document for the joint expert workshop “Practical Approaches to Ensuring the Full and Effective Participation of Indigenous Peoples in REDD+: Assessing Experiences and Lessons to Date”. The central aim of the workshop is to identify ways to provide for legitimate, effective and feasible participation of Indigenous Peoples in REDD+ activities, with an emphasis on national decision-making processes (policy making).

The case study deals with five consultation processes that were undertaken at the local level in Latin America about projects proposals. Issues at stake were: infrastructure building (Case 1 and 5), a private REDD+ project (Case 2), natural resources exploration (Case 3) and the creation of a natural protected area (Case 4). The analysis identify the conditions for dialogue and possible success factors -related to the consultation process, the consultation objective and rights protection-, possible gaps and lesson learned.

II. METHODOLOGY

Cases selection

The selection process of the 5 cases took into account the following main criteria: availability of data during the duration of the survey; geographic representation; comprehensive experiences of local consultation process; evidence of lessons learned or best practices in engagement processes. Identification and analysis of the cases have been based on literature and other published documents and on interviews with international/national experts and consultation processes actors.

Assessment criteria

While principles applying to participation of Indigenous Peoples in matters than may affect them are based on internationally agreed standards reflected in international law, good practices related to engagement processes are very context-specific¹. For this reason, some experts agree that there is no one-fits-all solution² and that identifying best practices may not be possible. Therefore, the good or bad practices presented in the present cases analysis do only refer to the specific case presented. The expression “key success factor” has been favored over “best practice” in order to underline the role this factor played in the specific case at stake. There is no general assumption that identified success factors will necessary work another contexts. Comments will be made for each case about up-scaling possibilities and lesson learned for other cases.

On the one hand, for a consultation process to be held, there are conditions for dialogue that need to be met. These conditions refer to the social, political, legal and institutional context of the case (Hartling, 2013). On the other hand, identifying success factors related to a consultation process

¹ ILO Convention 169 provides that consultations shall be undertaken “*in a form appropriate to the circumstances*” (Art. 6.2) and according to “*appropriate proceeding*” (Art. 6.1.a.), without further specification. The nature and scope of the measures to be taken to give effect to the Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country (Art. 34). See also UNDRIP, Art. 30.2.

² For example, see ANAYA J. 2009. Doc. UN A /HRC/12/34/Add.6. Appendix A, par. 15.

depends very much on the aim of the process, i.e. on what is deemed to be a “success”. As far a prior consultation of Indigenous Peoples is concerned, three different legitimate aims, and therefore three different types of success factors, can be identified. First, consultation has to be carried out according to appropriate proceedings. This refers to the jurisdictional concept of “due process”. These factors help the process to start and progress in a way that is considered as legitimate by all the parties involved, whatever the final outcome. They generally relate to existing legal requirements about free, prior and informed consultation set forth in ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples, international case law and other sources of international law. They refer to trust building, transparency, information sharing and decision-making processes. Second, some factors help reaching an agreement between the parties. These success factors are more context-specific and refer to procedural or substantive elements (e.g. satisfaction of interests and/or needs) that help building consensus between the parties on a proposal. Finally, in accordance with current international law, engagement with indigenous people should not only aim at reaching an agreement on a specific issue, but should also contribute to the protection of their substantive rights and to the exercise of their right to self-determination (Anaya, J. 2013). These factors refer to situations where the consultation process has the object or the effect of strengthening these substantive rights.

Presentation of the findings

Cases description is divided into the following sections: (1) Summary of key elements; (2) Context: Project background and Regulatory Framework; (3) Presentation of the actors of the consultation process; (4) Process: Designing, Implementation, M&E; (5) Findings and comments on key issues (e.g. stakeholders and question consulted, timing, representativeness and legitimacy, benefit-sharing/other benefits, traditional knowledge, sustainable forest management and/or land tenure rights); (6) Conclusions: assessment of pre-conditions for dialogue, possible ‘key success factors’, and possible gaps and errors; (7) Lessons learned and up-scaling potential and limitations. Sections 1 to 4 are mainly descriptive. Comments of the author are presented in Section 5 to 7. Sections presentation may vary from a case to another.

III. LATIN AMERICA - CONTEXT

There are between 30 and 50 million indigenous peoples in Latin America, representing around 400 linguistic groups³. Most of them live in areas rich in biodiversity and natural resources. At the same time countries of the region rank among the first producers of natural resources (metals and hydrocarbons)⁴ and rely much on their exploitation to sustain their economic growth. New large scale infrastructures and energy production facilities are being built on indigenous territories. Absence of the State during the last decades, lack of compliance with international or national requirements on Indigenous Peoples rights, and persistent poverty despite economic growth and increasing pressure on indigenous territories have fostered lasting mistrust towards authorities and radicalization of positions, which has generated ongoing social conflicts⁵. However, 15 of the 22

³ See UNICEF and FUNPROEIB ANDES, 2009 and Cabrero F. et al. 2013.

⁴ See Altomonte H. et al. 2013.

⁵ See Chávez D. et al, 2012. DPLF and OXFAM, 2011. Jahncke Benavente J. and Meza R., 2010.

States that ratified ILO Convention 169 are LAC countries. Almost all of LAC countries⁶ voted on favor of the UNDRIP. In addition, the Inter-American Court of Human Rights has recognized the right to prior consultation has a general principle of international law and sanctioned States for lack of prior consultation⁷. Strengthened indigenous organizations and CSOs are pushing for human rights and environment protection. Supreme Courts have recognized the obligation to consult Indigenous Peoples and several draft laws on prior consultation have been discussed, often after violent conflicts⁸. Attempts to undertake consultation processes have been disappointing so far⁹. In this context REDD+ was first seen as an additional threat on territorial integrity¹⁰. Nonetheless, international safeguards and requirement for Indigenous Peoples' participation are opening the door for a new scenario.

IV. CASE STUDIES

Case 1 - Isiboro Sécore Indigenous Territory and National Park (TIPNIS)

1. Summary

| | |
|-------------------------------|---|
| Country | Bolivia |
| Region | Regions of Beni and Cochabamba |
| Project Description | Construction of the road "Villa Tunari-San Ignacio de Moxos" through the Isiboro Sécore Indigenous Territory and National Park (TIPNIS) |
| Promoter | Ministry of Public Works, Services and Housing |
| Affected communities | Mojeño-Trinitario, Chimane and Yuracaré Indigenous Peoples from the TIPNIS |
| Consultation objective | Reach an agreement with TIPNIS indigenous communities on the following issues: (i) Determine whether or not the TIPNIS should be an "intangibility zone", in order to allow for (a) the development of activities of Mojeño-Trinitario, Chimane y Yuracaré Indigenous Peoples and (b) the construction of the Villa Tunari-San Ignacio de Moxos road; (ii) Establish safeguard measures for the protection of the TIPNIS and to avoid illegal occupation of the territory |
| Time period | 29 July 2012- 7 December 2012 |
| Results | Official results: 57 on 69 communities agreed to modify the intangibility regime and 55 accepted the road construction. CSO's results showed different figures and limited level of acceptance. |

⁶ Colombia abstained.

⁷ See Case *Pueblo indígena Kichwa de Sarayaku vs. Ecuador* (2012).

⁸ For example, the deadly conflict in the Peruvian district of Bagua in 2009 was a major factor in the adoption of the Act on the right to prior consultation. The conflict during the Indigenous March in Bolivia in 2011 led to the adoption of Act No. 222 on prior consultation on the TIPNIS (See Case 1).

⁹ Schilling-Vacalfor A. and Flemmer R. 2013.

¹⁰ See for example, the Anchorage Declaration of 2009. Available at: <http://www.forestpeoples.org/fr/node/516> [Accessed: 27.08.2013].

2. Context

2.1. National context and projects background

The Plurinational State of Bolivia (Bolivia) counts the highest proportion of Indigenous Peoples in Latin America. In 2001, population of indigenous origin amounted to 62% of the Bolivian population, which is over 10 million. Among the 36 peoples recognized by the Constitution, the majority were Quechua (49.5%) and Aymara (40.6%), who live in the western Andes (Tamburini, 2013). According to the 2012 census results, published in August 2013¹¹, indigenous population¹² would now represent 40.6% of the national population, while Quechua population amounts to 45.6% and Aymara to 42.4%¹³.

The consultation process at stake was about the construction of a road that would cross the Isiboro Sécore Indigenous Territory and National Park (*Territorio Indígena y Parque Nacional Isiboro Sécore-TIPNIS*) and about the regulatory status of this territory. It is considered to be the first prior consultation process organized in the Plurinational State of Bolivia (Ministry of Public Works, 2012:381).

The TIPNIS – This area of 1.2 million Ha covers part of the regions of Beni and Cochabamba, in the center of Bolivia. It was qualified as a National Park in 1965 for its rich biodiversity and importance for water distribution (Decree-Law No. 7401), hosting the basins of the Sécore and Isiboro rivers¹⁴. Traditionally occupied by Indigenous Peoples, it also attracted settlers since the 1970s, notably coca producers (Ortiz, 2011), who occupy 7% of the TIPNIS¹⁵. In 1990, asking for respect for their land rights and dignity, Indigenous Peoples organized the first indigenous march to the capital city, La Paz. One of the consequences of the negotiations was that the area became additionally an indigenous territory. Supreme Decree No.22610 provided for the demarcation of the territory to avoid new illegal settlements. Hence, the TIPNIS acquired a strong symbolic value for Indigenous Peoples. In 1997, a provisional title was granted to the indigenous organization Sub-central TIPNIS, created in 1988¹⁶. The territory is then qualified as a Native Community Land (*Tierra Comunitaria de Origen* – TCO) in 2009, pertaining collectively to the Mojeño-Trinitario, Chimane and Yuracaré peoples, represented by the organization Sub-Central TIPNIS¹⁷. Territorial conflicts between Indigenous Peoples and settlers from the south of the territory were common¹⁸. It is worth mentioning that oil exploration activities are carried out in the TIPNIS since several years. Currently, more than 30% of the area is covered by oil blocks (Jímenez, 2013).

¹¹ Bolivia, Características de población y vivienda censo nacional de población y vivienda 2012, Instituto Nacional de Estadística, August 2013.

¹² Results take into account individuals over 15.

¹³ Results of the 2012 census have been challenged. América Economía. Cuestionado censo 2012 de Bolivia será evaluado por organismos internacionales, *América Economía* 14 August 2013. Available at: www.americaeconomia.com/node/98294 [Accessed: 20.08.2013] and TAMBURINI, 2013.

¹⁴ See Strategic Environmental Assessment, SERNAP, 2011.

¹⁵ See TIPNIS Management Plan, 2004.

¹⁶ See TIPNIS Management Plan, 2004.

¹⁷ Title N° TCO-NAL-000229. See CEDLA, 2011. See TAMBURINI, 2012 and Ministry of Public Works, 2012, p. 48.

¹⁸ Office of the Ombudsman, 2011.

They are currently 64 indigenous communities living in the TIPNIS pertaining to the Mojeño-Trinitario, Chimane and Yuracaré Indigenous Peoples¹⁹. Their number may vary according to the circumstances (resources extraction, conflict, etc)²⁰. According to the 2001 census, indigenous population would rise to 3991, while the settlers' population would amount to 6354²¹. Even though every people have their own organizational structure, a common feature is that the communities take decisions within a community assembly (or *cabildo*)²². The assembly elects a "Co-councilor" (*corregidor*) as representative. Co-councilors from the TIPNIS gather once a year to form the Meeting of Co-councilors (Ortiz, 2011), which is the highest political indigenous authority of the TIPNIS²³. The executive body of the Meeting of Co-councilors is the Sub-Central TIPNIS, set up in 1988. In 2001, communities from the Sécore River created their own organization, the Sub-Central Sécore²⁴. Additionally, some communities, who renounced to their collective land rights, joined the settlers from the south of the TIPNIS to create an organization of the Cochabamba region, the CONISUR (Ortiz, 2011. Tamburini, 2012). Although the legitimacy of CONISUR is challenged²⁵ for its proximity with the authorities, the three organizations are affiliated to regional organizations that are members of CIDOB, the national indigenous organization (Ortiz, 2011)²⁶. Knowing to which Sub-Central a community is affiliated is a disputed issue. According to the regional authority on protected areas (SERNAP), they were 72 communities in 2007, 49 affiliated to Sub-Central TIPNIS, 17 to Sub-Central Sécore, and 3 to CONISUR. According to official figures from 2012²⁷, 69 communities were affiliated as such: 33 to Sub-Central TIPNIS, 18 to Sub-Central Sécore, and 18 to CONISUR. The Sub-Central TIPNIS still claims it represents 66 communities²⁸.

