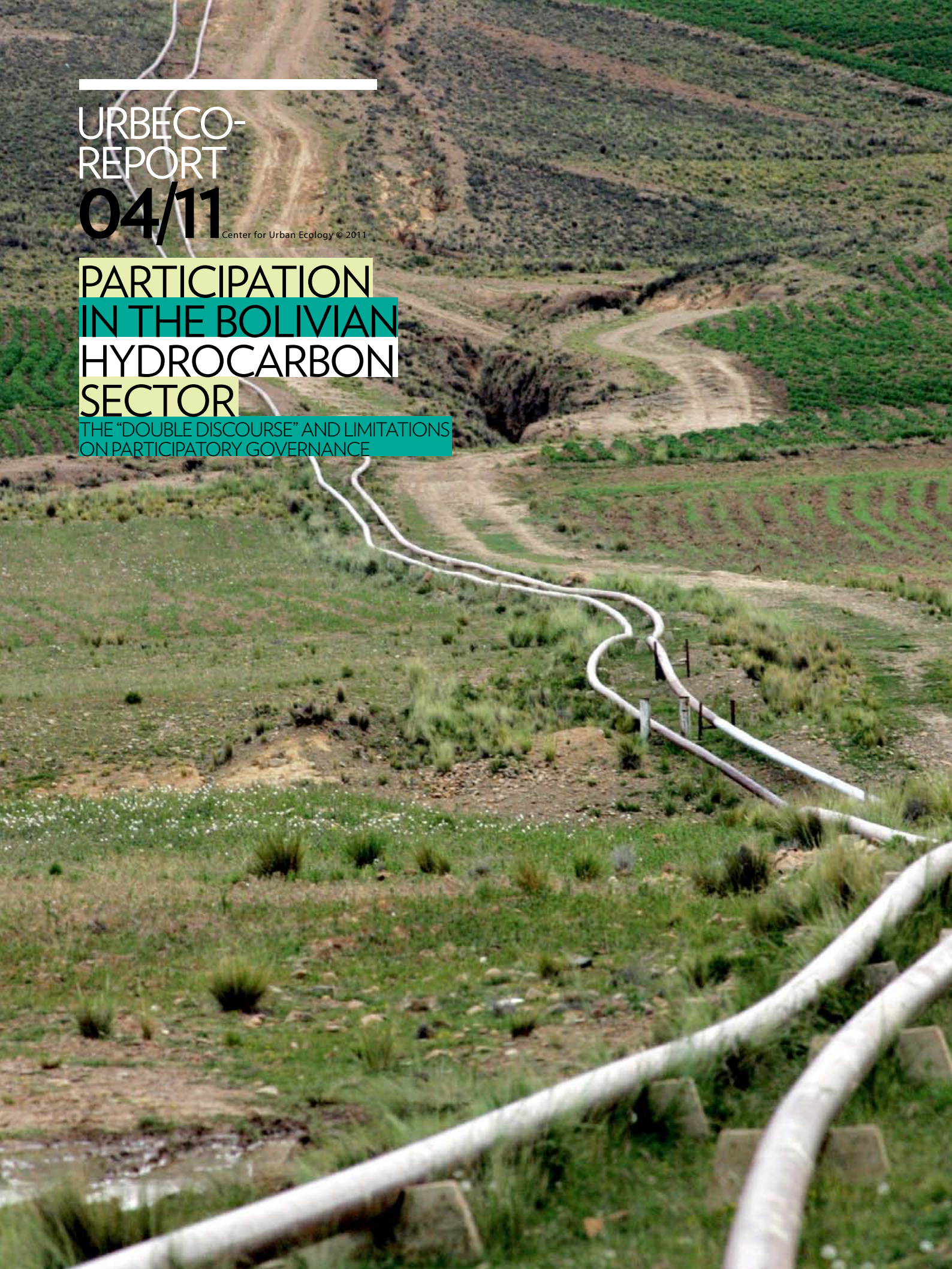

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PARTICIPATION
IN THE BOLIVIAN
HYDROCARBON
SECTOR

THE "DOUBLE DISCOURSE" AND LIMITATIONS
ON PARTICIPATORY GOVERNANCE



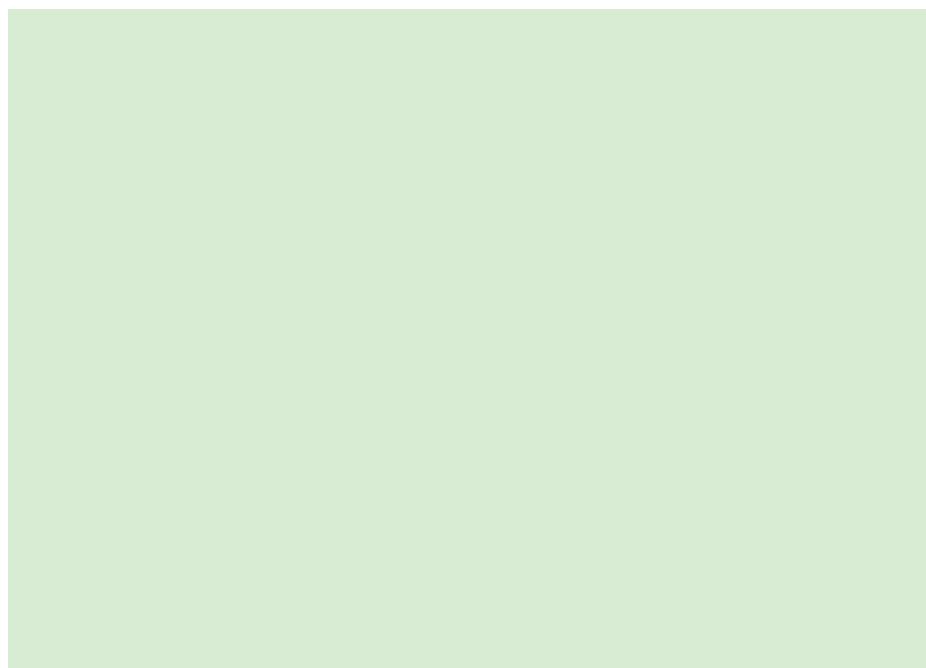
PARTICIPATION IN THE BOLIVIAN HYDROCARBON SECTOR

THE “DOUBLE DISCOURSE” AND LIMITATIONS ON PARTICIPATORY GOVERNANCE



HÅVARD HAARSTAD
CECILIA CAMPERO

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TITLE:
PARTICIPATION IN THE BOLIVIAN HYDROCARBON SECTOR: THE “DOUBLE
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PREFACE

“Participation” is currently a buzzword in discourses on everything from urban planning to global governance. Social scientists are both enthusiastic about and skeptical of this ambiguous concept. Some argue that it is used in so many ways and in so many different contexts that it has been emptied of actual content and become a rhetorical tool for top-down decision-making. But it can also contain a potential for empowerment, by giving local communities the right to be heard in projects that affect them.

