4

Prior Consultation in Latin American Extractives

Structural Forces behind Environmental Violence

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Environmental Violence Engaged

This chapter adopts the larger volume's definition of environmental violence (EV), as "direct and indirect harm experienced by humans due to toxic and non-toxic pollutants put into a local – and concurrently, the global – ecosystem through human activities and processes" [1]. The analysis illustrates one component of the book's framework: the production of environmental violence by "structural violence," which comprises "formal policies or practices that lead to the unequal distribution of risk and benefits to different groups of people, often divided along lines of race, socio-economic status, or other differentiators" [1]. In particular, the chapter reveals how new hydrocarbon and mining development in Indigenous areas is encouraged by: (1) state disregard of Indigenous rights to lands impacted by extraction; and (2) narrow definitions, again employed by state actors, of impacts of projects that are in the vicinity of Indigenous communities. The chapter further explores institutional factors that contribute to these two forms of structural violence.

4.1 Introduction

In recent decades, Latin America has seen a shift in government policies toward Indigenous communities that are impacted by development. Especially salient in this trajectory is "prior consultation," a participatory institution according to which the state must "consult" communities before approving major new development projects, including in the region's important mining and hydrocarbon sectors.

If prior consultation formally invites Indigenous communities into conversations about new extraction and its impacts on their territories, in actuality, as this chapter demonstrates, the institution can lead state actors to bypass and threaten communities' land rights while downplaying the environmental harms of planned projects.

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This outcome is due to the pro-extraction bent of national governments to which state agencies report, and to the measures the agencies take before prior consultations are initiated. State actors have disregarded project impacts and Indigenous land rights as a means to deny overlap between Indigenous territory and impacted areas, withhold prior consultation, and, ultimately, streamline extraction.

This chapter uncovers these dynamics through analysis of three important Indigenous mining and hydrocarbon conflicts in Bolivia, Colombia, and Peru.[1]

4.2 Prior Consultation and Associated Challenges for Indigenous Communities in Latin America

Globally, two structures stand out as foundations for national prior consultation norms: the binding 1989 Convention No. 169 of the International Labour Organization (the Indigenous and Tribal Peoples Convention, "ILO 169") and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). ILO 169 marked a shift away from the integrationist approach to Indigeneity articulated in the 1959 ILO Convention No. 107 [3]. Consistent with the new convention's focus on respecting the traditions and rights of Indigenous communities, signatories of ILO 169 must "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly" ([4], Article 6.1). The prior consultation prerequisite holds for the exploration and extraction of state-owned subsoil resources ([4], Article 15.2).

Related to prior consultation is the concept of "free, prior, and informed consent" (FPIC) of impacted communities [5, 6]. For most large-scale development, ILO 169 does not mandate community consent, though governments are to conduct prior consultation with the "*objective* of achieving agreement or consent to the proposed measures" ([4], Article 6.2, emphasis added). The convention generally requires consent for a Native community's relocation, but the government can still avoid this higher standard:

> Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. *When their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations*. ([4], Article 16.2, emphasis added)

In contrast to ILO 169, the nonbinding UNDRIP devotes extensive attention to consent [7]. Latin America is an important setting in which to study prior consultation, given that 14 of the 24 governments worldwide that have ratified ILO 169 are from

[1] The study draws on portions of Maiah Jaskoski's *The Politics of Extraction: Territorial Rights, Participatory Institutions, and Conflict in Latin America* [2].

the region. Furthermore, the government of every Latin American country voted for UNDRIP, with the exception of the Colombian government, which abstained [8].

Research reveals that, in practice, extractivist states in Latin America have treated prior consultation as merely a bureaucratic step in the approval of hydrocarbon and mining activities [9,10]. More broadly, comparative research on the implementation of prior consultation at the national level has found prior consultation disappointing as an institution of Indigenous representation. Scholars emphasize that communities are not provided sufficient information about development plans, national norms generally rule out entirely a consent standard, and the lack of Indigenous influence in the design and conduct of prior consultation processes, which the state tends to control [9, 11, 12]. Scholars also note the divisive nature of consultation processes – especially the state's practice of consulting individual communities and leaving out higher-level Indigenous authorities [9, 13].

Some scholars recommend adjusting the design of prior consultation institutions to strengthen the position and influence of communities in prior consultation processes [9, 12, 14]. Others doubt that state-led participatory processes could provide for genuine Indigenous participation and representation and, instead, devote attention to the phenomenon of Indigenous–developed and led "self-consultations" (autoconsultas; [11, 15], 134). These community-centered processes are not connected to formal state structures for prior consultation but are frequently grounded in ILO 169 and/or UNDRIP, as well as Indigenous peoples' laws [11].

That prior consultation seems not to offer Indigenous communities influence in extractives has not gone unnoticed by communities. The development and implementation of national prior consultation structures have been conflict ridden, with communities seeking institutions that would grant them more voice.[2] Disillusionment of Indigenous communities with the limits of prior consultation has caused some to reject it altogether, refusing state efforts to consult them ([2], ch. 6, [6, 15], ch. 4, [24]).