The VillaTunari and San Ignacio road - Since several decades the idea of connecting the region of Beni with the rest of the country has been discussed. In 1985 the Congress stated the necessity of this connection (Act No.717). On 18 September 1990, the Congress put the Executive branch in charge of working on the financing of a study for the construction of a road that would cross the TIPNIS, between Villa Tunari and San Ignacio de Moxos (Act No. 1185). It is only in 2008 that an agreement was signed between Bolivia and Brazil to finance the infrastructure.²⁹ In fact, the project took place in the broader context of the Regional Integration of South America (IIRSA) that plans the road connection between the Pacific and the Atlantic oceans. A contract was signed with a Brazilian company (OAS) and the project was supported the Brazilian Development Bank (BNDES)³⁰. The new road would also facilitate transport of coca production surplus.³¹ The road has been divided in three

¹⁹ Office of the Ombudsman, 2011.

²⁰ Ministry of Public Works, 2012, p.44-45 and TIPNIS Management Plan, 2004.

²¹ Management Plan, 2004.

²² Dossier Consulta del TIPNIS y rol del OEP/TSE, Servicio Intercultural de Fortalecimiento Democrático, 2012, p. 12. TIPNIS Management Plan, 2004.

²³ TIPNIS Management Plan, 2004, pp. 44, 104.

²⁴ According to the CSO report on the consultation process, the Sub-Centrals TIPNIS and Sécore are the highest indigenous originations in the TIPNIS.

²⁵ MAS margina a la Cidob de consulta sobre el Tipnis, hará el trabajo con el Conisur. *AINI* 9 February 2012. Available at: <http://www.aininoticias.org/2012/02/mas-margina-a-la-cidob-de-consulta-sobre-el-tipnis-hara-el-trabajo-con-el-conisur/> [Accessed: 20.08.2013]. See also, Ortiz, 2011.

²⁶ See TIPNIS Management Plan, 2004.

²⁷ Dossier Consulta del TIPNIS y rol del OEP/TSE, Servicio Intercultural de Fortalecimiento Democrático, 2012.

²⁸ See Ministry of Public Works, 2012. Annex 5, pag. 448.

²⁹ Ortiz, 2011

³⁰ Office of the Ombudsman, 2011.

³¹ Tamburini, 2012

sections, against the opinion of the protected areas authority (SERNAP), while Section No.2 (Isinuta to Monte Grande) would cross the park³². A stormy debate on the road lay-out and its environmental assessment caused resignation of several Ministries' officials (Ortiz, 2011). The environmental impact assessment of Section No.2 has not been published³³. In 2011, the Congress eventually approved the financing of the project. On 3 June 2011, the President, Evo Morales, inaugurated the beginning of the works, without consulting Indigenous Peoples' representatives according to the Constitution, which generated a social conflict.

Social Conflict – Between 2008 and 2011, the Meeting of Co-Councilors of the TIPNIS adopted several resolutions expressing their opposition to the road construction³⁴. Facing the firm decision to build the road without being involved in the process, indigenous organization - CIDOB and the Sub-Centrals, supported by CONAMAQ (highlands indigenous organization) -, started the 8th Indigenous March to La Paz on 15 August 2011. On 25 September, more than 500 police officials were sent to stop the march. Demonstrators were violently brutalized and arrested³⁵. After a 65-days journey, the March arrived to La Paz on 19 October 2011. Facing strong pressure from the streets, the Government eventually accepted to suspend the project on 20 October 2011. The same month, in order to avoid an “*unnecessary conflict promoted by the opposition*”³⁶ the TIPNIS Protection Act No. 180 was adopted, which provided for the “intangibility” of the TIPNIS and expressly forbid that the road crosses the area. However, few weeks later, some other indigenous communities and coca growers' organizations from the South of the TIPNIS, supported by the government³⁷, started protests in favor of the road construction and ask for cancellation of Act No. 180, arguing lack of consultation³⁸. In a report issued in November 2011, the Office of the Ombudsman stated the right to prior consultation had been breached. In February 2012, the Congress eventually approved a law on prior consultation that required the organization of a specific consultation process with TIPNIS' indigenous communities. It is worth mentioning that in August 2011, the Brazilian Ambassador in Brazil mentioned the Brazilian Development Bank (BNDES) would not keep financing the project without an agreement being reached between the Bolivian Government of the Indigenous Peoples of the TIPNIS³⁹.

2.2. Relevant regulatory framework

Bolivia was one of the first countries to ratify ILO Convenio 169 in 1991. Pursuant to the case law of the Constitutional Court, the Convention has force of constitutional law⁴⁰. Bolivia not only voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples but also made it binding as national law (Act No. 3760). In 2009, a revision of the Constitution allowed for the recognition of

³² Office of the Ombudsman, 2011.

³³ A Strategic Environmental Assessment has been drafted by the SERNAP in 2011.

³⁴ See Resolution No.2 of the 30th Meeting of Co-Councilors, 18 March 2012. Available at: <http://cejis.org/web-version-2012/node/438> [20.08.2013].

³⁵ The Ombudsman issued a detailed report on the facts and human rights violation (Ombudsman, 2011).

³⁶ Ministry of Public, 2013, p. 11.

³⁷ Tamburini, 2012

³⁸ Final report of the consultation process, Ministry of Public Work, 2013, p. 12 and 26

³⁹ América Economía. Brasil pide diálogo entre gobierno boliviano e indígenas para financiar el tramo II en el TIPNIS, *América Economía* 4 August 2011. Available at: <http://www.americaeconomia.com/negocios-industrias/brasil-pide-dialogo-entre-gobierno-boliviano-e-indigenas-para-financiar-el-tramo> [Accessed: 20.08.2013]

⁴⁰ Case 1420/2004-R.

Indigenous Peoples' rights at the highest normative level. The 2009 Constitution, adopted by referendum, expressly recognizes Indigenous Peoples' right to be consulted before the adoption of legislative or administrative measures that may affect them and about exploitation of non-renewable natural resources in their territories (Art. 30 and 352). However, no regulation has been adopted to establish the details of the consultation process. A draft law on prior consultation is currently under review.

The 2011 TIPNIS Protection Act No. 180 provides for a specific protection regime for the area. It states that the TIPNIS is an "intangible zone" (Art. 1, III). It also impedes that the road between VillaTunari - San Ignacio de Moxos crosses the TIPNIS (Art. 3). Supreme Decree No. 1146 adopted in February 2012 clarifies the regime of intangibility: it provides that Indigenous Peoples may use renewable natural resources for subsistence and traditional purpose, but expressly prohibits any commercial exploitation of the resources, in contradiction with the existing management plan of the TIPNIS and going further than the indigenous claim.⁴¹ It expressly prohibits new settlements and illegal land occupation, commercial wood exploitation and activities that would cause significant adverse socio-environmental impacts. The area will be co-managed by the authorities and the Indigenous Peoples of the TIPNIS. However, in 2012 the Congress adopted the Prior Consultation of TIPNIS Indigenous Peoples Act No. 222, without consulting Indigenous Peoples. It provides for the organization of a consultation process, not only on the road project but also on the intangible character of the area, opening the door for a revision of the TIPNIS Protection Act No. 180. The proposed consultation would address several questions: (i) determine whether or not the TIPNIS should be an intangible zone, in order to allow for (a) the development of activities of Mojeño-Trinitario, Chimane y Yuracaré Indigenous Peoples and (b) the construction of the VillaTunari-San Ignacio de Moxos road, and (ii) establishing safeguard measures for the protection of the TIPNIS and measures to avoid illegal occupation of the territory. In May 2012, the deadline of the process was extended by 120 days (Act No.240), until 7 September 2012. In June 2012, the Constitutional Court of Bolivia declared the conformity of Act No.222 with the Constitution, under the condition that the consultation process was agreed on between the State and Indigenous Peoples by means of a mutually agreed protocol (Case No.0300/2012).

3. Actors

Bolivian authorities:

- Ministry of Environment and Water and Ministry of Public Works, Services and Housing: responsible for carrying out the consultation
- Electoral Supreme Court - Inter-Cultural Service for Democratic Strengthening (SIFDE): observer; will report on the process
- Ministry of Finance: must ensure sufficient resources for the process

Indigenous Peoples:

- 69 Mojeño-Trinitarias, Chimanos y Yuracaré communities from the TIPNIS: consulted communities
- Indigenous Organizations:

⁴¹ Tamburini, 2012

- Sub-Central TIPNIS: indigenous organization, representing indigenous communities from the TIPNIS; owner of the TIPNIS as an indigenous territory (TCO), on behalf of the indigenous communities (from 33 to 66 communities, depending on the source)
- Sub-Central Sécure: indigenous organization, representing indigenous communities from the TIPNIS (up to 17 communities, depending on the source)
- CONISUR: represents communities living outside the indigenous territories (TCO) (up to 18 communities, depending on the source)
- CIDOB: National indigenous organizations

Civil Society

- Human Rights Permanent Assembly of Bolivia (APDHB) and Permanent Committee for Human Rights Protection (CPDH/ FIDH): civil society observers; did not participate in the consultation meetings
- Catholic Church: observer

4. Process

4.1. Designing

The phases of the consultation process were specified by Act No.222, which has not been drafted in cooperation with indigenous representative institutions. Act No. 222 provides for three main phases: preparation, implementation and results. During the preparation, a schedule and a consultation protocol will be adopted. The communities will be fully informed about the process and the content of the proposed measure. During the consultation, indigenous peoples will get information and discussion will take place on the three topics submitted to consultation: intangibility of the TIPNIS, the road construction and safeguards measures for protecting the TIPNIS, with the aim of reaching an agreement (consent it not sought). Minutes will be drafted and results notified. Agreements will be binding both on the State and on Indigenous Peoples.

According to the Ministry of Public Works' Report

In April 2013, The Ministry of Public Works issued a detailed report on the prior consultation process⁴², which was handed over to the National Congress⁴³. The report presents the various phases of the process, and results in every community.

According to the report, contact was made to the three organizations of the TIPNIS, assuming their legitimacy. Sub-central TIPNIS did not want to participate, while Sub-central Sécure and CONISUR expressed their will to cooperate during the process⁴⁴. Two teams of officials visited the TIPNIS to collect information about the communities. The information collected helped the drafting of a consultation protocol, which was then presented to the communities in a dozen of meetings

⁴² Ministry of Public Works. 2012. Available at : <http://www.oopp.gob.bo/tipnis/> [Accessed: 13.08.2013].

⁴³ While the consultation conclusions were presented to and approved by the indigenous attending the concluding meeting on 6 December 2012 (see below), there is no evidence this report has been approved by the indigenous representative institutions.

⁴⁴ Ministry of Public Works. 2012, p. 73.

between April and July 2012. Comments were received on the text⁴⁵. On 3 July 2012, a national meeting was held, where 44 Co-Councilors (on 69) agreed to proceed with the consultation process, 12 representing communities affiliated to Sub-Central TIPNIS. Organizers of the 8th March did not attend the meetings. On 25 and 27 July, CONISUR and Sub-Central Sécure approved the consultation protocol. No agreement was reached with Sub-Central TIPNIS⁴⁶. It is reported that the Co-councilors of the TIPNIS required that the consultation was made directly to the communities and not to its leaders and that the decision should be taken by the communities' assemblies, not by the organizations⁴⁷. Participation of the national organization CIDOB was not considered⁴⁸.