Participation reforms in Bolivia have created optimism around the prospect that indigenous groups can take part in shaping gas extraction projects developed in and around their communities. The indigenous President Evo Morales has gained an international reputation for his politics of indigenous empowerment and returning the ownership of natural resources to “the people”.

An important motivation for the work behind this report is to understand how the reforms implemented by the Morales Government work in practice. What makes this case particularly interesting is that Bolivia is highly dependent on revenues from exports of natural gas, which may influence the Government’s willingness to allow for actual participation of local communities. By evaluating the participation process in Bolivia we intend to communicate both the strengths and weaknesses of these reforms, and to provide insights into participation in natural resource governance that can be helpful elsewhere.

We appreciate the cooperation of informants in Bolivia who shared their knowledge and experiences, and the collaboration with the Center for Urban Ecology that made this report possible. The research draws on funding from the Research Council of Norway and the Meltzer Foundation. It is part of the research project “Negotiating New Political Spaces” based at the Department of Geography, University of Bergen.

Håvard Haarstad and Cecilia Campero

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EXECUTIVE SUMMARY

Mechanisms allowing citizens to participate in the design of natural resource extraction, and to have a share in the benefits that are generated from such extraction, are of vital importance to social, economic and political development, as well as to environmental sustainability. Bolivia is seen as one of the most advanced countries with regard to granting rights to participation and consultation in extractive projects. Therefore, it is of general interest to assess the participation process in the hydrocarbon sector of this country in order to learn from policy innovation and to understand the enduring constraints on democratization of natural resource governance.

In this report we assess the current process of participation in Bolivia by focusing on both the legal and the institutional framework and on a particular case (a seismic prospecting project on Block Iñau, involving the Capitanías Alto Parapetí, Kaami and Iupaguasu in Santa Cruz) to establish how this legal framework is implemented in practice. We find that the situation in Bolivia is characterized by a “double discourse”: on one hand, the Morales government has promoted a radical discourse and a policy of granting rights to indigenous territory, self-determination and participation in the design of hydrocarbon projects. On the other hand, the government is pushing for an extensive expansion of extractive activity, including within indigenous territories. Representatives of the government have suggested that indigenous opposition and demands for participation are obstacles to the economic development of the country as a whole.

This “double discourse” can be recognized in the process of participation, which grants extensive rights but has several limitations in its design and practice that potentially undermine democratic participation and efficient governance. These limitations include: (1) insufficient independent monitoring, as the Ministry of Hydrocarbons and Energy is both an actor and the judge in the process, (2) overemphasis on compensation payment and a lack of monitoring of compensation payments, (3) a lack of capacity in the general population of communities to participate effectively and (4) failure to include municipalities in the process.

8.

1. INTRODUCTION

- SOCIAL SCIENTISTS HAVE ALSO OBSERVED THAT THE SOCIETIES THAT HAVE ACCOMPLISHED THIS TASK REASONABLY WELL HAVE DEPENDED ON STRONG INSTITUTIONS AND GOOD PRACTICES OF GOVERNANCE.

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1.1 BACKGROUND

Natural resource extraction has the potential to bring significant welfare and wealth to societies fortunate enough to possess reserves. However, as history illustrates, hopes of development and improved livelihoods have time and time again been replaced by realities of environmental degradation and increasing inequalities. Looking at these experiences in many places across the globe, social scientists now talk about “the curse of natural resources.” This reflects the observation that countries that discover natural resources often have worse development trends than countries without such resources. It is a difficult task for any society to manage enormous resource rents in a way that maintains democracy, preserves the environment and benefits everyone.

Social scientists have also observed that the societies that have accomplished this task reasonably well have depended on strong institutions and good practices of governance. This allows citizens to see where revenues are directed and creates mechanisms that make it difficult for elite groups to enrich themselves. Good governance allows different social actors to participate in the development and monitoring of extractive projects and distribute the revenues from industrialization, in particular those actors that are the most affected socially and environmentally by these projects. It can be argued that revenue-sharing mechanisms and proper citizen participation are necessary to achieve improved welfare from industrialized natural resource extraction.

This report assesses the processes of citizen participation in Bolivia, a country that has recently implemented far-reaching reforms giving citizens the right to have their voices heard regarding how natural resources should be extracted. Bolivia is interesting as a study in this context because – as it is an economically poor but resource-rich country with great cultural diversities, geographical complexities and socio-economic inequalities – institutional innovation here can generate valuable learning for other countries. The basis for the report is personal interviews with policy makers, bureaucrats, scholars and activists, an extensive survey of the existing legal framework and a case study of one particular participation process in Santa Cruz (2D Seismic Prospecting - Iñau Block Project). What we have aimed to assess is how the process of citizen participation works in practice – the obstacles to substantive participation, how participation relates to the goal of gas industrialization and whether the participants can use this process to make their voices heard. We believe that what we have found can be useful for both policy makers and participants in Bolivia, as well as those in other countries that are seeking to learn from the Bolivian experience.