Added to criticisms of the quality of prior consultations for participating communities are studies of how prior consultation has failed Indigenous communities by not reaching them at all. States have disallowed community participation, especially where they expect Indigenous peoples to oppose extraction ([15], ch. 3, [20, 25], ch. 3). In some cases, this state tactic of avoiding prior consultation has backfired, generating intensive, visible activism by communities that insist on being consulted ([2], ch. 5, [20], pp. 1097–98, [24, 26]).

The analysis that follows presents further evidence of state agents bypassing prior consultation. Yet, unlike previous scholarship, it also reveals the structural

[2] For example, conflict over prior consultation institutions has transpired in Bolivia [16, 17], Chile [18], Colombia [19], Ecuador [20, 21], Guatemala [22], and Peru ([12, 23], pp. 9, 21–22, 34–35).

violence that serves as a mechanism connecting state interests in expediting extraction to the actual omission of prior consultation. This structural violence consists of state maneuvers to downplay both Indigenous land rights and the impacts of projects that are situated near Indigenous communities.

4.3 Country-Case Selection

Bolivia, Colombia, and Peru offer promising settings for a study about state actions to avoid prior consultation and, in that way, advance extractive projects. First, prior consultation is well established in the three countries. In each case, the government ratified ILO 169 in the 1990s, and prior consultation is institutionalized in extractives through widely accepted procedures; prior consultations usually take place in accordance with regulations ([2], ch. 3).

Second, the Bolivian, Colombian, and Peruvian governments' strong commitment to extraction could motivate state agencies to sidestep prior consultation. Historically, the national economy in each country has depended on mining and hydrocarbons. And the sectors in which the three conflicts in this chapter took place – mining, oil, and natural gas in Peru, Colombia, and Bolivia, respectively – boomed in the 1990s–2010s, encouraged by extractivist national policies ([2], ch. 2).

If these similarities among the countries make them attractive for a study on government efforts to avoid consulting Indigenous communities, important cross-country variation facilitates a different systems research design ([27], pp. 34–39). More precisely, the differences make it possible to test alternative explanations for why state actors might avoid consulting communities. They also permit an exploration of whether mechanisms identified in this research can operate in different contexts – that is, the reach of the study's findings.

In terms of broad contextual differences, the countries vary in their regime dynamics. Bolivian democracy was stable from the transition away from military rule in the early 1980s through the period of study. Peru is a case of redemocratization following the 2000 resignation of civilian President Alberto Fujimori (1990–2000). Colombia's democracy dates to the late 1950s, but it deepened considerably in the early 1990s, through extensive decentralizing reforms and the creation of a progressive Constitutional Court. Yet civil war, which was intense in Colombian hydrocarbon and mining zones, interfered with two basic components of democracy: civil and human rights protections. The reduction of the armed violence in the late 2000s created space for socioenvironmental activism, with mobilizing over hydrocarbon and mining development prominent ([2], ch. 3).

The countries also present variations in government ideology. We might expect agencies operating under governments on the right to promote investment over Indigenous rights more than agencies of leftist governments. The conflicts in

Colombia and Peru unfolded while right-wing executives known for implementing liberal economic models were in office.[3] In contrast, during the Bolivian conflict, President Evo Morales (2006–2019) of the Movement for Socialism (Movimiento al Socialismo, MAS) party governed. Morales, a vocal advocate of Indigenous rights, came to power with the support of the country's most powerful Indigenous movements, though the latter would develop strong critiques of his administration's actual development policies.

Another factor that could shape how state agencies approach prior consultation is their autonomy relative to extractive firms: Free of the influence of companies and their development timelines, autonomous agencies might be unlikely to try to skip prior consultation. Across the three countries, relevant state agencies hold different degrees of formal autonomy. Prior consultations in Peruvian mining and hydrocarbons are led by the same ministry that is responsible for attracting investment in the sectors, the energy and mining ministry (Ministerio de Energía y Minas, MINEM). Until 2015, MINEM also oversaw the review and approval of environmental impact studies (*estudio de impacto ambiental*, EIA).[4] Relative to Peru, Colombian oversight agencies enjoy substantial formal independence. The national agency for environmental licensing (Agencia Nacional de Licencias Ambientales, ANLA) attached to the environment ministry, reviews and approves EIAs for large-scale projects, while the interior ministry conducts all prior consultations.[5] Bolivia serves as an intermediate case in which the hydrocarbon ministry leads prior consultations for oil and gas projects, and the environment ministry issues environmental licenses.