The final Protocol⁴⁹ details the principles, methodologies and phases of the consultation process. The consultation should be free, informed, public, continuous, participative, inter-cultural, flexible carried out in good faith with sufficient time. All the parties shall make best efforts to conduct the process. A total of 15 consultation teams will visit the communities, formed by officials from the Ministry of Public Work and Ministry of Environment, communication professionals and indigenous facilitators chosen by the communities (previously trained) and officials from SIFDE⁵⁰. The protocol provides for a preparation phase, during which the protocol should be agreed on with indigenous organizations, and information is shared about the process and the visit of the team. After necessary coordination, a community assembly will be convened. During the assembly the team will share all the information about the consultation process and its object, will collect information on the community's vision on development, and identify impacts of the road construction. After deliberation, dialogue will be held to reach an agreement and minutes of the meeting will be signed. Agreements will be published, implemented and monitored. The Protocol identifies the 69 communities that will be consulted.

According to other sources

In a letter dated 3 December 2012⁵¹, the Sub-Central TIPNIS denies the organization of prior coordination on the process and disputed that the consultation was organized prior to the proposed measure. Referring to international law, it also challenges the ability of the government to convene communities without approval of the Sub-Central, the legitimate representative institution of the TIPNIS. Civil society observers consider that the Protocol was not agreed on with the representative institutions of the TIPNIS communities.⁵²

⁴⁵ Ministry of Public Works. 2012, p. 57, 73, 76, 382.

⁴⁶ Ministry of Public Works. 2012, p. 76-78 and Annex 13, p. 593.

⁴⁷ Ministry of Public Works. 2012, p. 12, 47 and Annex 13, p. 593.

⁴⁸ AINI. *MAS margina a la CIDOB de consulta sobre el TIPNIS, hará el trabajo con el CONISUR*. 9 February 2012. Available at: <http://www.aininoticias.org/2012/02/mas-margina-a-la-cidob-de-consulta-sobre-el-tipnis-hara-el-trabajo-con-el-conisur/> [Accessed: 20.08.2013].

⁴⁹ Ministry of Public Works. 2012, Annex 4.

⁵⁰ Ministry of Public Works. 2012, p. 69-70, 84.

⁵¹ Ministry of Public Works. 2012, Annex 5, p. 54.

⁵² Tamburini, 2013. Delgado and Vargas, 2012

4.2. Implementation

According to the official SIFDE report⁵³ (January 2013)

According to the report, 69 communities were consulted between 29 July and 6 December 2012. Communities' leaders were informed of consultation meeting dates and invited to convene community members on a specific date. Local assemblies were held during one to two days meetings in presence of authorities' representatives, SIFDE observers and, most of the time, facilitators. The issues discussed were: (i) intangibility of the TIPNIS, (ii) construction of the road, (iii) proposed safeguard measures to be taken and (iv) proposed measures against illegal occupation. Methodology used is not reported. On 6 December 2012, indigenous organizations (Sub-centrals) and community members were convened to sign the concluding minutes of the process. The results showed that on 69 consulted communities: 11 communities decided not to be consulted; 57 on 58 communities were in favor of derogating the intangible character of the TIPNIS; 56 on 58 communities were favoring the construction of the road. The report mentions that communities were worried about the limitations intangibility imposes on economic activities. However, several communities insisted that an impact study was necessary. Other communities also asked to be consulted on the final determination of the road lay-out.

According to FIDH and Catholic Church Reports (March – April 2013)

In October 2012, leaders of the Sub-Central TIPNIS asked the Catholic Church and the human rights NGO Human Rights Permanent Assembly of Bolivia (APDHB) to conduct a survey about the consultation process⁵⁴. The Church, APDHB and the Permanent Committee for Human Rights Protection (CPDH), member of the International Human Rights Federation (FIDH), carried out a field visit to 35⁵⁵ of the 58 consulted communities, including all the 32 communities from the Sub-Central TIPNIS, between November and December 2012. Two reports were issued, the first by the Church and APDHB in March and the second by FIDH and in April 2013⁵⁶.

Among the findings, the Church and APDHB's survey reports several issues related to the consultation process and outcome:

- *Opportunity*: the consultation process started after the road construction works began;
- *Coordination*: several communities were not previously informed of the authorities' visit;
- *Reach*: only 19 of the 35 communities have been actually visited by the authorities;
- *Information*: several communities mentioned that the meaning of the term "intangibility" and its scope was not clear; none of the visited communities were informed about socio-environmental impacts of the road; no environmental impact assessment has been drafted; the conclusions of

⁵³ Tribunal Supremo Electoral, Servicio Intercultural de Fortalecimiento Democrático, Informe de observación y acompañamiento de la consulta previa, libre e informada a los pueblos indígenas del territorio indígena y Parque Nacional Isiboro Sécore – TIPNIS, La Paz – Bolivia, 2012 (versión resumen).

⁵⁴ The Office of the National Ombudsman did not participate in the mission but is currently drafting its own report on the process.

⁵⁵ And the management center of the TIPNIS, where several families live.

⁵⁶ Informe de la Comisión interinstitucional Iglesia Católica y Asamblea Permanente de Derechos Humanos de Bolivia, Informe por comunidad visitada, 27 marzo 2013, and Bolivia: Informe de verificación de la consulta realizada en el territorio indígena parque nacional Isiboro-Sécore, FIDH/APDHB, abril 2013. Available at: <http://www.cedib.org/documentos/consulta-tipnis-compendio-de-informes/>

- the strategic impact assessment were not shared; meetings were held in Spanish; translators' interventions were poor; communities could not consult external advisors;
- *Respect for traditional institutions*: in several communities, the meetings were held only with part the community members, in some case in private houses (outside community assembly) or without the Co-Councilor; in half of the cases, the minutes were signed by only part of the members; final minutes of the consultation process were not signed during a Meeting of Co-Councilors;
 - *Schedule*: sufficient time was not given for proper deliberation inside the traditional institutions and access sufficient information with technical advisers;
 - *Good faith*: officials visited communities several time without mentioning the institution they belonged to; gifts and development projects were made conditional to the approval of the consultation and modification of the intangibility; the road was presented as an "ecological" infrastructure; health services were suspended in several communities after refusal was expressed; local civil servants pressured community members to accept the road construction; communities were told that the intangibility of the territory would prohibit any activities, including subsistence activities; minutes of meetings mentioned information contrary to expressed positions; an explicit link was made between accepting derogating the intangibility regime, accepting the road construction and benefiting from development projects; radios were confiscated
 - *Outcome*: 19 of the 35 communities visited did not accept the consultation process (SIFDE report mentions only 11 of the total 69 communities involved); 30 of the 35 communities visited did not accept the road construction (SIFDE report mentions only 2 on 69).

According to the Ministry of Public Works' report (April 2013)

The report of the Ministry of Public Works outlines that the consultation process was carried out according to the protocol and followed the following sequences: (1) first contact was made to communities authorities; (2) local assembly was convened according to local customs; (3) community decides whether or not it want to participate in the process; (4) when decision was positive, consultation started: (i) information was shared about the project, regulatory framework and steps of the consultation process, (ii) the community presented their current needs (education, health, sports, security, food sovereignty, basic services, natural resources exploitation, transport, communication, territorial management) ; (iii) a debate was held and decision was taken on the three topics independently (intangibility and its impacts; safeguard measures to protect the territory and the construction of the road); (5) minutes of the meeting were drafted. No fixed deadlines were imposed during the process.

About the road construction, it was said that alternatives were sought to build and 'ecological road' that would have minimum impacts on the environment and on the communities⁵⁷. The benefits of the project were outlined: the road will connected the area with the rest of the country and ease its development. No construction works have been carried out inside the TIPNIS so far. However, it was specified that the final lay-out of the road was still undefined. Among the reported communities' positions and concerns (whatever the organization they were affiliated to), the intangibility was generally rejected because it was perceived as prohibiting *any* activity in the TIPNIS and hindering

⁵⁷ Ministry of Public Works. 2012, p. 64.

economic development. Most of the communities imposed conditions on the road construction: a socio-environmental assessment should be drafted and discussed, the road should be “ecological”, the final lay-out should be consulted, road shall not cross the center of the TIPNIS, final decision should be taken by the Meeting of Co-Councilors⁵⁸, and community members shall be hired during the work and shall benefit from income generated by the road. According to the report, tension between communities arose because of pressures from leaders connected with the business sector and external agents⁵⁹.

On 6 December 2012, representatives on the communities were invited to a general meeting to sign the minutes of the consultation process. The President of the Sub-Central TIPNIS rejected the invitation, while 52 representatives attended the meeting, including at least 15 representatives of communities affiliated to Sub-Central TIPNIS. Of the 69 consulted communities: 11 did not want to participate; 57 rejected the intangibility and 1 favored it, 55 favored the road construction and 3 opposed it. Minutes of the concluding meeting mentions that the road shall be “ecological” and the final lay-out shall be designed in a participatory way. Representatives attending the meeting agreed on the conclusions of the process presented during the meeting⁶⁰.

The report of the Ministry of Public Works issued in April 2013 concludes that⁶¹: according to the binding nature of the consultation agreement, Act No. 180 shall be abrogated; a new law and a new plan shall be adopted to protect the TIPNIS (a proposal is made in the report); the project of the ecological road shall be designed with the communities; the Government shall work on a development plan, in coordination with the Indigenous Peoples and coordinate the activities of the monitoring committee. In addition, based on the identification of communities’ need, the report proposes a draft development plan on the TIPNIS. The proposal identify possible programs and projects that deal with territorial management, access to public services (health, education, housing) and social programs, protection of cultural identity, capacity building, inland and river transport, telecommunication, economic activity, forest management and food sovereignty.

4.3 M&E

During the final meeting of the consultation process, on 6 December 2012, indigenous leaders present agreed to set up a Follow-up Committee consisting of indigenous representatives that would monitor the fulfillment of the agreements reached, meeting four times a year⁶².

5. Findings and Comments on key issues

5.1. Stakeholders involved and questions consulted

According to Law No.222, the consultation was limited to the indigenous communities from the TIPNIS, without identifying their representative institutions. Drafting of the consultation protocol occurred with representatives of the communities (Co-councilors) who wanted to participate. Arguably, communities standing outside the borders of the TIPNIS as an indigenous territory have

⁵⁸ Asked by at least 9 communities pertaining to the 3 organizations.

⁵⁹ Ministry of Public Works. 2012, p. 14.

⁶⁰ See Ministry of Public Works. 2012, Annex 24, p. 1679.

⁶¹ Ministry of Public Works. 2012, p. 317.

⁶² Ministry of Public Works. 2012, p. 312 and SIFDE report.

also been consulted.⁶³ The three questions consulted (intangibility, road construction and safeguard measures) were discussed directly with the communities. TIPNIS organizations (Sub-Central TIPNIS, Sub Central Sécure and CONISUR) were not associated as such. The National organization (CIDOB), weakened after the social protest⁶⁴, was not involved in the process.

5.2. Consultation timing

Consultation shall occur when potential impacts on Indigenous Peoples are identified, but at a moment that allows for true influence on the content. As mentioned before, consultation was late: it started in 2012 about the final section of the road, when the decision to build the road was taken several years before. However, as mentioned by several communities, a second consultation process would be necessary to agree on the final lay-out of the road, its impacts and compensation measures.

As to REDD+, limiting consultation to local projects will limit ability of indigenous peoples to influence the content of the proposals. One of the main difficulties could be identifying when a proposed measure affects Indigenous Peoples as far as Readiness-related proposals are concerned. The risk of late consultation should be prevented by ensuring ongoing participation of indigenous peoples in policy and programs designing⁶⁵.