1.2 PARTICIPATION IN THE BOLIVIAN GAS SECTOR

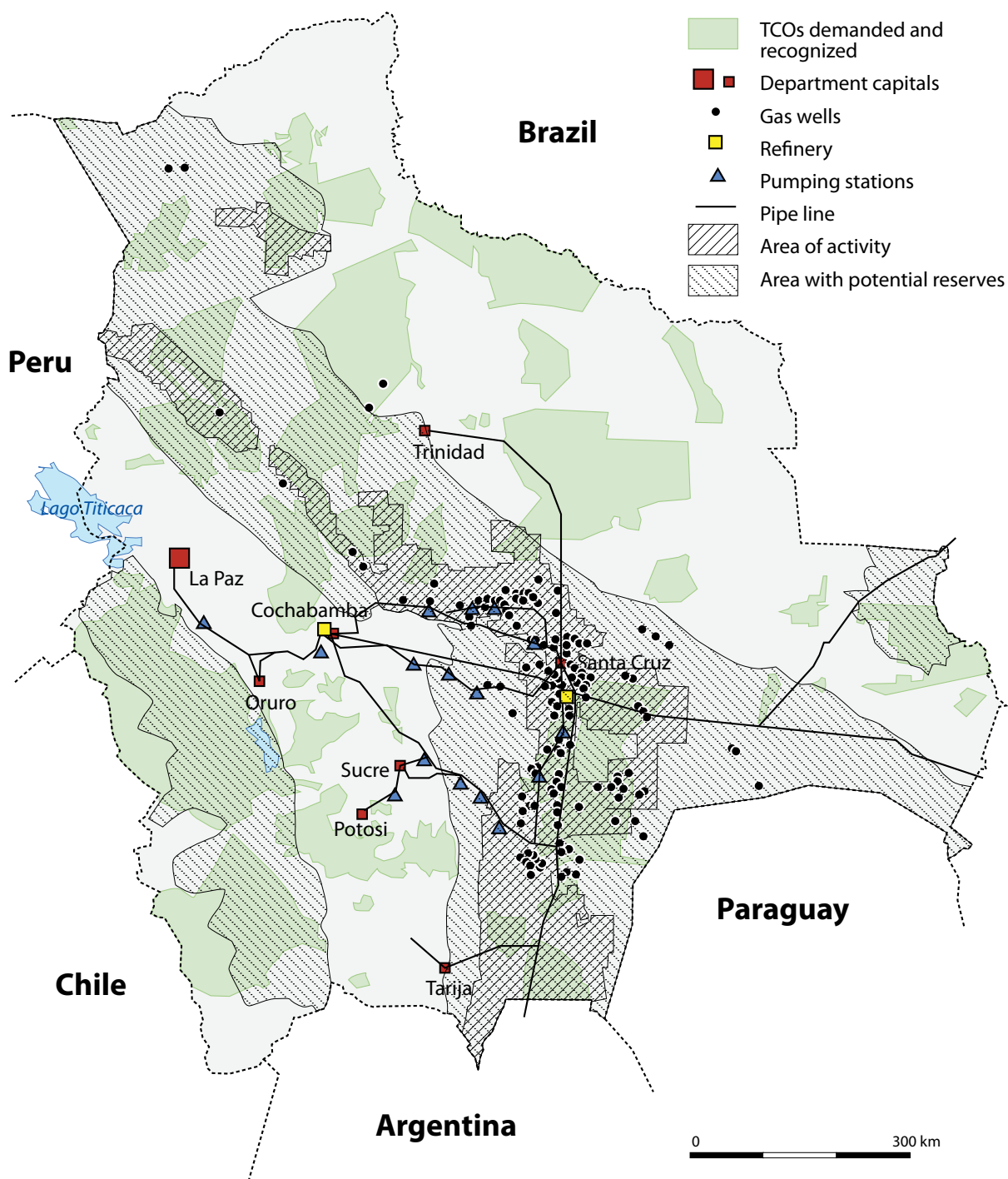
In 2007, the Morales government passed a Supreme Decree (DS 29033) that made it compulsory to conduct a process of participation and previous consultation for those hydrocarbon projects that could have

10.

socio-environmental effects on indigenous communities or protected areas. Since the consultation and participation procedure in the gas sector was implemented, 21 participation proceedings have been completed. For 2011, there are 12 proceedings planned (Ministerio de Hidrocarburos y Energía, 2011). These proceedings have primarily been developed in the Chaco region of the country, in Santa Cruz, Tarija and Chuquisaca. The overlapping between territories of indigenous peoples and petroleum concessions is illustrated in Figure 1. As the figure illustrates, there is a significant overlap between the activities of the hydrocarbon sector and the indigenous communities. This opens the way for complex conflicts over territory, environmental protection and the distribution of benefits. “Participation” is a mechanism that can potentially mediate and resolve these conflicts.

The concept of citizen participation can be understood as “real and effective capacity of the individual or of a group to influence matters that directly or indirectly affect their lives and their activities in society” (Gyarmati, 1987, p. 235). This term has been used and contested in different ways throughout recent Bolivian history. Some governments have understood the right to participate as a right to be informed or to collaborate, without involving citizens in final decisions. That understanding is reflected, for example, in the Environment Law No. 1333 (1992), promulgated during Jaime Paz’s government, and in the Popular Participation Law No. 1551 (1994), from the Gonzalo Sánchez de Lozada presidency. For these reasons Bolivian citizens have demanded, sometimes through extra-legal means, a greater influence on how natural resources are governed. The so-called Gas War of 2003 is a famous example of this. The causes behind these protests were complex, but one of the central demands was a governance model that benefits “the people” more and is less generous towards foreign companies. The Gas War was a direct pretext for President Sánchez de Lozada leaving office, and for his successor, Carlos Mesa, passing the current Law of Hydrocarbons No. 3058. This law goes further than the previous laws in requiring participation in the gas sector, in taxing companies and in distributing revenue. What the Gas War also illustrates is that, in contrast to many countries that are victims of the “curse of natural resources,” Bolivia has a highly organized civil society that considers itself as the owner of natural resources reserves and is willing to mobilize politically to press this claim.

The current government of Evo Morales is to a significant extent a result of this mobilization, and it has made public ownership of natural resources a centrepiece of its political discourse. It has shifted its policies to strengthen the right to participate, giving communities a greater level of empowerment. The nationalization of gas that came into effect on May 1, 2007, through the Supreme Decree No. 27101, was presented as taking back the ownership of the gas resources to “the people” (el pueblo). Nationalization has strengthened the role of the state enterprise YPFB in the sector and increased the tax rates on foreign companies, among other measures. In addition to these political changes, the Morales government has enacted the Consultation and Participation for Hydrocarbon Activities Regulation (DS 29033) and the



12.

Figure 1: Overlay map, indigenous peoples and extractive activity
 Source: Authors' elaboration of ACSUR-CEDIB, 2008
 Created by Kjell Helge Sjøstrøm

Socio-Environmental Monitoring in Hydrocarbon Activities inside the Territory of the Original Indigenous People and Peasant Communities Regulation (DS 29103, 2007). Later, these changes were strengthened with the new Constitution of 2009, and, currently, through the Participation and Social Control Law that is in preparation. These laws and decrees provide the juridical basis for a seemingly radical participation of communities, particularly indigenous communities, in the governance of hydrocarbon projects and the distribution of revenue. The current institutional landscape also creates a series of “checks and balances” in terms of the possibilities for citizens to press claims towards the government – including the Undersecretary of Coordination with Social Movements and Civil Society, under the Ministry of the Presidency; the General Directorate of Socio-Environmental Management, under the Ministry of Hydrocarbons and Energy; and the Ministry of Institutional Transparency and Fight against Corruption. In addition to these agencies, there are other institutions that were created during previous governments, like the Ombudsman and Human Rights Permanent Assembly. Finally, the Morales Government has aimed to institutionalize relations with popular organizations working to defend the rights of indigenous people, natives, workers and peasants by holding regular conferences with representatives of these organizations.