The countries also differ in the degree to which Indigenous communities contributed to prior consultation structures. This variation is important, given that Indigenous participation in designing prior consultation institutions can result in more legitimate consultation processes ([29]; see also [12] on the negative case of Peru). Could it be that where Indigenous communities helped create these formal norms, governments exhibit greater respect for the prior consultation stage? Alternatively, governments that confront prior consultation institutions that were developed by Indigenous peoples might try to sidestep the potentially more intensive, drawn-out processes, in pursuit of speedy project approvals. Of the three countries, only Bolivia saw active Indigenous engagement in the design of prior

[3] Peruvian president Ollanta Humala (2011–16) was elected on a leftist platform. However, because he governed on the right, this study does not treat his administration as left leaning, consistent with other comparative research on Peru [28]. The remainder of this discussion on cross-national similarities and differences draws on information from ([2], ch. 3).

[4] In 2015, the recently created National Service for Environmental Certification (Servicio Nacional de Certificación Ambiental, SENACE) began assuming EIA reviews. By the end of 2016, the agency was reviewing the EIA-d ("detailed EIAs" for development projects that caused "significant environmental impacts") in mining, transportation, and energy – i.e., hydrocarbons and electricity.

[5] Prior to 2011, when ANLA was created, the environment ministry reviewed EIAs.

consultation norms in hydrocarbons. Peruvian communities initially took part in the drafting of prior consultation regulations, but then, on becoming disillusioned with the endeavor, abandoned it. The Colombian government regulated prior consultation swiftly, through a top-down process.

Finally, the countries vary in the extent to which Indigenous land rights are linked to land titles. A narrow, title-based definition of land rights could make state actors more likely to bypass prior consultation, as the state could consider as "non-Indigenous" vast expanses of nontitled lands on which Indigenous people depend. In Bolivia, Indigenous communities have a right to prior consultation only if they hold title to impacted lands. In contrast, Peruvian and Colombian communities can base this right on other relationships to territory to include reliance on land for subsistence or spiritual practices, though, as shown in the below conflicts, sometimes only through legal battles.

This analysis demonstrates the same mechanisms at work in the three countries, despite their differences, when it comes to the connection between prior consultation and two facets of structural violence – the state downplaying Indigenous land rights and the environmental impacts on Indigenous communities.

4.4 State Disregard of Environmental Impacts and Indigenous Territorial Rights as a Means of Avoiding Prior Consultation

This analysis shows how state actors have sidestepped prior consultation by denying any impacts of extractive projects on Indigenous lands. They do so by employing narrow definitions of: (1) lands to which Indigenous communities have rights; and (2) the geographic reach of extractive projects' environmental impacts.

The three cases examined here were drawn from a larger sample: the most important social conflicts over new extractive projects in Bolivia, Colombia, and Peru that took place after hydrocarbons and mining were opened to private investment and after prior consultation had been regulated in the sectors.[6] Starting with a sample of *conflicts* held promise for producing cases in which state agencies bypassed prior consultation, because this state behavior might tend to generate community pushback (i.e., conflict). Importantly, focusing on conflicts also presents the possibility of selecting cases in which Indigenous activism *reversed* initial state determinations about land rights and environmental impacts. Indeed, in two of the three cases in this analysis, communities successfully defended, through

[6] The author compiled this conflict sample through her review of secondary sources and her interviews in the three countries with experts on extractive conflict, during 2016–17. Bolivian natural gas expanded markedly in the 1990s–2000s with private foreign investment that followed the capitalization of hydrocarbons. After a leftist government nationalized the sector in 2006, private firms retained an important place in the sector ([2], pp. 39–41).

Table 4.1 *The cases*

Conflict	Sector	Most visible community goal	State methods of identifying impacted Indigenous communities	
			Indigenous lands	Project impacts
Putumayo (Colombia)	Oil	Modify project	Recognition of formal communal lands	Recognition of area of direct influence
Afrodita (Peru)	Mining	Block project	Recognition of formal communal lands; reduction of Indigenous lands through reclassification of project area as not protected and "abandoned"	Recognition of area of direct influence; reclassification of project as small-scale; reclassification of project area as not protected
Gran Chaco (Bolivia)	Natural gas	Compensation	Reclassification of project area as privately owned	Formal downgrading of project impacts

court proceedings, broader definitions of impacts and of Indigenous lands and, in turn, their right to prior consultation.

The role of the courts in the two cases – and also, in Peru, that of the national ombudsman's office, the Defensoría del Pueblo – demonstrates important variation across state actors: While the state agencies charged with defining project impacts and with leading prior consultation processes proved eager to minimize impacts and Indigenous land rights, those decisions could be reversed, by judicial action (and with support from Peru's Defensoría). Nevertheless, as the cases will show, the court decisions were issued only after project development had caused substantial environmental and social harms in Indigenous communities, and in one case the court did not suspend the extraction.

From the sample of extractive conflicts, the author chose three illustrative cases of states adopting restrictive definitions of project impacts and of Indigenous territory to avoid prior consultation. As shown in Table 4.1, the conflicts vary in terms of project sector and community goals. The case studies draw on data that the author collected through interviews and through her review of secondary and primary sources, which included laws, judicial decisions, executive measures, and news outlets.