5.3. Representativeness of all relevant stakeholders and legitimacy of results

According to the Ministry of Works' report, Sub-Central TIPNIS refused to participate in the process. Sub-Central TIPNIS denies the organization of prior coordination on the process and disputed that the consultation was organized prior to the proposed measure. Referring to international law, it also challenged the ability of the government to convene communities without approval of the Sub-Central, the legitimate representative institution of the TIPNIS. Civil society observers consider that the Protocol was not agreed on with the representative institutions of the TIPNIS communities.⁶⁶ However, the official report mentions that during the preparation meetings, Co-councilors decided that the consultation should be directly organized with the 69 communities and not with the organizations. In fact, consultation meetings were organized within each community individually to discuss the 3 topics. At the end of the process, the results were approved by 52 Co-Councilors convened by the Government as legitimate representatives.

Comments of the author:

- The Meetings of Co-councilors, the traditional decision-making institution of the TIPNIS, had already issues statements opposing the road construction. The decision of the Government to go on with the consultation and directly convene Co-Councilors was efficient, but did not respect this traditional institution. This may have weakened the institution and fostered division among communities as conflicting positions among indigenous constituencies could not be harmonized within their own structure;
- The decision to carry on meetings within every community was appropriate to ensure diffusion of information; however, individual communities were not able to take the decision

⁶³ Tamburini, 2013

⁶⁴ Tamburini, 2013

⁶⁵ See Anaya's opinion on strategic planning in the extractive industry sector (Anaya, 2013:15).

⁶⁶ Tamburini, 2013. Delgado and Vargas, 2012

in the name of the people; in fact, several communities asked for the Meeting of Co-councilors to take the final decision on the road construction;

- Willingness to work only with part of the communities or part of the families, without systematically respecting traditional authorities, may have created profound divisions inside the communities and increase mistrust towards the State;
- The final results show figures by communities and do not reflect the position of each Indigenous People; since agreements are binding on the State and on the Peoples of TIPNIS, there remain doubts about enforceability
- Interpretations of results vary dramatically between official reports and CSO survey: conditional agreements are seen as a 'yes' or a 'no'; the government eventually agreed with Indigenous Peoples that the designing of the 'ecological road' should be participative, and therefore that the approval was conditional.

5.4. Benefits from the project

According to the consultation reports, authorities highlighted the benefits of derogating the intangibility regime and constructing the road, without any reference to possible risks, impacts or drawbacks. Nonetheless, some communities favored the road construction because it will ease mobility and transport of commercial goods. Other communities did not perceive the potential benefits of the road because it will be too far to reach⁶⁷. According to CSO reports, authorities tied the acceptance of the road with proposals of social projects and gifts. In addition of dividing the communities, short term or misleading information of the costs/benefits might seriously jeopardize ownership of the project.

5.5 Land tenure rights

The consultation dealt with safeguard measures to be taken against illegal occupation of indigenous territories. Conclusions of the consultation mention the necessity to strengthen the legal and institutional framework as well as the effective control of the TIPNIS to ensure protection of land rights.

5.6. Costs

In March 2013, the Minister of Public Works announced total costs of the process would amount to 10 million Bolivianos (approx. USD 1.5 million). Estimated costs for the SIFDE activities amounted to USD 90,000, covering the participation of 30 officials during the four months mission⁶⁸. Actual final costs remain unknown.

6. Assessment of success factors

6.1. Conditions for dialogue

Social conditions for dialogue were seriously jeopardized after the repression of the social protest during the 8th march. Lack of dialogue before the protest has affected the trust towards authorities.

⁶⁷ See also the Strategic Environmental Assessment, 2011.

⁶⁸ Dirección Nacional del Servicio Intercultural de Fortalecimiento Democrático (SIFDE). 2012. Plan SIFDE de observación a la consulta TIPNIS. La Paz: Tribunal Supremo Electoral (TSE).

As to institutional conditions, officials had no previous experience and no specific intuitional framework existed, beside the *ad hoc* proceedings provided for by Act No.222. Legal certainty was improved though by Law No.222 and the Protocol.

6.2. Possible key success factors

a. Related to the consultation process

- Preparatory meetings held about the consultation Protocol⁶⁹
- Co-councilors were trained and informed before the visits to the communities
- The authorities held meetings inside each community, which helped reaching all its members; it was the first time State officials entered the communities⁷⁰
- Agenda and rules of conduct of the meetings were agreed on by assemblies before the meeting started, according to their own rules
- Information was shared through various channels: meetings, information offices, mail and radio
- The initial schedule has been extended

b. Related to the consultation objective

- Officials highlighted the benefits of the propositions. Although providing incomplete information is certainly not a good practice, agreement was given because concrete drawbacks (e.g. limitation of rights on natural resources) or benefits (e.g. development projects; improvement of transport) could be clearly identified by the communities, taking into account local reality and aspirations.

c. Related to rights protection

- During the meetings with the communities, a mapping of their needs was done and possible projects were outlined; however, it is reported that such projects were made conditional upon approval of the road construction⁷¹. The Management Plan of the TIPNIS, already agreed on by the Indigenous Peoples, was not taken into account.

6.3. Possible gaps and errors

a. Before the consultation

- Consultation was not prior, since the project was designed several years before and works already started for some sections⁷²; the Ministry of Works stated it was a prior consultation because work of section No.2 had not started yet. The consultation on a proposal to construct a road – as it happened – was surely late as the decision was already taken and there was no possibility to influence to outcome (no ‘reversibility’).
- Indigenous organizations were not involved in the designing or implementation process, which limited its legitimacy and capacity to fit the reality

⁶⁹ However, there are differences between the final protocol and the protocols signed by communities’ representatives. See Ministry of Public Works. 2012, annexes 4, 6-8.

⁷⁰ Ministry of Public Works. 2012, p. 12.

⁷¹ FIDH, 2013.

⁷² Office of the Ombudsman, 2011.

- The Protocol was approved by some Co-Councilors, and not within a Meeting of Co-councilors, the highest authority of the TIPNIS
- The object of the consultation was ambiguous: instead of consulting the communities on the road construction, it made a confusing link between the intangibility of the territory, the development of activities that would benefit the communities and the road construction;
- Since its formulation, the process appeared to be more like a referendum that did not allow for consensus building

b. During the consultation

- Communities did not receive prior information on the process and the project;
- Despite what the Protocol provided, no discussion seems to have taken place on the actual impacts of the road
- The starting point of the consultation was not the indigenous rights affected and the grade of affectation
- According to the SIFDE report, 24 communities did not receive prior documentation on the process and the projects when informed of the visit
- CSOs report several serious issues related to opportunity of the consultation, planning and time-frame, insufficient information, respect for traditional institutions, and good faith. The official report recognizes that in some instances meetings were held outside the local assembly or outside the community, only with part of the families, sometimes without the Co-councilor⁷³
- Translation may have been poor in several occasions
- It arise from the reports that communities were frequently divided about the consultation process and its outcome; minutes do not mention possible division; do not explain how internal conflicts were resolved, respecting the indigenous decision-making process;
- Consensus building was limited, since majority was sought among communities' members

c. After the consultation

- Official reports may abusively report 'unanimous support' of the community while meetings were only held with part of the community members that were supportive of the process
- Supervision of the process by the electoral authority was insufficient to ensure impartiality and credibility; observers from civil society were not invited
- Ownership by the communities may not be guaranteed on the long term due to alleged shortcomings in the process and incomplete information
- Long term relationship with indigenous people may be seriously affected in case of both faith and pressure for formal agreements

7. Lessons learned – Up-scaling potential and limitations

REDD+ implementation at the national and local level will raise the same type of challenges as to the stakeholders involved: identifying between legitimate representative institutions and decision making bodies of Indigenous Peoples. Indigenous Peoples have different governing structures, each

⁷³ In Gundonovia, the report mentions that the meeting was held outside the assembly and without the Co-Councilor (p. 260). In San Palbo and Santa Clara it was held outside the community and without all the members (p. 244); in Monte Cristo, without all the families (p. 180).

with differing domains of authority.⁷⁴ Deep prior knowledge of affected Indigenous Peoples is of paramount importance to ensure (i) effective coordination, (ii) adequate diffusion of information, and (iii) legitimate decision, which may involve different organizations. Opportunity should also be given to Indigenous Peoples to clarify who represent them in specific circumstances, as there may remain room for confusion among the people themselves.⁷⁵ Prior coordination will require agreements (protocols) between authorities and Indigenous Peoples on which organization will be engaged at which moment. Engaging with the representative organization that has ‘jurisdiction’ over the geographic scope of the measure may be a starting point, but determining what institution will participate in which phase is a key point that should be discussed in pre-consultation meetings and agreed on. Legitimacy would not be guaranteed by engaging with a specific organization, but rather by the process that leads to its identification. Working early on these protocols will be of great help when dealing with engagement on numerous measures with national scope (e.g. climate change policies, new legislation, or institutional arrangements).

Among critiques for bad faith from the State and uncertainty about the representativeness of the indigenous organizations, higher transparency on indigenous institutions and their respective powers is required to allow external observers to assess the process.

Case 2 – REDD+ pilot project in Guna Yala

1. Summary

| | |
|-------------------------------|---|
| Country | Panama |
| Region | Guna Yala (ex-San Blas) |
| Project Description | Voluntary market REDD+ proposal (VCS) |
| Promoter | Wildlife Works |
| Affected communities | 49 Guna communities from the Guna Yala indigenous territory (Comarca) |
| Consultation objective | Obtaining the consent of the Guna General Congress |
| Time period | May 2012 – June 2013 |
| Result | Consent not given |

2. Context

2.1. General context

According to the 2010 census, Indigenous Peoples of Panama represent 12.7% (417,559) of the total population of 3,405,813. The five indigenous regions own 20% of the national territory (Sarsaneda del Cid, 2012).

The Guna People, formerly known as “Kuna”, is one of the seven Indigenous Peoples living in the Republic of Panama, along with the Ngäbe, Emberá, Wounaan, Buglé, Naso Tjerdi and Bri Bri (Sarsaneda del Cid, 2012). With a population of 80,526, it is the second largest indigenous group in

⁷⁴ Doyle C. and Cariño J. 2013. OHCHR Colombia. 2013

⁷⁵ Colchester, 2010

the country, counting for 20% of the total indigenous population⁷⁶. Guna people occupy three different Comarcas: Madugandí, Wargandí and Guna Yala⁷⁷. Guna Yala (also known as San Blas) is located in the northeast of Panama. They are 33,109 people living in Guna Yala⁷⁸, organized in 49 communities, 38 living on coral islands, 9 on the coast and 2 inland (Solís, 2013). Although the communities are spread on several islands, the density is sufficient to allow for effective communication and coordination between them when needed.

Since 1870, when the area belonged to Colombia, the *Tule Nega* region was acknowledged as belonging to the Gunas (Solís, 2013). On 25 February 1925, a conflict arose between the Guna people and the State during the “Dule revolution”. It forced the State to stop the repression and acknowledge respect for their rights⁷⁹. Panama recognized the territory as a *Comarca* in 1938 under the name of San Blas⁸⁰ (Act No. 2). It was then the first territory to be demarcated and legally recognized in 1953 as an indigenous territory (Act No. 16 and Act No. 20 of 1953). The Guna experience in strengthening their autonomy was a model for other Indigenous Peoples, which obtained their own regulatory status by means of specific laws adopted between 1983 and 2000. Currently, five *Comarcas* have been established by law⁸¹. While the central State remains in charge of security issues or exploitation of natural resources, Indigenous Peoples from Guna Yala enjoy some autonomy as regards education, health, tourism, and culture (Solís, 2013).