These are all elements of the political project of creating a “new state,” the Multinational State of Bolivia. This new State, in the words of the new Political Constitution of the State (CPE), “leaves in the past the colonial, republican and neoliberal State.” The same Constitution establishes that natural resources, including hydrocarbons, are the direct property of the Bolivian people to be administered by the State in the collective interest. This is a feature that remains from previous constitutions, which stated that the State has the original ownership of all natural resources, and is thus owned by the Bolivian people.

Although there was some previous recognition of the rights of the indigenous people, the construction of the new Multinational State and the living well as part of the political rhetoric of the Government has meant to the representatives of CONAMAQ that, “the indigenous are now the protagonists” (interview). Other informants, many of them related to the Government, reported that under this “new state,” there was “a change in the relation between the State and society” (interview with a representative of the Vice Ministry of Coordination with Social Movements and Civil Society). Evo Morales talks publically about the need to “rule obeying the will of the people.”

However, it is important to recognize that policies aimed at strengthening the right to participate in different cultural groups are not only part of the construction of the new State proposed by the Government of Evo Morales, but have in one form or another been part of policies for almost two decades. For instance, the Constitution of 1994 incorporated the principle of multiculturalism. Likewise, the constitutional reform of 2004 recognized indigenous rights, including the right to exercise participation directly and not only through political representation. The Citizens Associations and Indigenous People Law was enacted in 2004

to strengthen participatory democracy. A decade earlier, the 1994 Law of Popular Participation attempted to integrate indigenous communities, peasant organizations and urban neighborhood assemblies into the governance structure of the country by incorporating them as Territorial Base Organizations (Lopez, 2007).

As a result of these reforms, particularly the later ones implemented by the Morales Government, there is a great deal of international interest in Bolivia as well as optimism among some academics and political activists about the possibilities for a more democratic governance of natural resources. Bolivia is often seen as a country that turned its back on “neoliberal” globalization to use its natural resources for its own development needs, in more environmentally sustainable ways and with the participation of the indigenous population.

The reality is of course more complex than this “romantized” picture. Looking at the gas sector, the topic of this report, Bolivia is still part of an international market and needs both investments from foreign companies and competitive export agreements with other countries. The Morales Government needs expanded revenues from the gas sector in order to finance social programs and development objectives. These economic realities present important constraints on the possibilities for substantive participation for local communities and groups. For this reason, it can be argued that the various policies aimed at strengthening participatory governance, faced with the pressing need to attract investment into the country, have consistently been downplayed or ignored. The results, in the opinion of many, are that the balance between the rights of citizen participation on one hand and concerns for the investment climate and state revenues on the other has a strong tendency to be skewed towards the latter. Representatives of the government, including Vice-President García Linera and former Minister of Hydrocarbons, now Acting President of the YPFB, Carlos Villegas, have stated that the expansion of the gas sector is imperative in order to generate the revenues to finance social programs and general welfare, and that communities are often obstacles to achieving what is in the interest of the country as a whole (see Bebbington, 2011). As a representative of the Ministry of Environment and Water told us, “maybe we cannot have the luxury of saying no to a proposed investment project of 450 million dollars, which is usually what the oil companies invest, because these are millions of dollars that we would be losing” (personal interview).

One of our informants used the term “double discourse” to describe this contradiction between the aim of improved participation on the one hand and the attraction of foreign investment and the expansion of extractive activity on the other (interview with the representative of CEJIS). While there are new rights to participation written into the law, he stressed that there are also emblematic cases of these rights being disregarded, such as Lliquimuni and Coro Coro in La Paz. In both cases, the communities and peasant organizations claim that their rights to participation have been ignored. When we followed the specific case of the previous consultation process in Camiri for the three Capitanías

Alto Parapetí, Kaami and Iupagusu at the end of November 2010 many of the same perceptions resonated. We were told:

We care about keeping the water, fauna, flora, all that. So we keep these, because they are the means of subsistence in the lives of indigenous people; while the logic of the Ministry or the logic of companies does not take that into consideration. They are only interested in the activity, explore and exploit, but do not care if they are making an impact or not, from this comes the conflict. (Personal interview)

The term “double discourse” captures well what we see as a contradictory situation in Bolivia, where radical new rights to participation are potentially undermined and constrained by an aggressive expansion of extractive activity. In the following we will analyze how this contradiction works in practice, and conclude by highlighting a set of weaknesses in the current process that constrain substantive participation in the hydrocarbon sector. In section 2 we place the Bolivian reforms in the context of other South American countries that have implemented similar reforms. In section 3 we review the rights to participation written into the new Constitution and some of the debate around how these rights should be put into practice. In section 4 we review and analyze the legal framework for participation in the hydrocarbon sector, particularly the Law of Hydrocarbons and the DS 29033. We argue that there are certain weaknesses in this framework that can undermine government accountability and effective participation. In section 5 we offer a brief discussion of the draft (anteproyecto) of the new Law of Hydrocarbons. In section 6 we describe our case study of the participation process for the 2D Seismic Prospecting - Iñau Block Project. In section 7 we offer some conclusions and recommendations.

1.3 RESEARCH PROJECT AND DATA COLLECTION

This research is part of a research project called “Negotiating New Political Spaces”, which is financed by the Norwegian Research Council and hosted by the Department of Geography at the University of Bergen, Norway. The two authors conducted the data collection during November and December 2010. Twenty-seven interviews were held in La Paz and Camiri with actors who were considered central to understanding the process, including representatives of the Ministry of Hydrocarbons and Energy (a list of interviews can be found in Appendix 1). The survey of the legal framework focused on the laws broadly relevant to the participation process. The authors also participated in meetings between the Ministry and the representatives of the Capitanías Kaami, Alto Parapetí and Iupagusu at the end of November, to observe an actual participation process. This report is published in both Spanish and English. The interview quotes and some citations have been translated into English by the authors and a professional translator. (The authors are responsible for any misinterpretations.)

16.