As a final introductory note to the analysis, the case studies stress dynamics surrounding prior consultation for proposed extractive projects, consistent with the focus of this chapter. With this emphasis on the prior consultation stage, for each of the cases the chapter is not claiming that prior consultation or the project

in question was the main cause of conflict, or social mobilizing more generally, in the regions under study.

4.4.1 The Expansion of Oil Production in Colombia's Putumayo Department

In a first case, state actors avoided prior consultation as part of an oil conflict in the hydrocarbons-rich Colombian department (or region) of Putumayo. In this conflict, the interior ministry applied restrictive definitions of project impacts and of Indigenous territorial rights. On that basis, the state classified Indigenous communities as not impacted by oil development and, thus, ruled out prior consultation. Specifically, the ministry documented the lack of overlap between a project's "area of direct influence," on one hand, and formally recognized Indigenous lands, on the other. This narrow conception of impact on Indigenous communities followed Colombia's 1998 prior consultation regulations (Decree 1320), which provided for rapid, single-meeting consultations.[7]

4.4.1.1 Initial State Determination: No Overlap between Community Boundaries and Project Area of Direct Influence

The Putumayo conflict of focus erupted in 2014 when the state approved, without prior consultation, the expansion of production in the Cohembi, Quillacinga, and Quinde oilfields. The fields were in the Puerto Asís municipality, a major contributor to Putumayo's overall oil output ([32], p. 42, [33], pp. 49, 125, 128). In addition to oil, Putumayo – and Puerto Asís – produced coca for the cocaine trade, which helped fuel Colombia's civil war. As of 2014, the municipality had seen considerable violence tied to the war ([33], pp. 106–11, 116–19).

There were important precursors to the 2014 conflict. Before oil production in the fields began, the interior ministry determined in 2008 – based on a 2006 field visit – that no Indigenous communities were present in the project area: It concluded that neither the La Cabaña community of the Awá nation nor the state-recognized communal lands (*resguardo*) of Alto Lorenzo, of the Nasa, overlapped with the project's area of direct influence ([34], Section I.5.13, [35], Section I.1.9). Without consulting communities, in 2009 the environment ministry granted an environmental license to the consortium Colombian Energy for oil extraction. The state also did not lead a prior consultation for a 2010 expansion project ([34], Section I.5, [36]). Indigenous communities had experienced serious adverse environmental impacts from that expansion by 2014, when ANLA approved a modification to the 2010 project [36, 37].

[7] Supplemental regulations implemented in 2010 contained greater detail and partitioned prior consultation into several steps, to be completed in multiple meetings ([30], Section 4a, [31]).

4.4.1.2 2014 Project Expansion, and Protest

The 2014 revision allowed for extraction from 100 additional wells by Colombia Energy. It, therefore, disregarded a 39-well limit that had been established in negotiations between the state and nearby communities in 2006 [36, 37]. Communities were not consulted about the 2014 expansion because the interior ministry again determined a lack of Indigenous presence ([35], I.1.17).

As of late August 2014, protests against the new project had been ongoing for several weeks, and approximately 400 campesinos and Indigenous people were preventing Colombia Energy's operator from accessing the project area. With the blockade, residents hoped to achieve a dialogue with the government [36]. This organizing merged with a nearby strike that focused importantly on aerial coca fumigations that harmed (non-coca) crops. The most violence during the mobilizations resulted from clashes between police personnel and Afro-Colombians and the Nasa, in Puerto Asís. By late September 2014, 48 people had been wounded in the oil protests [38].

Senior government officials met with the Nasa in Putumayo during three months in late 2014 to resolve the conflict. The meetings produced several agreements, one of which called for government and civil-society actors to study the effects of the 2010 expansion. The civil-society group found that the project fell short of meeting international standards for contamination and health, and that Colombian standards were lax. It also concluded that the state should have consulted the local Indigenous communities [37].[8]

4.4.1.3 Constitutional Court Interpretations of Indigenous Territorial Rights and Project Impacts

In 2015 the Nasa and the Awá turned to the courts to defend their right to prior consultation. They employed the *acción de tutela* (commonly, "tutela"). Known elsewhere in Latin America as the *amparo*, the tutela is a judicial process available to people claiming harm to their fundamental rights. The Nasa and Awá argued in their tutelas that they had been heavily impacted by development in the oilfields and, therefore, that they should have been consulted. The Constitutional Court's decisions on the two cases shed light on just how restrictive the interior ministry's definition of Indigenous impact had been, relative to alternative interpretations.