The Guna People have formally adopted their own regulations in 1995, the Guna Fundamental Law (*Anmar Igar*) and the Statute of Guna Yala. This document may be seen as a codification of customary law, which is binding on the communities. Even though the State has not recognized it, it is reported to have respected it in practice, avoiding implementing various projects within the Guna Yala after negative decision of Guna people⁸². Every community has its own local assembly, which elects its representative, called the *saila*. *Sailas* are both political and spiritual leaders (Solís, 2013). In accordance with the Fundamental Law, the *sailas* gather every 3 months in the General Congress of Guna Culture, the highest body for cultural and spiritual matters. In addition, the *sailas* meet every 6 months during the General Guna Congress, the highest political-administrative authority of the Comarca according to the Fundamental Law and according to Act No. 16. The decisions are, in general, taken by consensus and are binding on the communities members. The General Congress is assisted by a subsidiary advisory body, the Guna Yala Research and Development Institute (GYRDI). In between the sessions, the Congress is represented by an executive body, consisting of three *Saila Dummagan*, a secretary and a treasury. The Guna people also take part in the National Coordinator of Indigenous Peoples from Panama (COONAPIP).

The Guna people are leading their own projects, relating to tourism and inter-cultural education. However, lack of development programs in the *Comarcas* and extreme poverty foster migration to urban areas⁸³. At national level, 96.3% of the indigenous communities live in poverty⁸⁴. Social

⁷⁶ La Población en Panamá, UNFPA, <http://panama.unfpa.org/poblacion-panama> [Accessed: 13.08.2013]

⁷⁷ UNICEF – FUNPROEIB Andes, 2009.

⁷⁸ 2010 Census. <http://estadisticas.contraloria.gob.pa/Resultados2010/Cuadros.aspx> (13.08.2013)

⁷⁹ The Nacional Congress has recognized the 25 of February as the national day of the Dule Revolution.

⁸⁰ In 1999, the name San Blas was changed to Kuna Yala, currently written Guna Yala.

⁸¹ UNICEF – FUNPROEIB Andes, 2009. Solís, 2013.

⁸² Masardule, 2012.

⁸³ Sarsaneda del Cid, 2012.

⁸⁴ OHCHR, 2012.

programs may have increased economic dependence from State resources. While 87% of the Guna Yala region was covered by forest⁸⁵, forest resources are only used for internal needs and not sold to third parties. Indigenous authorities strive to keep controlling activities on their lands. Oppositions between indigenous *Comarcas* and the authorities happen frequently. Extension of mining activities, tourism development, hydroelectric projects, military bases or other infrastructure were examples of tensions between competing political control over the territory⁸⁶.

2.2. Project background

In 2005, the Guna General Congress entered into a cooperation agreement with a US/Panama based NGO, Earth Train. Looking for means to protect the territory from external settlers, Earth Train proposed to look at a REDD+-related mechanism. In June 2011, the General Congress asked Earth Train to support its efforts in conducting a survey about the state of its forest, carbon sequestration potential and alternative for sustainable development. Earth Train invited the U.S. based company Wildlife Works to submit a project. The same year, Wildlife Works submitted a feasibility study on establishing a REDD+ project in Guna Yala. Climate change was not a new issue to the Gunas, since the representative of the Guna General Congress attended the 14th Conference of the Parties (COP 14) in Poznan in 2008. Guna Yala was also at the center of the discussions on REDD+ and Indigenous Peoples when the Forest Carbon Partnership Facility (FCPF) organized the Global Dialogue with Indigenous Peoples on one of its island in September 2011.

2.3. Embedment in larger processes

Even though this REDD+ project stands on its own, it is necessary to mention that Panama applied to the UN-REDD Programme in 2009. While dialogue was held with the national organization COONAPIP as the legitimate representative for Panama's Indigenous Peoples, the situation deteriorated in 2012. COONAPIP argued that his participation was not guaranteed according to international standards and that UN-REDD did not comply with several engagements. In February 2013, COONAPIP eventually withdrew from all discussions about REDD+ and encouraged Indigenous Peoples to take some distance with the topic⁸⁷. The UN-REDD Programme carried out an independent investigation and evaluation of Panama's UN-REDD National Programme in response to the complaints and the results of these are being released in the last quarter of 2013. The REDD+ project reviewed in the case study below was independent and not affiliated with the UN-REDD Programme in any way.

2.4. Relevant regulatory framework

Panama is one of the very few countries of Latin America that has not ratified ILO Convention 169⁸⁸, although is voted in favor of the UNDRIP. The national Constitution recognizes the cultural identity of the national indigenous communities as well as their territorial rights, but does not acknowledge the plurinational nature of the State. General Environment Act No. 41 of 1998 provides that activities, works or projects inside the indigenous territories shall be consulted with the communities with the

⁸⁵ Data from 2008. Solís, 2013.

⁸⁶ Sarsaneda del Cid 2012, p. 113-114. See ANAYA, J.2013. *Declaración del Relator Especial sobre los derechos de los pueblos indígenas al concluir su visita oficial a Panamá*, 26 July 2013. Available at: <http://unsr.jamesanaya.org/> [Accessed: 15.08.2013].

⁸⁷ Cuéllar N. (et al.). 2013. Independent team for the investigation and evaluation of the UN-REDD Panama Programme. 2013. Preliminary note on findings, conclusions and recommendation, 22 June 2013.

⁸⁸ ILO Convenio 107, which does not provide for prior consultation, is still in force in Panama.

aim of reaching an agreement on their rights and customs and on compensation measures. Moreover, Act No.72 of 2008 provides that public and private entities shall coordinated with traditional authorities plans, programs and projects implemented in their territories, in order to ensure free, prior and informed consent of the Indigenous Peoples and communities.

Even though not dealing expressly with the concept of FPIC, the Guna Fundamental Law regulates the implementation of projects within the territory. When projects are proposed, they are first assessed by the GYRDI which acts a filter. In case of approval, the project is presented to the General Congress of Guna Culture and then to the Guna General Congress. During the session, the project is openly discussed and comments are made. The Congress can then decide to accept it, reject it or postpone its final decision to the next General Congress (Solís, 2013). Indigenous Peoples from Guna Yala are aware of the necessity to obtain their approval before implementing project on their territory.

3. Actors and responsibilities

- Earth Train: US/Panama environmental NGO, working with the Guna people since 2005
- Wildlife Works: US company, promoter of the REDD+ pilot project
- Guna People: 49 communities of the Guna Yala territory
 - The Guna General Congress: highest political authority of Guna Yala; takes the final decisions on projects proposals
 - Guna Yala Research and Development Institute (GYRDI): advisory body of the Guna General Congress; advised by 9 external experts
 - General Congress of Guna Culture: highest spiritual and cultural authority of Guna Yala; issues an opinion on the projects proposals

4. Process

4.1. Designing⁸⁹

In October 2011, Wildlife Works presented a draft study on the implementation of a REDD+ project in Guna Yala (Narganá district) during the General Congress⁹⁰. Drawing on the experience it had acquired from REDD+ projects in Kenya, Wildlife Works proposed a 30 years contract to sell VCS carbon credits on the voluntary market. Initial investment would amount to UDS 1 million during the first two years of the project. The proposal provides for the respect of international standards (e.g. Convention 169, UNDRIP), benefit sharing engagements and possible local development projects. The Guna General Congress put the Guna Yala Research and Development Institute (GYRDI) in charge of assessing the proposal. Earth Train and Wildlife Works held a presentation meeting with the experts in April 2012. The GYRDI submitted the proposal, “Study on the feasibility of implementing a REDD+ pilot project and cooperation proposal in Guna Yala”, to the GGC in May 2012. The Congress decided the proposal needed further investigation and broader consultation with people who were

⁸⁹ Equipo Técnico Ampliado – IIDKY. Resultados preliminares evaluación y sugerencias a la propuesta de “Proyecto Piloto REDD+ para Gunayala”. Congreso General Guna. Congreso General de la Cultura Guna Gunayala. May 2013.

⁹⁰ See Equipo Técnico Ampliado – IIDKY, 2013.

not able to attend the Congress. The General Congress set up a study commission to carry out the assessment and organized the necessary prior, free and informed consultations with the communities (Resolution No.2)⁹¹ The complexity of the project required the GYRDI to call upon a group of 9 external Guna experts to assist it in its task. The proposal should be handed over to community leader. The engagement process would occur according to the procedures set forth in the Fundamental Law. However, no specific consultation plan or protocol that would detail the consultation process with the communities was formally agreed upon.

4.2. Implementation⁹²

During the planning of the consultation, the area of the project (Nargana) has been prioritized. On 29 and 30 June 2012, workshops were organized on the proposal by the team of external Guna experts with 6 communities from Nargana in order to inform the communities and receive comments on the project. Another workshop was held with 9 communities from the area on 30 and 31 July 2012. By the end of the process, around 25 communities on the 49 living in the Comarca had been informed during informative meetings of one day. Information on the project was not always received before the meetings. Hence, leaders were not always present.

In October 2012, the General Congress formed a technical group, within the GYRDI, to start summarizing the comments and draft proposals to overcome identified difficulties (Resolution No.7⁹³). The final report of the technical group was issued on 15 May 2013. The report assesses the different components of the project and makes proposal for its implementation. Among the observations made, the report mentions that duration of the contract should be reduced from 30 to 10 years (renewable), General Congress should decide on how to use the incomes, funds should be used to improve indigenous governance, and Wildlife Works should train community members to sell carbon credits. The report forecasts possible income for the communities according to possible market price evolution. It also highlights that incomes are not guaranteed and subject to market price variation. Within the possible gaps, the report mentions that no specific measures were planned to ensure safeguards application and rights protection. However, the report concludes the project is feasible and could bring economic profits and employment, improve forest management and strengthen the Guna institutions.

It is worth mentioning that during the assessment process, between 11 and 21 April 2013, two members of the technical group visited the Wildlife Work REDD+ project in Kenya in order to observe the work of the company and understand impacts of REDD+ projects. Their report was submitted to the General Congress of June 2013. The assessment report was positive, concluding that a REDD+ project in Guna Yala would be an opportunity to generate incomes that could be invested in development and conservation projects (Herrera H. and Núñez V.,2013).

Despite a globally positive assessment, the General Congress rejected the proposal in June 2013 (Resolution No.5 of 9 June 2013). The majority of the members considered that the Guna People were not yet prepared to enter into this kind of agreement, taking also into account the legal uncertainty surrounding REDD+ at the international level. Moreover, the General Congress decided

⁹¹ Equipo Técnico Ampliado – IIDKY, 2013.

⁹² See Solis, 2013. Equipo Técnico Ampliado – IIDKY, 2013.

⁹³ Equipo Técnico Ampliado – IIDKY, 2013.

to withdraw from any discussion on REDD+ and prohibited its members to participate in any event or activity related to REDD+, under threat of sanctions. At the end of the meeting, Wildlife Works acknowledged the decision and said it would respect it.

5. Findings and Comments on key issues

5.1. Stakeholders involved and questions consulted

The only stakeholder involved was the Guna People from Guna Yala. No authority from the State was involved in the process. The project was first analyzed by the GIRDY, as a technical advisory body, and then submitted to the communities before final decision by the General Congress. Emphasis was put on the affected communities from the area of the project, which did not cover the whole indigenous territory. The question submitted to the Guna General Congress was about the implementation of the REDD+ project. The same question was submitted to the communities during the workshops. One of the difficulties was precisely that every community had to take the decision internally on the whole project, before their representative attended the General Congress to take decision.

5.2. Consultation timing

The decision-making process of Guna Yala implies a timeframe imposed by the schedule of the General Congress sessions (meeting every 6 months). In the present case, final decision took 18 months, since four different sessions were necessary to: present the proposal (Oct. 2011), assess the first report (May 2012), organize the information (Oct. 2012) and take a final decision (June 2013). A process that may be seen as lengthy by a private company may be considered as too short by Indigenous Peoples. Different time perception may certainly generate frustration on both sides.

The communities were consulted between June and October 2012. Workshops with the communities were too short (1 day) given the complexity of the issue and the need for every community to take its own decision.