2. THE BOLIVIAN PARTICIPATION PROCESS IN CONTEXT

- CONSIDERING THE VARIOUS DEVELOPMENTS IN THE COUNTRIES OF LATIN AMERICA TO GRANT RIGHTS TO INDIGENOUS PEOPLES, IT CAN BE ARGUED THAT BOLIVIA IS THE COUNTRY WITH THE MOST ADVANCED LEGISLATION ON THIS SUBJECT.

2.1 ILO 169 AND THE NEIGHBORING COUNTRIES

Conflicts between local communities, indigenous groups and extractive industries have a long and complex history in many places in the world, not least in the Andes region. Policies to grant rights to local communities and indigenous groups in relation to extractive projects have been proposed or implemented in several of Bolivia's neighboring countries. The Convention on Indigenous and Tribal Peoples by the International Labour Organization (ILO 169), which mandates that indigenous peoples must be consulted about development projects in their territories, was ratified by Bolivia, Paraguay, Peru and Colombia in the early 1990s, with Venezuela, Ecuador, Brazil, Argentina and eventually Chile following later. Other international organizations have strengthened this right. In 1998, the Inter-American Commission found that it is a violation of the American Convention on Human Rights (Article 21, Right to Property) for a government to grant an extractive concession without the consent of the indigenous peoples of the area, and in 2007, the Inter-American Court on Human Rights issued a landmark ruling, *Case of the Saramaka People v. Suriname*, that the State must ensure the right of local peoples to give or withhold their consent in regard to development projects that may affect their territory (Finer et al., 2008).

However, countries have been slow to put in place legislation that creates mechanisms by which these rights can be exercised, most likely due to the threat this is perceived to hold for the industry and for government revenue. Some countries have had mechanisms in place to distribute revenues from extractive projects to local communities or to let local communities take part in managing revenues. A study by Slack (2004) on revenue sharing in Ecuador, Peru and Bolivia concludes that "these measures have not been adequate to address the serious adverse effects of resource extraction on marginalized populations," and that in most cases, the revenues that should have been distributed were not, or they were distributed without letting the communities decide how they were to be used.

We will briefly look at some examples of how other countries in the region have implemented legislation granting rights to participation in the development of extractive projects. Peru and Ecuador are the countries besides Bolivia that seem to be going the furthest in at least developing legislation to provide rights to participation. While Chile and Colombia have regulations governing participation, there is unresolved tension between the extractive state policy and the recognition of the right to consultation and participation.

PERU

In 2009 in Peru, the Ombudsman took an active role in promoting the draft of the Law of the Right of Consultation to Indigenous Peoples. This law provides that the process should be carried out by the state, having to come to an agreement with or consent of the indigenous peoples regarding the measures to be consulted. However, the state is the institution responsible for adopting the final decision.

This standard, in accordance with the 169 OIT Convention, states that the indigenous peoples to be consulted must meet both objective and subjective criteria, pursuant to the principle of self-identification.¹ This aims to ensure that the consultation process will include indigenous peoples and not others, implying that the right to consultation of indigenous peoples is different from the right of other citizens. As it will be seen further on, the differentiation of these processes is one of the elements shared by the Bolivian framework. Finally, a basic element of this legislation is that it intends to ensure that there is effective, transparent and conscious participation of the community, as it establishes that the entity responsible for executing the consultation should assure that the indigenous peoples have the assistance of advisers and a technical team in order to assure the real participation of the community.

ECUADOR

In the case of Ecuador, the right to participate is regulated both by the Constitution and by a specific regulation. In the former it is established that the Ecuadorian State is “a Multinational State” (Article 1), and upon recognition of social diversity, the indigenous peoples are guaranteed the right to a free previous and informed consultation if there are activities that correspond to non-renewable resources developed on their land that may affect them. Regarding specific regulations, there is a Prior Consultation Law for Hydrocarbons Activities that was promulgated in 2002. However, in that legislation there are some weaknesses in the scope of the consultation. For García (2005, p. 163), “it is not thought to allow for the decision by the affected peoples and communities whether or not they agree to the activity that is carried out in their territory. In short, it does not confer a right of veto on the activity for those concerned.” Finally, in order to strengthen the enforcement of the right to consultation, the Regulation to Article 28 of the Environmental Management Law was approved in 2006, and states that projects that violate the right to consultation may be null and void and unenforceable (García and Sandoval, 2007).

CHILE

In 2009, Decree 124, which regulates the consultation and the participation of the indigenous peoples, was passed in Chile. This legislation defines the consultation as “the procedure through which interested indigenous peoples can express their opinion about the way, the timing and the reason of certain legislative or administrative measures that may affect them directly and have their origin in one of the organs of the State administration ...” (article 2). From this specification, it is clear that the purpose of the consultation is not based on the right to participate actively, but on the right to voice an opinion, thus moving away from the principle promoted in the international legislation.

¹ Article 2: “I) Objective element, established by the lifestyles, culture and way of living by specific human groups, different from other sectors of the national population. It also includes their social organization and their traditional laws. These features may be totally or partially fulfilled. II) Subjective element, is the consciousness of belonging to a different group from the rest of the national population, and should be recognized as such by the indigenous people to whom they belong.”

It also has to be emphasized that, as in Peru, the organizations of the state will be the institutions in charge of conducting the process of consultation. However, in Chile this obligation is restricted when it comes to the General Comptroller of the Republic, the Municipalities, the Central Bank and the public enterprises (Centro de Políticas Públicas, n.d.). This means that state institutions that are constantly making decisions that may affect indigenous peoples and their local development are relieved of this responsibility. Where appropriate, the question of participation will be subject to sectorial regulations, in turn leaving to the relevant government institution in that sector the decision to incorporate the consultation right recognized in the Decree 124. This problem is aggravated by the decisions on the appropriateness or inappropriateness of the consultation process being concentrated in the executive branch without counting the participation of other sectors. This indicates a weakness in the regulation of the right to consult the indigenous peoples and a lack of compliance with the 169 Convention of OIT. Meza-Lopehandia (n.d.) considers that this article is contrary to what is sought in the 169 Agreement of OIT, as instead of instituting an instrument of participation, it is merely creating a simple mechanism to spread information to those affected.

COLOMBIA

As in Ecuador, the Constitution of Colombia “recognizes and protects the ethnic and cultural diversity of the nation” (Article 7). From this recognition, it defends the right of the indigenous peoples to participate when the natural resources are to be exploited in their territories. The right of the indigenous peoples to participate in decision making is also consecrated in Law 70 of 1993, which states that communities have the right to participate in the design, elaboration and evaluation of the environmental impact and social-economic and cultural studies. The meaning of the provisions is the inclusion of community involvement from the earliest stage.