The Nasa wanted to be consulted in the hope of adjusting the project to protect their lands, including sacred spaces [37]. Their tutela identified a range of adverse environmental impacts from oil development, including bird deaths due to air pollution, harm to plants and soil caused by leakage from abandoned wells, and various threats brought by water use and contamination – for instance, interference

[8] On the studies and resulting reports, see also [39].

with cultural rituals and with the work of traditional doctors ([34], Section I.2). In its 2016 decision on the Nasa tutela, the Constitutional Court required prior consultation and also compensation for environmental impacts. The court refrained from halting oil activities, as it characterized Putumayo's oil production as crucial for national development ([34], Sections III.8, IV).

The 2016 ruling challenged the interior ministry's definitions of project impacts and Indigenous territory. The court asserted that serious impacts reached well beyond the project's defined area of direct influence, emphasizing that, by harming water sources, oil development affected a much larger area ([34], Section III.8). As for Indigenous land rights, the court found that the borders of a resguardo were not necessarily relevant. Rather, the Nasa qualified as directly impacted, because they relied on areas affected by oil development to satisfy their material and spiritual needs and as part of their customs and rituals ([34], Sections II, III.1.11, III.7).

La Cabaña's tutela also protested the lack of prior consultation on the grounds that oil development impacted the community directly ([35], Section I.1.20), while demanding that the operations of 27 local wells be suspended [40]. In its November 2018 decision on the Awá case, the Constitutional Court admonished Decree 1320 as inadequate for reserving prior consultations for only communities in a project's area of direct influence ([35], Section III.12.6) and, again, employed conceptions of Indigenous territory and project impacts that were substantially broader than those applied by the interior ministry. The court interpreted as Indigenous territory not only lands to which communities held titles, but also areas with spiritual meaning and areas used intermittently ([35], Sections III.7.7, III.8.1, III.8.7–8.8). With regard to project impacts, the court found that oil development had caused direct negative health impacts on La Cabaña, in part because of the nature of oil contamination, and especially how it spread beyond the project's area of direct influence, for instance, by polluting water sources on which the community relied ([35], Section III.21.6). The court also found that air contamination caused by oil development threatened crops, plants, and animals ([35], Sections III.21.9–21.10). The decision devoted special attention to the impacts of hydrocarbon extraction on the San Lorenzo River, which the court characterized as of "vital importance" to La Cabaña, for spiritual, economic, and social activities ([35], Section III.21.20).

Based on its finding of direct impacts on La Cabaña, the court ruled that the state should have consulted the Awá for the 2009, 2010, and 2014 oil projects. It required prior consultation to identify the environmental, spiritual, cultural, and social impacts of extraction on the Awá, and it mandated preventative, mitigation, and restoration measures as needed. The court again chose not to pause oil work, taking into consideration, among other factors, the importance of production in the oilfields for the national and regional economies [35, I.2, II.25.2, III.25.5, V, 41].

4.4.2 The Afrodita Mining Project in Northern Peru

In a conflict over the Afrodita mining project, Peruvian state bodies and structures contributed to a determination that the project did not directly impact Indigenous peoples. The state (1) recognized only formally defined communal lands, and limited characterizations of Afrodita's environmental impacts, similar to the Putumayo case; and (2) changed the classifications of the project and of the project site. State rules altered the *project* by allowing for its partition into multiple small projects so that the owner could transition from large-scale mining to the less-stringent, small-scale mining sector. With regard to the *project site*, subnational and national state entities used legal and regulatory structures that weakened Indigenous land rights to define the impacted lands as "abandoned." In addition, the executive ignored the extent to which Afrodita would harm the region by revoking the site's planned parkland status. The redrawing of the national park boundaries in question also threatened the recognition of nearby Indigenous lands.

4.4.2.1 Overlap between National Park and Indigenous Communal Boundaries

The Afrodita concessions were located in the Condor Mountain Range (Cordillera del Cóndor) in Peru's northern Amazon, near the border with Ecuador. In 1993, the Peruvian state granted the concessions to the exploration company Metalfin, of the British Hochschild group. Metalfin subsequently established Compañía Minera Afrodita S.A. and, in 1999, transferred all 203 000 hectares of its Condor gold exploration properties to the new firm ([42, 43], p. 28, [41]).

The mine site became part of a protected national park in the early 2000s, due to collaboration between the state and the local Awajún and Wampis Indigenous nations. The park initiative came from a peace agreement that resolved the long-standing Peru–Ecuador border dispute. That conflict had culminated in the 1995 Cenepa War in Condor. As part of the peace, the Peruvian and Ecuadorian governments committed to working with local Indigenous communities to institute protected ecological areas in the combat zone ([44], p. 4).

The national park endeavor appealed to the Awajún and Wampis, who valued the area as a water source, and for its cultural significance and environmental uniqueness ([43], pp. 12, 17–19). Moreover, the two nations hoped the park project would help them formalize their landholdings ([44], pp. 5, 6–7). Awajún and Wampis leaders sought to protect what they viewed as their traditional territory through a combination of a park and Indigenous land titles. They supported the creation of a national park on the condition that it share borders with (1) titled Indigenous communal lands, and (2) other lands to which communities sought title ([45], Section II.1).