5.3. Representativeness of all relevant stakeholders and legitimacy of results

All the representatives of the communities are convened to vote during the General Congress, the highest indigenous political body. Every community elects five delegates to attend the General Congress, while only the community's representative (*Saila*) has the right to vote. Women are respected in Guna society but do not occupy public mandate.⁹⁴ Information workshops could not be held within all the 49 communities, which certainly had an impact on the final decision. However, representatives of all the communities took the final decision within the General Congress. No issues related to representativeness or legitimacy of the result have been reported.

5.4. Benefit-sharing arrangements

The project proposal provided for a benefit sharing mechanism. Wildlife Works would get around 20% of the profits and the Guna people would get around 50 and 60%, depending on prices fluctuation. One half of the incomes would go to the Congress/Guna People, the other half would go to a community fund, according to the project area, submitted to transparency requirement. Wildlife

⁹⁴ Alvarado, E. 2001

Work could veto inappropriate projects proposals (e.g. political meetings, parties, etc.) The rest of the income would cover the implementation costs. The price per carbon credit mentioned is between USD 5 and 20. A company would be set up.

This proposal was not sufficient in itself to reach an agreement with the Guna People. Several members of the General Congress expressed concerns about the idea of giving a price to environment protection and lose control over their land. It is possible that forecasts of high profits have generated suspicion. Additionally, the benefit sharing mechanism created new management structures that did not fit within the Guna traditional institutional framework.

5.5. Land tenure rights and traditional knowledge

The Guna Yala territory has been recognized and titled. However, the GYRDI report mentions that, while international safeguards were mentioned, no specific mechanism or process had been identified by Wildlife Works to ensure their effective application and protection of Gunas' human rights (social rights, environment protection, and land rights).

According to the GYRDI final report, the Guna people would provide their traditional knowledge, as well as their conservation and forest management practices during the project.

6. Assessment of success factors

6.1. Conditions for dialogue

All the conditions seemed fulfilled. Both parties were willing to discuss. The respect for traditional authorities and application of the Fundamental Law contributed to create appropriate social, political, legal and institutional conditions.

Even if all the reasons that justified the refusal to grant consent remain uncertain, one cannot underestimate the impact of the decision of the COONAPIP (national indigenous organization) to withdraw from all REDD+ related discussions in February 2013. This decision created a climate of mistrust around REDD+ proposals. The Guna Congress took the decision to forbid discussions about REDD+.

6.2. Possible key success factors

a. Related to the consultation process

- Parties agreed that the whole process was led by the people itself, according to its own existing rules
- Identification of legitimate representative authorities was eased by the publication of the Guna Fundamental Law and by the fact that the highest political authority organized the process itself; no legitimacy issue has been reported
- The process ended when the institutions decided it (sufficient time allocation)
- The Guna People were able to assess the information and set up their own multidisciplinary technical team. Guna personnel took part in the study of Wildlife Works
- Decisions have been taken by the representative institutions of the Guna People

b. Related to the consultation objective

- Community members have been able to visit a REDD+ pilot project (Africa) and gather first hand information
- The GYRDI was able to assess the positive and negative impacts of the proposal, with its own experts

c. Related to rights protection

- Autonomy of the Guna people has been respected throughout the process

6.3. Possible gaps and errors

- Not having drafted the initial proposal in a participatory way may have reduced ownership of the proposal and increased mistrust
- The proposal from Wildlife Work, based on its project in Africa, has not been totally adapted to the local reality (e.g. project proposals identified economic activities not carried out in Guna Yala; benefit sharing mechanism implied new structures that did not fit within existing institutional framework)
- Designing of the consultation process, and its communication strategy, can be seen as weak; besides the rules provided for by the Fundamental Law, there is no evidence that an appropriate consultation protocol has been drafted in order to ensure adequate reach and sufficient information⁹⁵; capacity building to local communities was key, since the decision on the project was first taken in every local assembly before the leader participated in the General Congress.
- Budgeting of the consultation process may have been insufficient according to local conditions (e.g. boat visits depending on climate, high fuel price); free-of-charge intervention of the external experts did not allow for full involvement in the process;
- It seems that sufficient time was not always allocated to local workshops
- Translation may have been poor, regarding the complexity of the topic (Solís, 2013)

7. Lessons learned – Up-scaling potential and limitations

As regards legitimacy, the respect shown to traditional authorities was key to gain acceptance during the process. When dealing with measures of broader territorial scope, it would be legitimate to engage with the national organization, which represents the Guna people at the national level. However, this would not imply a change in the decision-making authorities. In fact, the Guna General Congress shall approve any program, plan or project within the Comarca. It is also in charge of the territorial integrity. Hence, Guna General Congress, will still play a central role in deciding about any measure (whatever its scope) that could impact Guna Yala. In addition, taking into account the decision making process of the Guna, each community will have to be properly informed, since Guna congress members are bound by previous local decisions. Properly engaging with communities requires specific planning and budgeting. However, underestimating the necessity to properly inform the communities could have an impact when decisions are taken at a higher level.

⁹⁵ Solís recommends the drafting of a specific FPIC manual (Solís, 2013).

Application of indigenous rules was necessary to ensure legitimacy. Yet, those rules might not have considered large scale consultation on highly technical issues. It may be necessary to mutually agree on a detailed consultation protocol to complement existing indigenous rules and processes.

Consensus building requires a deep understanding of communities' interests and needs, which may be related to rights and specific values. Participation in financial benefits is not necessarily sufficient to generate communities' interest in REDD+ and might even generate suspicion when high profits are forecast. The possibility to lose control over the territory is a sensitive issue for Indigenous Peoples, which may not be compensated by benefit-sharing agreements. Discussion on co-benefits from REDD+ (e.g. biodiversity protection, forest governance, land rights) could be a better starting point.

Case 3 - Gas fields Exploration in Charagua Norte

1. Summary

| | |
|-------------------------------|--|
| Country | Bolivia |
| Region | Santa Cruz |
| Object | Seismic survey 2D in Campos Tacobo y Tajibo, San Isidro Block (Gas fields Exploration) |
| Promoter | Minister of Hydrocarbons and Energy |
| Affected communities | Guaraní communities from Charagua Norte |
| Consultation objective | Reaching an agreement on activities |
| Time period | December 2009 – June 2010 |
| Result | Agreement reached |

2. Context

2.1. Project background

The project submitted to the consultation process was a planned seismic survey in the San Isidro Block, district of Charagua, province of Cordillera of the region of Santa Cruz. The project refers to exploration of gas fields by the company Pluspetrol Bolivia Corporations S.A. (PBC) already active in the area. In fact, oil companies are carrying exploration and exploitation activities in the area since several decades. The planned activities would be carried out in the indigenous territories (*Territorios Indígenas Originarios Campesinos*- TIOC) of Charagua Norte and Isozo, pertaining to Guaraní communities.

Guaranís' representative institutions are well structured and organized. Communities have their own assemblies and representatives (*capitán*). Communities' representatives gather in 'zonal assemblies' (assembly of Guaraní People-APG), represented by *Capitanías*. There are three zonal assemblies in the Charagua district: APG Charagua del Alto y Bajo Isozo, APG Charagua Sur, and APG Charagua Norte. The three *Capitanías* gather to form the Guaraní People Assembly of Bolivia (APG Bolivia). Set up in 1987, the APG Bolivia is a member of the national Confederation of Indigenous Peoples of

Bolivia (CIDOB). There are 30 Guaraní communities (around 7200 individuals) living on the Charagua Norte territory, which has been titled to the APG Charagua Norte.⁹⁶

Since 2007, the NGO CEJIS helped the communities of Charagua Norte to build a network of socio-environmental monitors and trained the community on technical and legal issues.

2.2. Relevant regulatory framework

Bolivia was one of the first countries to ratify ILO Convenio 169 in 1991. Pursuant to the case law of the Constitutional Court, the Convention has force of constitutional law (STC 1420/2004-R). In 2009, a revision of the Constitution allowed for the recognition of Indigenous Peoples' rights at the highest normative level. The 2009 Constitution expressly recognizes Indigenous Peoples' right to be consulted before the adoption of legislative or administrative measures that may affect them and about exploitation of non-renewable natural resources in their territories (Art. 30 and 352). However, no general regulation has been adopted to establish the details of the consultation process.

During the debate about hydrocarbons nationalization, a new law on hydrocarbons has been adopted. The 2005 Act on Hydrocarbons No. 3058 provides for a specific section dealing with Indigenous Peoples' rights, while recognizing the right to prior consent. Consultation process was established by its Regulation adopted in 2007 (Supreme Decree No. 29033), which details the applicable principles and the various steps of the process. Consultation shall be carried out in two moments: before the granting of the license and before the approval of the environmental impact assessment study.

3. Actors

Bolivian authorities:

- Ministry of Hydrocarbons and Energy (Socio-Environmental Management Division): responsible for conducting the consultation process
- Vice-Ministry of Environment, Biodiversity and Climate Change: participated in socio-environmental impact identification and evaluation
- Yacimientos Petrolíferos Fiscales Bolivianos (YPFB): state-owned oil company; observer

Indigenous Peoples:

- Indigenous communities from TCO Charagua Norte: approximately 7200 individuals and 1300 families; 20 communities directly affected by the project
- Capitanías of Charagua Norte, Alto Isoso y Bajo Isoso: Representative institutions of the communities and of the corresponding local Assembly of the Guaraní People (APG)
- Assembly of the Guaraní People (APG - Bolivia): organization of Guaraní People, member of the national Confederation of Indigenous Peoples of Bolivia (CIDOB)
- Local network of socio-environmental monitors
- Center for Legal Studies and Social Investigation (CEJIS): NGO, adviser of the Indigenous Peoples

⁹⁶ Fundación Tierra, 2010 and 2011. Bascopé, 2010

4. Process⁹⁷

4.1. First process

Designing

The stages of the consultation process are provided for by the Supreme Decree No. 29003. On 16 December 2009, a meeting was held between officials of the Ministry of Hydrocarbons, YBFN and the *Capitanía* of Charagua Norte, since APG Charagua Norte was the owner of the affected territory, without all its members attending the meeting. In accordance with Supreme Decree No. 29033, a memorandum of understandings (MoU) on the consultation process (time frame, meetings location and budget) was agreed on 22 January 2010 with the indigenous representatives of the *Capitanía* present, but without participation of all the representatives of the *Capitanía* and without participation of APG, the highest representative body of the Guaraní people.

Implementation

Information meetings were held based on the MoU with some local communities, end of February and end of March. The process was mainly of informative nature. The process showed limited participation and limited participant's knowledge of the project and of the MoU. The information provided by the authority was eventually challenged by community members who asked for more time. APG stood against the consultation process and asked for respect of traditional institutions and indigenous organizations. APG Charagua Norte admitted problems and agreed that the process should be reinitiated. In fact, Supreme Decree No.29033 provides that the preliminary meeting and the agreement on the consultation agenda shall be made with the local representatives of indigenous communities, *in cooperation with* the regional and national representative institutions. Indigenous institutions and customs shall be respected throughout the process.

4.2. Second process

Designing

On 5 April, the *Capitanía* of APG Charagua Norte submitted a revised agenda to the Ministry of Hydrocarbons, which was eventually accepted. With the help of CEJIS, a draft protocol was issued, discussed with the Socio-Environmental Management Division of the Ministry of Hydrocarbons and submitted to the communities for comment. On 29 and 30 April, an assembly (APG Charagua Norte) was held on the consultation process with communities, and agreed on fundamental principles that should guide the implementation of the consultation process: consensus should be achieved at each stage of the process, rights and institutions of the people must be respected, and broad participation should be fostered. A second assembly gathered on 8 and 9 May 2010 to deal with planning, information sharing and possible impacts of the activities.

Implementation

According to the agreed protocol, field inspections were organized on 20 and 21 May with participation of socio-environmental monitors. A second visit occurred with the help of technical advisers in June. A final assembly (APG Charagua Norte) was held on 23 and 24 June to discuss the

⁹⁷ See Bascopé, 2010a and 2010b.

project. The Ministry of Hydrocarbons and the communities eventually reached an agreement on impacts of the project and compensation measures. The national organization (APG) was involved at every stage of the process.