Furthermore, Decree 1320 of 1998 forms part of the legislative framework that regulates prior consultation with the indigenous and black peoples for the exploitation of the natural resources inside their territory. For Colombia’s National Indigenous Organization (ONIC, 2010), this regulation has two shortcomings. First, it was imposed by the government, that is to say, the indigenous communities were not consulted about it. Second, it has been declared contrary to ILO 169 by the Board of Directors of ILO. This has led to questioning about its legitimacy, legality, scope of application and procedure (Rodríguez, 2005). Article 1 is one of many postulates that lead to this rule being contrary to ILO 169, as it establishes that the purpose of the consultation is to analyze the impacts that may occur in an indigenous or black community as a result of the exploitation of resources inside their territory. This moves away from the purpose of the consultation launched by the international norms, which lies in gaining the consent or agreement of the indigenous peoples to the measures proposed.

In summary, most Latin-American states have made efforts to develop laws that grant rights of consultation to indigenous peoples in their territories, using two different mechanisms. First, they have incorporated international policies and principles into their domestic legislation. Second, they have adopted laws and decrees allowing these international principles to be adapted to the reality in their own regulatory systems. In the case of Peru and Ecuador, it is evident that the indigenous rights are an important factor for the building of the multicultural state. However, this characteristic is not visible in Chile or Colombia, because in both countries the national legislation has provisions that appear to contradict the guidelines of the international legislation, such as ILO 169.

Considering the various developments in the countries of Latin America to grant rights to indigenous peoples, it can be argued that Bolivia is the country with the most advanced legislation on this subject. Not only does it broadly include these rights in its Constitution and in specific regulations, but the country has also created comprehensive institutional mechanisms to protect these rights in practice.

22.

3. THE NEW CONSTITUTION AND THE RIGHT TO PARTICIPATION

*- THE NEW CONSTITUTION
IS CHARACTERIZED BY THE
PROVISION OF A GREATER
LEVEL OF COMMUNITY
EMPOWERMENT.*

23.

3.1 THE NEW CONSTITUTION

Bolivia's new Constitution was written by a Constituent Assembly convening in Sucre in August 2006. The process of writing it was fraught with conflict between members seen as aligned with the indigenous movement and the MAS party and the "media luna" movement of oppositional and conservative representatives. It was approved by popular referendum in January 2009, but has been criticized by the opposition for over-representing indigenous peoples and thereby discriminating against the non-indigenous. In relation to the issue of natural resource governance, the new Constitution is characterized by the provision of a greater level of community empowerment. The Constitution incorporates the right to prior consultation on activities related to the exploitation of non-renewable natural resources. Consultation as a tool to exercise the right to participate is incorporated through a chapter aimed to establish the rights of the nations and peasant indigenous peoples. In the chapter mentioned, Article 30, in paragraphs 15 and 16, establishes the right of nations and peasant indigenous peoples to participate in the decisions taken and to appropriate the benefits generated by activities in their territory.

Article 30

Paragraph 15.- To be consulted through appropriate procedures and in particular through their institutions, whenever consideration is being given to legislative or administrative measures which may affect them. In this context, with regard to the exploitation of non-renewable natural resources in the territory they inhabit, the right to compulsory prior consultation conducted by the State in good faith and agreed upon will be respected and guaranteed.

Paragraph 16.- To participate in the benefits of the exploitation of natural resources in their territories.

Also, the chapter on distribution of powers, Article 304, records the powers that the original indigenous peasant people have to exercise their right to prior consultation and to be able to control the hydrocarbon activities carried out in their territories.

Article 304

I. The peasant 'originario' indigenous autonomies might exercise the following exclusive powers:

21. Participate, develop and execute freely and informed the mechanisms of prior consultation, concerning the application of legislative, executive and administrative measures that may affect them.

II. The autonomous peasant indigenous communities can exercise the following shared powers:

4. Control and regulation of the institutions and external organizations that develop activities in their jurisdiction [...]

III. The indigenous 'originario' peasant autonomies could exercise the following concurrent powers:

9. Control and socio-environmental monitoring of the hydrocarbon and mining activities that may develop in their jurisdiction.

Finally, it also highlights the provisions of the chapter on natural resources, article 352, which determines that the exploitation of natural resources shall be subject to the consultation process, which should be free, prior and informed. In this sense, it can be argued that the process of consultation has to be built on three elements: freedom, in that it represents an act of free will, in the absence of coercion and even co-optation; prior consent, implying that there should be enough time for actors to acquire the relevant information and there should not be a strict temporal limitation on the participation process; and finally, consent should be informed, as substantive participation is impossible when actors are not informed. In turn there should be timely and accurate transmission of information, to which there has to be free access. It is also necessary to generate mechanisms so the community can fully understand the data obtained.

While rights for indigenous groups in relation to natural resources have existed in multiple forms prior to the new constitution, the constitution certainly seems to strengthen these rights. This is particularly so with regard to rights to territorial autonomy and the incorporation of the traditional decision-making structures into governance. Our informants agreed that the Constitution does represent a strengthening of rights in various ways. To the representative of the Ombudsman, from the office for the Program of the Human Rights of the Nations and Original Indigenous and Peasant Peoples, the incorporation of the rights of the consultation and participation of the indigenous peoples into the Constitution has meant a formal advance regarding the recognition of these rights (personal interview). The Ombudsman representative argued that the recognition of these rights is part of the recognition of the human rights (personal interview). Still, the Constitution leaves it to specific legislation to develop the precise procedures for how the previous consultation should be conducted, and this has created a great deal of disagreement over how binding these rights should be in practice.

In a process of prior consultation, the government may use different tactics. First, a process can be used to build consensus in communities for a planned project. If this does not work, prior consultation provides the government with mechanisms to bind communities to a legal process whereby project approval is the only possible result, as it is the state that has the final arbitrary power (Clavero, 2010). According to the Constitution, the right to consultation does not necessarily imply binding participation, as it does not give the right to veto. Despite the provision of autonomy and self-determination in the Constitution, there are repeated complaints from social organizations, who claim that these rights are broken. For example, by CONAMAQ (the National Council of Qullasuyus, Ayllus and Markas) it is asserted that the Government is not respecting the prior consultation established in the Constitution (Los Tiempos, August 22, 2010). Likewise, a representative of the Extractive Industry Committee of CONAMAQ pointed out that “the Interamerican Committee of Human Rights, from the OAS, observed that the Government of Bolivia does not apply the consultation about extractive activities in indigenous territories” (La Razón, October 30,

2010). Similar observations are made by the supervisory bodies such as the ILO, pointing to violations of the right to prior consultation of indigenous peoples.² One of our informants, the representative of CEJIS, told us that “there is a tendency to keep the consultation at a minimum, just make an informative administration decision, and link this to the identification of impacts, without any entailed binding feature, and to link it also to the issue of compensation” (personal interview).