Negotiations between the state and the Awajún and Wampis created the Santiago Comaina Reserve (Zona Reservada Santiago Comaina, ZRSC) as a step toward

establishing a park. A prior consultation process with the Awajún and Wampis defined the boundaries of the Ichigkat-Muja Condor Mountain Range National Park (Parque Nacional Ichigkat Muja de la Cordillera del Cóndor, PNIMCC), within the ZRSC. The consultation process concluded in November 2004 ([44], pp. 5–6, 11).

4.4.2.2 The Contraction of the Parklands and of Indigenous Territory

The executive reduced in size the PNIMCC specifically to allow for mining in Condor, and in response to pressures from Afrodita. Initially, the company sought exploration privileges in the ZRSC from the state agency that founded and oversaw protected areas, the Instituto Nacional de Recursos Naturales (INRENA). INRENA denied Afrodita's request in 2001, declaring mining incompatible with Condor's ecological and geological characteristics and referencing the ongoing national park project. Afrodita then turned to MINEM's General Directorate of Environmental Affairs in Mining (Dirección General de Asuntos Ambientales Mineros, DGAAM). DGAAM routed Afrodita's application to INRENA, which again refused to allow the exploration on the basis of the reserve's protected status ([43], p. 30).

Afrodita succeeded with its third approach: to reduce in size the PNIMCC to eliminate the park's overlap with the mine site. In 2005, Afrodita's owner, Jorge Bedoya Torrico, met several times with state officials to convince the defense and foreign affairs ministries that, relative to a national park, Afrodita's operations on the border would defend more effectively Peruvian sovereignty from ongoing informal Ecuadorian mining activities ([43], pp. 30–32, [46]). A 2007 decree diminished the size of the ZRSC and instituted the PNIMCC, which was 58% smaller than the park dimensions defined in 2004 ([44], p. 11). The decree excluded from the PNIMCC an extensive stretch of Awajún and Wampis's proclaimed territory that communities had previously claimed through the first park project ([45], Section II.1).

Mining exploration in Condor, which was now open to development, expanded dramatically ([43], p. 31, [44], p. 12).

4.4.2.3 Transition to Small-Scale Mining Sector

Alongside the PNIMCC fight was a conflict over the surface rights needed to develop the Afrodita concessions. This struggle drove Bedoya to the small-scale mining sector.

The surface-rights battle began in December 2009, when MINEM approved Afrodita's Environmental Impact Statement (Declaración de Impacto Ambiental, DIA) to begin exploration [47]. After the DIA approval, and still in December 2009, the Organization for the Development of the Border Communities of El Cenepa (Organización de Desarrollo de las Comunidades Fronterizas del Cenepa, ODECOFROC) denounced mining in Condor, in writing to MINEM ([48], p. 2). When 52 Amazonian communities threatened to protest Afrodita's exploration

work and its impacts, all without prior consultation, MINEM suspended Afrodita's exploration privileges in February 2010 on the grounds that the firm lacked permission from communities to access their land [49]. The project was stalled until 2013 ([50], p. 24).

To move forward with his mining plans, Bedoya distributed the Afrodita titles across several companies of which he was the legal representative. Bedoya now operated in the small-scale mining sector, governed by regional environmental rules ([44], p. 31, [50], p. 24, [51]). These subnational requirements were less cumbersome than those of the national environmental regime, including with regard to community participation ([50], p. 24, [52]). Bedoya and his firms – referred to here as Afrodita for the sake of simplicity – built strong relationships with Amazonas regional government officials and sympathetic communities.[9]

4.4.2.4 Definition of Awajún and Wampis Lands as "Abandoned"

When seeking the Amazonas government's permission to mine, Bedoya took advantage of recently implemented norms that facilitated the transfer of Indigenous lands to companies for extraction. Specifically, Article 6 of a 2013 decree, DS 054-2013-PCM (which would be supported by the 2014 Law 30230) did not differentiate between nontitled Indigenous lands – to which communities historically had recognized rights – on one hand, and "abandoned lands" (*terrenos eriazos*) on the other, and it streamlined the issuance of easements on the latter [53, 54].

Afrodita asked the Amazonas government in 2013 for access to 56 hectares, to extract from one of the Condor concessions. The regional government brought the matter to the National Superintendency of State Assets (Superintendencia Nacional de Bienes Nacionales, SBN), which granted easements on public lands. SBN classified the property as abandoned and granted the easement. In June 2014, the Amazonas government approved the Afrodita operations. Several months later, MINEM allowed the extraction on the basis of the abandoned land status. Amazonas's regional energy and mining office (Dirección Regional de Energía y Minas) issued the construction permissions for the project in early 2015 and authorized extraction in April 2016 ([50], p. 24, [55, 56]).