4.3 M&E

Socio-environmental monitors from the communities will participate in the monitoring of the exploration activities, with the logistic support of the company⁹⁸.

5. Findings and Comments on key issues

5.1. Stakeholders involved and questions consulted

As provided for by applicable regulations, several levels of representative institutions were involved in the process. Lack of involvement of the national organization was a reason why the process was reinitiated. Coordination with the various level of representation allowed ensuring a high level of legitimacy of the process.

5.2. Benefits from the project

There is no evidence about existence of benefit sharing mechanisms related to the activities. In this case, planned activities were related to exploration of resources, which will not generate direct profits. According to the agreements, the company will spend at least USD 50.000 in social programs. On the other hand, pursuant Article 119 of the Hydrocarbons Act, every socio-environmental impact shall be compensated. Meetings on compensation were held during communities' assemblies. Compensation amounted to USD 100.000.

6. Assessment of success factors

6.1. Conditions for dialogue

- Supreme Decree No. 29033 grounded indigenous claim for improving cooperation
- The Ministry of Hydrocarbons showed sufficient willingness to resume the process when it had lost credibility; implicitly admitted an error

6.2. Possible key success factors

a. Related to the consultation process

- Consultation protocol agreed on with the affected people and applied throughout the process
- Dealing with all representative institutions and respecting their internal norms, procedures and decision making process, without pressure, was necessary for the dialogue to go on and to reach a legitimate agreement
- Guaraní peoples were well organized, trained since 2007 and informed: able to coordinate a response, take a clear position on issues and negotiate with authorities; took an active role throughout the process
- Ministry of Hydrocarbons satisfied communities' demand to complete missing information
- All the meetings were held on the communities' territory

⁹⁸ See CEJIS, 2013.

- Communities were able to access information about other consultation processes in the Region, which helped them have a greater impact on the process

b. Related to the consultation objective

- Key role of local socio-environmental monitors and local advisers in generating and assessing information: people were able to assess impacts of activities and draft credible propositions for mitigation
- Information provided for by the communities has been taken into account by the Ministry of Hydrocarbons
- Importance given to communities' participation during all the steps of the process; the consent has been built step by step

c. Related to rights protection

- The Communities' Life Plan (*Plan de Vida*) has been taken into account when assessing social-environmental impacts
- Participatory impacts evaluation and field visits helped improving knowledge of the territories
- Support to socio-environmental monitors helped preserving the environment

6.3. Possible gaps and errors

- Using a consultation protocol not agreed between the parties had several negative consequences:
 - Deeply affected legitimacy of the process by not dealing with local and national representative institutions and imposing a consultation protocol not agreed on
 - Did not allow communities' members to access the information in an appropriate manner
 - Power-point presentation on technical information did not allow for effective participation of the indigenous communities

7. Lessons learned – Up-scaling potential and limitations

The high capacity of the Guarani People to assess and generate information was a result of several years of training. Generating such capacities on REDD+-related issues at the national level is without doubt an ongoing challenge.

The vertical organization of the Guarani People should allow for coordination at various levels. The involvement of several indigenous organizations from the beginning, from local to national level, would allow avoiding disputes on representativeness.

A successful experience does not guarantee general improvement: subsequent consultation processes were not organized as well. Ministry of Energy experiences frequent changes of staff may limit institutional learning. There is a need to work on institutional learning.

Case 4 - Maijuna Regional Conservation Area

1. Summary

| | |
|-------------------------------|---|
| Country | Peru |
| Region | Loreto |
| Object | Consultation of the Technical File on the creation of the Regional Conservation Area "Maijuna" |
| Promoter | Regional Government of Loreto |
| Affected communities | Maijuna Indigenous Peoples: native communities from Orejones, San Pablo de Totolla, Puerto Huamán, and Nueva Vida |
| Consultation objective | Achieving agreement or consent |
| Time period | 23 May 2013 - present |
| Result | Process pending |

2. Context

2.1. Project background

The Maijuna people consist of several communities amounting to 300-500 individuals living in the Peruvian Amazon, between the Napo and the Putumayo rivers, fighting for the survival of their cultural identity. In August 2009, Maijuna communities asked the Regional Government of Loreto to protect the biological diversity of their area as well as their cultural values, facing strong pressure from illegal activities. In April 2011 the Regional Government of Loreto declares of regional public interest the conservation of the biological diversity of the Maijuna's territories and their cultural values⁹⁹. The Program for Sustainable Conservation, Management and Use of Biological Diversity of Loreto (PROCREL) was put in charge of evaluating the best way to achieve it. The main idea proposed was the creation of a Regional Conservation Area (RCA). In February 2012, the Regional Government adopted the Regional Decree N°001-2012-GRL-CR that approves the creation of the RCA of Maijuna. PROCREL was in charge of the drafting of the required technical file. According to the final technical file¹⁰⁰, PROCREL engaged on a continuous basis with the Maijuna communities of the area to draft the file in a participatory manner and informed them about the project. The final technical file states that the Maijuna People faced strong pressure from illegal extraction of natural resources in their territory (e.g. logging, fishing and mining) and saw the creation of a natural protected area as an appropriate instrument to protect the natural resources they traditionally use. When the technical file was assessed by the national agency in charge on protected areas (SERNANP), an observation was made on the duty to consult indigenous communities that might be affected by the project, according to the new Act on the right to prior consultation of Indigenous Peoples and its Regulation that entered into force in April 2012. In May 2013, the Government of Loreto concluded that the Maijuna communities living in the surroundings of the protected area could be directly affected by the measure approving the technical file of the project. According to the law on prior consultation, the Regional Government asked the authorization to lead a prior consultation process to the Vice-Ministry for Inter-cultural Affairs.

⁹⁹ Regional Decree N°001-2012-GRL-CR.

¹⁰⁰ SERNANP, 2013

2.2. Embedment in larger processes

The Regional Government of Loreto has already created several RCA in the Region. The Maijuna protected area is presented as an essential element to contribute to the biological connection between them (SERNANP, 2013).

2.3. Relevant regulatory framework

Since the entry into force of the Act on the right to prior consultation (Act N°29785) in 2011 and its Regulation in 2012 (Supreme Decree No.001-2012-MC), authorities shall consult Indigenous Peoples on administrative and legislative measures as well as development plans, programs and projects that may directly affect Indigenous Peoples' collective rights, with the objective of achieving agreement or consent on the proposed measures. In February 2013, the Vice-Ministry of Intercultural Affairs published guidelines on the regulatory framework on prior consultation for civil servants¹⁰¹. Despite strong criticism from the civil society and indigenous organizations, the Vice-Ministry never complied with its obligation to publish a data base of the Indigenous Peoples of Peru.

It is worth mentioning that Regulation of the National Protected Areas Act (Act No.26834) adopted in 2001 (Supreme Decree No.038-2001-AG) states that the final categorization of national protected areas should be submitted to a transparent consultation process of local populations. The process should be carried out according to ILO Convention 169. Overlaps on protected areas with communities' territories shall be conditional on obtaining communities' prior consent (Art. 43.2). In the present case, the study mentions there is no overlap.

3. Actors and responsibilities

Peruvian authorities

- Regional Government of Loreto – PROCREL: is the entity responsible for issuing the technical file that supports the Supreme Decree that will create the Regional Conservation Area
- Vice-Ministry for Inter-cultural Affairs (Ministry of Culture): Responsible for the national policy on prior consultation. Brings technical assistance to the parties during all the consultation stages. Provides translators and facilitators
- SERNANP: National agency of protected natural areas. Responsible for issuing a compulsory opinion on the creation of the RCA. Brings technical assistance
- Ministry of Environment: Participated in the consultation plan drafting. Will issue the Supreme Decree creating the RCA.

Indigenous Peoples

- Maijuna communities: four native communities of the Maijuna people (Orejones, San Pablo de Totolla, Puerto Huamán and Nueva Vida) are the identified affected communities
- Kichwa communities: pretend to be affected, but were not initially involved in the process

Observers:

- Office of the National Ombudsman (*Defensoría del Pueblo*), ILO, Naturaleza y Cultura Internacional (NGO), GIZ.

¹⁰¹ Available at: <http://consultaprevia.cultura.gob.pe/> [Accessed 30.08.2013]

4. Process

4.1. Designing

The consultation process was based on the Act on the right to prior consultation and its Regulation that defines all the stages of the consultation process. The consultation process has to follow 7 main steps: (1) Identification of the measure; (2) Identification of the affected people; (3) Publicity of the measure and of the Consultation Plan; (4) Information; (5) Internal assessment by the affected people; (6) Dialogue; (7) Decision.

Concluded step 1 and 2, the Regulation provides that the authority in charge may organize preparatory meetings to inform the affected people about the Consultation Plan. The Regional Government used this possibility. On 20 and 21 May 2013, the Regional Government organized prior meetings that allowed for the participatory drafting of the Consultation Plan with the affected communities. The authority and the communities agreed on the place and dates of the meetings. Upon request of the communities, the duration of the meetings was reduced to accelerate the process, estimating their information sufficient.

4.2. Implementation

After the drafting of the Consultation Plan, the Regional Government published the plan and the proposed measure on its web page and handed it over to the communities' representatives on 23 May 2013. During the information phase the Regional Government issued a press release and radiocasted information spots¹⁰². An information meeting was held on 24 June in the community of Puerto Huamán. During 25 and 26 June, the representatives proceeded to the internal evaluation of the proposal within the same community. On 6 July, Maijuna's representatives handed over the minutes of their meeting expressing their support to the creation of the RCA. A day before, on 5 July, the Federation of Native Communities from Medio Napo, Curaray and Arabela (FECONAMNCUA) issued a press release stating that the consultation process did not involve three Kichwa communities which could be affected by the creation of the protected area and that they were mentioned in the final technical file. They ask for the public disclosure of the criteria taken into account to identify the affected communities and FECONAMNCUA mentions it will formally request its inclusion in the consultation process¹⁰³. Pursuant to the applicable norms, the deadline for presenting this request already expired. However, authorities have agreed to include the Kichwa communities in the dialogue phase and to take into account their comments on the proposal. The deadline imposed by applicable norms will be extended.

5. Assessment of success factors

5.1. Conditions for dialogue

All the conditions seemed fulfilled. All the parties were willing to discuss and trusted each other. The new legislation on prior consultation provided for the necessary guidelines.

¹⁰² Available at: <http://www.regionloreto.gob.pe/Pag/ConsultaPrevia.aspx> [Accessed: 30.08.2013]

¹⁰³ FECONAMNCUA, 2013.

5.2. Possible key success factors

a. Related to the consultation process

- Consultation process regulated by law: increase transparency and legitimacy
- Consultation Plan elaborated in a participatory manner
- Communication: presence of previously trained translators and facilitators
- Vice-Ministry for Inter-cultural Affairs and other observers could bring assistance on legal matters during the meetings
- Traditional authorities were respected
- Flexibility was sufficient to include new communities, despite limited legal possibilities

b. Related to the consultation objective

- Information exchanged on biodiversity conservation, RCA objectives, benefits and impacts several years before the consultation process started. It is assumed that communities knew what they could get from the measure
- Trust built by previous work of PROCREL with communities: previous informative sessions, capacity building, support of economic activities
- The ACR will be co-managed by the regional Government and the local communities: relationship would be based on partnership

5.3. Possible gaps and errors

- Understanding of substantive rights (e.g. rights on territory and natural resources) might still be limited among community members
- Inter-cultural methodology limited to the presence of translators
- Selling of carbon credits is seen as a source of income, but no discussions on REDD+ were reported
- Funding of the process was not secured: consultation costs are borne by the Regional Government with the support of Naturaleza y Cultura Internacional (NGO)
- The field visits did not allow identifying all the communities that could be affected by the measure
- Publicity methods did not allow reaching all the possible affected communities
- The regulation does not specify how communities should request their inclusion in the process
- The only legal remedy for failure to identify all the affected communities is action for annulment of the final measure, which would affect efficiency
- Using the community leaders as translators did not always allow for appropriate translation

6. Findings and Comments on key issues

6.1. Stakeholders involved and questions consulted

Initially, only four Maijuna communities were consulted on the ACR proposal. A complaint addressed by Kichwa communities, affected by the project, led to their inclusion in the process. Meetings were held between officials and communities' representatives, but internal assessment occurred within communities' assemblies. Neither the regional nor the national organizations were involved.