The authorities in charge of hydrocarbon extraction and industrialization, including President Morales and his Vice-President García Linera, seem to have come to the realization that popular participation in an industrial sector will impose a degree of constraint on projects, and must therefore be seen in relation to economic priorities. In various public statements the vision of a balance between economic development on one hand and democracy, participation and indigenous rights on the other has been questioned by officials. Here the notion of “double discourse” becomes relevant – the same authorities promote participation on one hand and a logic of extraction on the other. Further, economical development and participation are understood to be in direct conflict with one another, implying that the country has to choose between one and the other.

Acting President Carlos Villegas of the state enterprise Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) claimed that “the environmental license and the consultation and participation of peasant organizations and indigenous peoples in the permits for the execution of oil projects are barriers to investment” (La Razon, January 11, 2010). Likewise, Villegas has claimed that the right of consultation has in many communities led to demands for compensation exceeding the availability of company resources (La Razon, January 11, 2010). The government is now promoting a policy to limit the compensation, which “shall have a minimum of compensation based on a percentage of the investment (of the company) and a maximum depending on some variables that have to be evaluated (...) it will range from 0.5% (minimum) and 1.5% as a maximum of (oil) investment” (La Razon, June 17, 2010).

Another representative authority from the government, the Deputy Minister of Government Coordination, Wilfredo Chávez, said, “(in) consultation processes, indigenous rights will be recognized and respected, but, they will take into account the rights of society and economic interests of the State will be privileged, there is a need to ‘speed up investment’ in the petroleum sector, one of the pillars of the national development plan” (FOBOMADE, 2010, p. 3). This helps us to understand that while the communities demand effective enforcement of regulations to protect the right to consultation, it is clear that several of the highest-level officials in the sector consider these rights as undermining the economic interest of the State. This was confirmed by a representative of the YPFB, who during a process of consultation carried out in the Department of Santa Cruz, in the city of Camiri, told

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² See the comments made by the Committee of Experts on the application of Conventions and Recommendations: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displayAllComments.cfm?hdroff=1&ctry=0080&conv=C169&Lang=SP>.

us that “the consultation process is decreasing business investment, it complicates investment. For example, in a block between Argentina and Bolivia, Argentina has already begun to operate, and here, everything is delayed by the consultation process” (personal interview).

Another perspective holds that extraction and participation are not necessarily mutually exclusive goals or in even in conflict with one another. Rather, they could be pursued as mutually beneficial aims to ensure that the necessary revenues are generated and that there are mechanisms for distributing these revenues and spaces for participation to relieve conflict and allow for communities’ influence on issues important to their livelihoods. To level the balance between economic development and the right to participate, the representative of the Ministry of Hydrocarbons and Energy, from the Department of Socio-Environmental Management, said in an interview that participation is achieved through the consultation process, and it becomes a benefit rather than a detriment to investment, provided it is implemented properly, that is, with complete, transparent and timely information. In that case, “the company can operate peacefully and the country and communities can generate resources” (personal interview).

The need to find such a balance was also stressed by representatives of indigenous organizations. The representative of natural resources and environment of the APG (Asamblea del Pueblo Guaraní, Guaraní Peoples’ Assembly) stated that the participation of different organizations and social movements does not seek to limit or threaten the country’s economic development. By contrast, he suggests the following: “[the gas] should be industrialized in Bolivia [...]. My policy as long as I have been in the secretariat is to not go against the development of the country. [Development] can be done, but while respecting our rights, there should be a benefit to the Indians ...”. The APG is an organization that plays a crucial role when representing communities in negotiating with the Ministry of Hydrocarbons and Energy, and later in the negotiation between the community and the company to define the amount of compensation.

In turn, the Constitution makes important advances in articulating the rights of indigenous peoples, at the same time as it establishes the right of the State to develop natural resources economically. However, the Constitution does not discuss what should be done if these aims come into conflict, how to prioritize between them or how to develop procedures for making participation beneficial to economic development. As we have seen, authorities in the hydrocarbon sector, for example the YPFB President, see participation as ultimately in conflict with economic development and therefore it has to be limited in the interest of Bolivia as a whole. Others see participation as something that is beneficial to development in that it creates tranquillity or social stability surrounding economic activity, or as an unalienable right that can coexist with economic development. How to prioritize the aims of economic development and democratic participation and how to make them mutually beneficial depend on the procedures in specific legislation and how these procedures are implemented.

28.

4. THE LEGAL FRAMEWORK FOR PARTICIPATION IN THE HYDROCARBON SECTOR

*- AT PRESENT, THE
HYDROCARBONS SECTOR
IS THE ONLY ONE THAT
HAS A REGULATION FOR
THE PARTICIPATION OF
INDIGENOUS PEOPLES.*

4.1 LAW OF HYDROCARBONS AND SUPREME DECREE 29033

There is a complex legal framework that regulates participation and grants various rights to citizens and communities to be informed and consulted about the extractive projects that affect them. Several of these laws originate from previous governments, which the Morales Government has on occasions specified through Supreme Decrees. This is the case with the basic law for the hydrocarbon sector. The Hydrocarbons Law (No. 3058) was enacted during the administration of former President Carlos Mesa, and it has been complemented by a Supreme Decree that specifies the process of consultation (DS 29033). The complexity of this overlapping and sometimes contradictory legal framework creates a degree of uncertainty as to the actual rights and procedures that are to be followed, which in turn gives governing authorities the possibility to adjust participation processes in their favor. In addition there are certain weaknesses in the existing legislation that undermine the articulated aims of the Constitution in important ways, for example that communities should have a voice in the development of the extractive projects that affect them.

Until a new law of hydrocarbons is promulgated by the Morales Government (see chapter 5), the existing Hydrocarbons Law establishes the legal foundation for the development of exploration and exploitation activities in the sector. At present, the hydrocarbons sector is the only one that has a regulation for the participation of indigenous peoples. (Other sectors, such as mining, have made some attempts at regulation, but so far these have failed to materialize.)