4.4.2.5 Broader Interpretations of Indigenous Land Rights and Environmental Impacts: The Courts

The Awajún and Wampis pushed back against the above challenges to their territorial rights, with considerable success. In one victory, the nations achieved the

[9] For example, support for Bedoya's mining plans from local communities and regional public officials produced, in 2014, the document, "Declaration of Regional Interest in the Condor Mountain Range Mining Project" ([50], p. 25).

reversal of the April 2016 permission to mine. In a context in which the 2013 easement had lapsed, and in line with an ODECOFROC request and a recommendation by the Defensoría del Pueblo, the Amazonas regional council supported the withdrawal of the 2016 authorization. By the time the Amazonas governor withdrew the permission in December 2016, the company had built encampments, and exploration had impacted the area significantly [52]. While the Awajún and Wampis were contesting the 2013 easement and related permissions, Article 6 of DS 054-2013-PCM was thrown out in March 2015 (by the Cuarto Sala Civil de la Corte Superior de Justicia de Lima).[10] The court highlighted the treatment of Indigenous territorial rights by ILO 169, which recognizes Indigenous rights to lands that they traditionally occupied [54].

To contest the lack of prior consultation for the Afrodita development, Indigenous communities also used the judicial system. An ODECOFROC representative filed an amparo in 2013 that decried the state for issuing mining titles and approving exploration in Condor without consulting impacted Indigenous communities. Following a negative outcome from a lower court, a 2019 court ruling (by the Décimo Juzgado Constitucional de la Corte Superior de Lima) nullified 111 mining concessions in Awajún and Wampis territory. The decision also invalidated the approvals of Afrodita's DIA for exploration and of an exploration project of a different mining firm ([45, 48], p. 8, [58]). The 2019 ruling emphasized that it could be necessary to consult an Indigenous community that did not reside within the concession area; it was sufficient that a community be located nearby or be susceptible to negative impacts on the environment or ecosystem. Using this logic, the court required prior consultation with the Awajún and Wampis, noting the importance of Condor for the nations' daily life, culture, and traditional practices ([45], Section XV.1).

In another filing, in 2017, ODECOFROC sought to defend the consultation for the PNIMCC that had concluded in 2004, and the original park dimensions [59]. That case was pending in 2020 [60].

4.4.3 The Bolivian Guaraní and the Gran Chaco Natural Gas Plant

In a third and final case, the Bolivian hydrocarbon ministry refused to consult communities of the Guaraní nation – organized under the Asamblea del Pueblo Guaraní (APG) – for the Gran Chaco natural gas plant. In the Gran Chaco conflict, state actors justified not consulting the Guaraní by relying on narrow definitions of Indigenous territory and project impacts.

[10] In June 2020, the Constitutional Tribunal ruled that Law 30230 did not apply to Indigenous communities, because they had not been consulted about it. Approximately 10 000 people, of several Indigenous organizations, had initiated that case in 2015 [57].

According to Bolivian regulations, the hydrocarbon ministry must consult peasant, Indigenous, and Native communities (*los pueblos campesinos, indígenas, y originarios*) impacted by Category 1 oil and gas projects – that is, projects with the highest level of environmental impact – before approving EIAs (in Bolivia, Estudios de Evaluación de Impacto Ambiental, EEIAs ([61], Article 15, [62], Article 115, [63], Article 15). In contrast to the Colombian and Peruvian cases, Indigenous communities in Bolivia have been considered impacted by hydrocarbon development for purposes of prior consultation only if they held communal title to impacted land, in the form of Tierras Comunitarias de Orígen (TCOs; [64], p. 664).

Achieving prior consultation was complicated further by various state actions that impeded Indigenous communal land titling in hydrocarbon areas. In fact, some such measures have been taken specifically with the aim of avoiding prior consultation. Two tactics stand out. First, the national land-reform agency (Instituto Nacional de Reforma Agraria, INRA) classified stretches of Guaraní lands as public, similar to the above-described "abandoned lands" logic in Peru.[11] Second, the state oil company (Yacimientos Petrolíferos Fiscales Bolivianos, YPFB) has secured land rights at its project locations. Aside from denying communities title to impacted lands, the state – and specifically the environment ministry – also regularly ruled out prior consultation by classifying development as Category 2 projects [66].

4.4.3.1 Restrictive State Determinations of Indigenous Territory and Environmental Impacts

The Gran Chaco Liquid Separation Plant was expected to be the third largest of its kind in Latin America, based on its size and operations ([67], p. 80). The state awarded the plant construction, estimated to cost $500 million, to the Spanish firm Técnicas Reunidas, though YPFB was the face of the project in discussions with the nearby Yaku Igua *capitanía*, a term that refers to an organized group of Guaraní communities ([67], pp. 109, 112, [68]).

Yaku Igua communities that depended on agriculture and livestock farming considered themselves impacted by Gran Chaco and believed they should be consulted about the project. The capitanía initially expected to be consulted, for several reasons: INRA made an early assessment that the project was on Yaku Igua lands; the capitanía had received documentation that the Gran Chaco plant was a Category 1 project; and the hydrocarbon ministry had consulted the Guaraní about other projects in the area ([69], p. 84).