According to the Regulation of the Act on prior consultation, the representative institution invited is the organization corresponding to the geographical scope of the measure.

6.2. Benefits from the project

No direct monetary benefits will result from the creation of the RCA. However, possible benefits for the communities includes: co-management of the area, participation in tourism activities, participation in supervision activities and promotion of Maijuna economic activities. The final technical file lists selling of carbon credits as a mean to finance the RCA. The benefits from carbon selling would entirely finance the operating costs of the RCA. No benefit sharing from carbon credits has been considered.

6.3 Land tenure rights

All the affected communities have their lands titled. Authorities mentioned that communities had their lands titled during the preparation of the technical file and that there is no overlap with communities' lands. However, it also mentions that the communities carry on activities on the territory that would be covered by the RCA. Pursuant to Article 14 of ILO Convention 169 and in accordance with the case law of the Inter-American Court of Human Rights, which are both compulsory in Peru, the State shall recognize ownership and possession of the peoples concerned over the lands they traditionally occupy. Therefore, the creation of the RCA might impede the communities to get their whole traditional territories titled.

7. Lessons learned – Up-scaling potential and limitations

Existing relationship based on trust and information sharing can significantly ease a consultation process. The process was also eased by the limited number of communities involved.

As to stakeholders' involvement, a data base of Indigenous Peoples will allow for identification of affected peoples and their representative institutions, even though it was disputed and is still not public. While applicable norms provide for the participation of the organization corresponding to the geographical scope of the measure, this provision has not been agreed on with Indigenous Peoples¹⁰⁴ and might be challenged in future consultation processes.

The new regulatory framework on prior consultation will apply whatever the scope of the measure (planes, programs, projects and norms). Possible preparatory meetings should systematically be organized to address pending issues and improve coordination.

¹⁰⁴ Grupo de Trabajo sobre Pueblos Indígenas de la Coordinadora Nacional de Derechos Humanos. 2012.

Case 5 - *Vía al Mar* - Road construction between Nuqui and Altos de Copidijo

1. Summary

| | |
|-------------------------------|--|
| Country | Colombia |
| Region | Chocó |
| Project Description | " <i>Vía al Mar</i> ": Construction of a road between Nuqui and Altos de Copidijo (Pacific coast of Colombia) |
| Promoter | National Roads Institute (INVIAS) – <i>Vía al Mar</i> Consortium |
| Affected communities | Afro-Colombian communities from Riscales, Unión Panamericana, Villaconto Río Quito, Cantón de San Pablo, Río Baudó and Paimadó Río Quito |
| Consultation objective | Agreement on project impacts and management measures (prevention, mitigation or compensation) |
| Time period | September 2005 – April 2009 |
| Result | Agreement reached |

2. Context

2.1. Project background

The project takes place in the Region of Chocó (North Colombia), known for its biodiversity and being the territory of Afro-Colombian as well as indigenous communities. Constructing a road between Ánimas and Nuquí (124km) in the Region of Chocó is a project that started in 1967. It was aimed at connecting the inlands with the harbor of Tribugá, on the Pacific Coast of Colombia. The project was embedded in a larger one: the road connection of the Latin American continent by the Pan-American Highway. After several interruptions, the project started again in 2001. The planned road was divided in 5 sections, 4 of which required environmental license approval. In 2004, the Colombian National Roads Institute (INVIAS) applied for environmental license to the Ministry of Environment for the first section, located between Nuquí and Altos de Copidijo (18km). Investment for this section amounted to COP\$ 125.000 million. In January 2006, the Ministry of the Interior and Justice certified the presence of Afro-Colombian communities in the project area¹⁰⁵. In fact, the road would cross the territory of the Afro-Colombian Community of Riscales, which implied the requirement of a prior consultation process.

2.2. Relevant regulatory framework

When adopting of Act No. 21 of 4 March 1991 Colombia was one of the first countries to ratify ILO Convenio 169¹⁰⁶. Pursuant to Article 93 of the Constitution, ratified human rights instruments have direct legal effects in internal law. According to Article 330 of the Constitution, indigenous communities have the right to participate in decisions referred to the exploitation of natural resources pertaining to their territories¹⁰⁷. Act No.70 adopted on 1993 recognized specific collective rights to Afro-Colombian communities, among them, the right to participate in decisions that may affect them (Article 3). In addition, they have the right to participate in the designing, drawing up and evaluation of socio-environmental impact assessments of projects implemented in their territories

¹⁰⁵ OFI06 – 1993 – DET – 1000, 31 January 2006.

¹⁰⁶ After Norway (1990) and México (1990).

¹⁰⁷ In 1997, the Constitution Court ruled that the right to participate in these decisions was to be exercised through prior consultation, which is by itself a specific fundamental right (Case SU-039/97).

(Article 44). Plan, programs and projects aimed at benefiting these communities should be designed with their participation, taking into account their aspirations as to development (Article 49). According to the Colombian Constitutional Court, Afro-Colombian communities benefit from the application of ILO Convention 169 (Case C-169/01). Pursuant to Act No. 99 of 1993, decisions about exploitation of natural resources shall be submitted to prior consultation with indigenous and Afro-Colombian communities (Article 76). Participation and prior consultation of indigenous and Afro-Colombian communities in the drafting of socio-environmental impact assessments has been regulated in 1997 by Decree No. 1320¹⁰⁸. When issuance of an environmental license is compulsory, then the prior consultation process takes place within the socio-environmental assessment. However, Colombia still lacks a general norm that would regulate the right to prior consultation. It is worth mentioning that since 1997 the Constitutional Court has issued a high number of decisions protecting the right to prior consultation.

3. Actors

Colombia authorities:

- Colombian National Roads Institute - INVIAS: promoter of the project; led the consultation process
- Ministry of Environment, Housing and Territorial Development: responsible for issuing the environmental assessment
- *Via al Mar* Consortium: private promoter of the project since 2009.

Affected Peoples:

- Afro-Colombian communities (126) represented by the Afrochocó Territorial Collective (Community Councils of Riscales, Unión Panamericana, Villacontó Río Quito, Cantón de San Pablo, Consejo Comunitario General del Río Baudó y sus afluentes – ACABA y Paimadó Río Quito)

4. Process

4.1. Designing

Meetings about the project were held with affected communities on 10 September 2005, 20-21 October 2005, 16 August 2006, 28 August 2006, 23 March 2007, 12 April 2007, 28 February 2008 and 14 May 2008. Local communities favored the construction of the road (Gracia, 2009). Pre-agreements were signed on 28 July 2008 and 27 February 2009 with the Afrochocó Territorial Collective. Those documents provide for methodological approaches on the consultation process: decision making process, M&E, safeguards for communities' participation and grievance mechanisms. They also deal with social responsibility and contain compromises of INVIAS to work on socio-environmental needs with the National Council of Economic and Social Policy (CONPES). The Prior Consultation Unit of the Ministry of the Interior and Justice participated in the drafting process of the pre-agreements.¹⁰⁹

¹⁰⁸ This regulation has been criticized not only for not complying with ILO Convention 169 but also for having been adopted without consulting the communities.

¹⁰⁹ Oxfam, 2011

4.2. Implementation

The prior consultation process took place within the elaboration of the socio-environmental assessment. INVIAS submitted its environmental impact assessment for the road section between Nuquí and Altos de Copidijo (Section 1) to the Ministry of Environment in August 2008. In January 2009, the *Vía al Mar* Consortium took over the responsibility of obtaining the environment license. According to the Ministry of Environment, the impact assessment was drafted with the participation of the affected communities, notably on impacts identification and drawing up of the environment management plan.

On 12 March 2009, the Ministry of Environment required the planning of a prior consultation process with the Community Council Riscales. The consultation took place on 21 March 2009 in an education institute in Nuquí. On 22 March 2009, the official minute of the process was signed by representatives of the Community Councils, members of the Afrochocó Territorial Collective.¹¹⁰ The agreements provide for the implementation of several programs and projects that would directly benefit the local communities.

4.3 M&E

INVIAS and the *Vía el Mar* Consortium should inform the communities and the Ministry of Environment about execution of the projects on an ongoing basis. They will finance the setting up and functioning of the Training and Socio-cultural Follow-Up Centre (CICAS) to include the communities in the project implementation and monitoring phases. The agreements concluded also provide that inappropriate conduct (e.g. discrimination, instigation of prostitution, breach of community rules) would justify throwing-out of the territories.¹¹¹

5. Assessment of success factors

5.1. Conditions for dialogue

All the conditions seemed fulfilled.

5.2. Possible key success factors

a. Related to the consultation process

- Community Councils were involved as the main forum for dialogue
- Representative institutions and leaders were respected as such
- The Afrochocó Collective did promote inter-cultural dialogue
- Participation of communities' representatives and advisors was promoted all along the process

b. Related to the consultation objective

- Inputs of community members have been taken into account
- Impacts have been identified by 32 technical cards, agreed on and compensated by specific programs/projects
- Monitoring mechanism has been put in place

¹¹⁰ Oxfam 2011

¹¹¹ Oxfam 2011

c. Related to rights protection

- Communities' approach to development taken into account when formulating social programs and projects.

5.3. Possible gaps and errors

- Consultation did not always occurred before the activities started and territories were affected
- Pre-agreements were not fulfilled by authorities
- The division of the works in several sections did not allowed for the engagement of all the affected communities
- Land rights recognition was not completed
- Insufficient funding to comply with social engagements

6. Findings and Comments on key issues

6.1. Timing of consultation

As in Case 1, communities were only consulted on a section of the road and did not participate in the designing of the project which started years before. Ability to influence the project was limited, which may have increased bargaining positioning.

6.2. Benefits from the project

As a result of the consultation process, the authorities and the Community Councils affiliated to the Afrochocó Collective agreed on the creation of 5 programs co-financed by INVIAS and the Community Councils¹¹²: (1) Strengthening of governance, territorial management and control (COP \$775.180.991); (2) Environmental organization and strengthening of the Ancestral Productive Systems (SPA) and economic systems (COP \$3.492.827.632); (3) Bio-diversity recovery, environmental protection and compensation (COP \$725.999.988); (4) Environmental sanitation and health services (COP\$ 35.000.000); (5) Organization, control and recovery of natural resources and immigration (COP\$ 3.902.000.000).

In addition, specific agreements have been made according to compensation measures with Community Councils (Oxfam 2011): (1) Setting up of a center for fauna recovery; financial support of INVIAS in the drafting of Community Ethno-educational Plan (*Planes Etnoeducativos Comunitarios*); (2) INVIAS will compensated damages to houses and plantations caused by the road construction; evaluation would be made with landlords; (3) 70% of the workforces would come the Afro-Colombian communities (with gender perspective); (4) Implementation of 32 programs/projects with the Afrochocó territorial collective aiming at fauna protection, local development and community governance. Budget amounted to COP \$ 5.029.006.611 (COP\$ 4.463.006.611 from INVIAS and COP\$ 566.000.000 for the communities).

These agreements had to be implemented during the road construction. However, several projects have been suspended for lack of funding.

¹¹² Oxfam 2011

7. Lessons learned – Up-scaling potential and limitations

Impacts of the project have been identified in details, agreed on and compensated by specific programs/projects according the communities aspirations. Eventually, all the projects were not financed. Complexity and costs of this approach could limit its application at the national level.

* * *

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Interviews

Interviews

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