Despite these early expectations among the Guaraní, the environment ministry issued a license for Gran Chaco in April 2012 without consulting them [70].

[11] This system began in 2009, according to the director of CEJIS, a Bolivian nongovernmental organization that supported Guaraní land titling [65].

By that time, the state had ruled out prior consultation on two grounds. First, the environment ministry had classified the project as Category 2. Second, there was the question of land rights. YPFB had reported that the plant was on titled, private land, and the city of Yacuiba had deemed the land within its "urban radius," and not in TCO Yaku Igua [70, 71].

Yaku Igua leadership responded to the project's licensing by asking to meet with state representatives. In April–June 2012 discussions, officials of INRA, YPFB, and the environment and hydrocarbon ministries explained to the capitanía the process of licensing and Gran Chaco's Category 2 status. On June 25, 2012, a government commission traveled to the Yaku Igua community of Yerobiarenda, which was adjacent to the plant site, to negotiate compensation payments with the APG Yaku Igua. Determined to be consulted, Yaku Igua's representatives refused to discuss the proposed social investments ([69], p. 82, [70, 71]).

The day of the government's failed Yerobiarenda visit, Yaku Igua blocked the Gran Chaco project, while the Council of Guaraní Captains of Tarija (Consejo de Capitanes Guaraníes de Tarija), the APG, and the leaders of Yaku Igua's 18 communities held an "emergency meeting" in Yerobiarenda. Meeting participants agreed to continue the blockade and to threaten to close the valves of the major Juana Azurduy gas pipeline to force a prior consultation for Gran Chaco [70, 71].

4.4.3.2 Conflict Resolution

The conflict over prior consultation for Gran Chaco concluded days later, at the end of June 2012, without a consultation process. A signed agreement between the APG Yaku Igua and the hydrocarbon minister, who had traveled to the region, committed the minister to address APG Yaku Igua's demands for: (1) social investment programs for the Guaraní; and (2) a review of the Gran Chaco environmental license and of several properties that neighbored the plant to determine Indigenous land allocations ([69], p. 84, [72]).

The last cycle of the Gran Chaco conflict concerned compensation. A May 2013 agreement assigned state agencies to design and pay for social and economic development projects that Yaku Igua would propose [68].

Gran Chaco began test operations in October 2014 [73]. As of early 2020, the plant was producing liquefied natural gas for export, mainly to Paraguay and Peru. The value of the gas exported in 2019 surpassed $44 million [74].

4.5 Conclusion

The Putumayo, Afrodita, and Gran Chaco cases exemplify how the installation of prior consultation requirements can motivate state actors working under extractivist governments to define narrowly Indigenous territory and the environmental

impacts of hydrocarbons and mining. Through this practice, state agencies have avoided consulting communities, as a means to expedite development. In the three conflicts, entities of the state withheld communities' right to prior consultation, in part, using formal rules within prior consultation regulations, but also through their applications of those rules. The latitude for alternative interpretations of legal and regulatory structures was perhaps revealed most vividly in Colombian and Peruvian court rulings that challenged initial state assessments by taking broader approaches to identifying project impacts and Indigenous communal rights.

The court decisions draw attention to another finding in this chapter. Early determinations by state agencies can be overturned later, at least by highly mobilized communities. In the Colombian and Peruvian cases, communities secured prior consultation by using the judiciary. Importantly, however, the quality of Indigenous representation in the mandated consultations necessarily would be poor, due to the sequencing of consultations, project approvals, and project development. The Colombian Constitutional Court required prior consultation in Putumayo but did not, in the meantime, suspend oil extraction, which had already devastated communities' environments. In the Afrodita conflict, mining permissions were revoked, but only after local communities had been impacted significantly by exploration work.

A final observation relates to how this analysis engages with the focus of the larger volume. The chapter illustrates a component of the book's central theoretical framework: the causal relationship between structural and environmental violence. Specifically, it reveals how structural violence – the state's denial of both Indigenous rights to land and environmental threats close to Indigenous communities – can facilitate extraction and associated environmental violence that harms Indigenous communities. The study's larger contribution is that it explores a *factor that brings about or bolsters this structural violence*: the introduction of prior consultation in contexts in which governments promote new extraction.

The harms to communities and to the environment generated by prior consultation may extend beyond environmental violence in Indigenous communities in extractive zones. When the state articulates a narrow definition of Indigenous lands for purposes of deciding whether to consult communities, that definition can extend to the realm of Indigenous land rights more generally, weakening Native communities' claims to ancestral territory in other contexts. Moreover, a narrow state definition of "project impacts" within mining or hydrocarbons can carry over to development in other sectors. The result would be an increase in the streamlining of approvals of environmentally destructive development, along with environmental violence, in multiple sectors, in Indigenous lands and beyond.

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