This Law regulates the right of rural, indigenous and native peoples to participate and be consulted. It establishes that this process should be carried out prior to any extractive activity and in a timely manner (articles 114-118). The consultation process should be conducted in two stages. The first stage is prior to the bidding, approval, procurement, invitation and approval of the activity, work or hydrocarbon project. The second stage is prior to the approval of the Study of Environmental Impact Assessment (EIA). In the consultation that takes place in both phases, there is a process of coordination and information, in which the information supplied by the operating company of the consultation process should be submitted in a complete, timely, truthful and appropriate manner. The application and incorporation of these features should allow the existence of an effective participatory process, intended to generate comprehensive knowledge of all the impacts generated by the company and outline the planned mitigation measures.

The completion of the process of consultation leads to the stage of compensation, which takes place only between two actors, the operating company and the community. Article 119 of the Law governs that relative to compensation:

Article 119

When oil and gas activities are carried out in communal, indigenous or peasant territories, titled or not, all direct, cumulative and long-

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term negative socio-environmental impacts that shall occur should be financially compensated by the holders of hydrocarbon activities in a fair manner, respecting the territoriality, the customs of those affected, based on the Environmental Impact Assessment and other means to assess the damage that can not be quantified.

The Ministry of Sustainable Development and the highest relevant Environmental Authority, the Ministry of Hydrocarbons, Ministry of Rural and Agricultural Affairs, and the Ministry of Indigenous and Native Peoples are obliged to ensure that the compensation measure is implemented and realized in a period of fifteen (15) days after the compensation amount that is agreed upon (...).

Supreme Decree No. 29033 enacted in 2007 regulates and specifies this participation process established in the Law of Hydrocarbons. This decree was debated for over two years and finally achieved its enactment during the current Government of President Evo Morales. In accordance with the provisions of the Hydrocarbons Law, this decree specifies that the consultation process should be conducted in two stages. However, unlike the Law, it says that the consultation in the first phase does not include the active participation of the community. Rather, it establishes that the purpose of the consultation in the first stage is to inform local actors about the general aspects of the activity, work or project and to gather the opinion of the organizations likely to be affected.

In the case of the second stage, it holds that the purpose of the consultation process is to establish how indigenous communities will be affected and, on that basis, to reach the agreement or consent of these communities so that the oil and gas operations can be initiated (Article 115). The basic principle is that if it is established that the project will potentially affect a protected area or indigenous groups, then there will be a participation process with the communities affected that has to be completed before the environmental license can be granted to the operating company.

In this process the Ministry of Hydrocarbons and Energy is what is called the “Competent Authority” for the consultation and participation process for extractive projects. This means that this Ministry is the overall authority in charge of conducting the consultation and participation process, and can decide whether other relevant state entities should be included in the process. The Competent Environmental Authority is the Vice Ministry of Biodiversity, Forest Resources and Environment. This gives the Ministry of Hydrocarbons and Energy a central role in the conduct of consultation and participation. As the Competent Authority, the Ministry of Hydrocarbons and Energy organizes the process and is responsible for giving the necessary information to the communities within a given time frame and for overseeing that the process is conducted according to the relevant regulations. Included in this process is the Ministry of Hydrocarbons and Energy, other state entities that the Ministry of Hydrocarbons and Energy deems relevant and organizations representing the affected communities. The operating company should not, according to the regulations, be part of this process.

During meetings with the Ministry of Hydrocarbons and Energy and the relevant state entities, the organizations representing the communities will be given a chance to present additional information to the Environmental Impact Assessment on the potential socio-environmental damages that may result from the proposed project. These organizations may conduct independent studies in cooperation with community members, though this depends on funding being available. Community organizations can apply to have costs in relation to independent studies and the consultation process covered through company funds administered by the Ministry of Hydrocarbons and Energy, but this funding tends to be limited to actual travel and lodging costs to take part in the meetings organized by the Ministry of Hydrocarbons and Energy. In turn there are few funds available for community organizations to conduct independent studies, and a lack of technical expertise is also a problematic limitation (personal interviews). Community organizations present their input to the Environmental Impact Assessment categorized as “mitigable” and “non-mitigable.” Categorizing potential damages as “mitigable” implies that the operating company will have to adjust its plans for the project accordingly, while “non-mitigable” implies that it is not possible to adjust the project accordingly, and these potential damages become subject to compensation negotiations. The input provided by the community organizations becomes part of the “Accord Validation Agreement” signed by the Ministry of Hydrocarbons and Energy and representatives from the community, and this Agreement in turn becomes part of the Environmental Impact Assessment.³

When there is a negative result of the consultation process, that is to say, no agreement is reached between the actors, the State shall promote a reconciliation process. However, if an agreement between the Ministry of Hydrocarbons and Energy and the community organizations is reached and signed, the Ministry of Hydrocarbons and Energy can grant an environmental licence to the operating company that enables it to begin the project. The entire process of consultation and participation established by the current Law of Hydrocarbons and Supreme Decree 29033 is illustrated below in Figure 2.

4.2 GOVERNANCE REFORMS AND RIGHTS TO PARTICIPATION

Apart from the specific rules governing participation in the hydrocarbon sector, there is a wide range of laws that regulate and protect the right of the public to participate or oversee governmental actions in various areas. Among these we will look briefly at the SAFCO Law, as one of the first in the history of social control, the Popular Participation Law, the Environmental Law and the current rights to social control written into the new Constitution. As we mentioned above, this brief

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³ To clarify, in this report, we use the term “environmental study” to refer to both the DIP (Document of Public Information) and the EIA (Environmental Impact Assessment). The DIP is the basic document for the consultation and participation process. It includes information about the project and the identification of potential impacts. The EIA is the sum of the DIP documents plus the validation agreements.

overview of the development of rights of citizens to participation in Bolivian law suggests that participation is not something invented by the Morales Government but a right that has gradually been expanded and redefined since the country returned to democracy. The result of this is a complex field of laws and rights that establish different forms of citizen participation and accountability.

According to the former President of Bolivia and the current Dean of the Faculty of Law of the Catholic University of Bolivia, Eduardo Rodríguez, the first antecedent of social control is the SAFCO Law (interview). Law 1178, known as the SAFCO Law (Law on Administration and Government Control) was enacted during the government of Jaime Paz Zamora in the year 1990. It is the first rule governing the administration and control systems of the State's resources, and is aimed to control the revenue generation and the effective and efficient use of public resources, make public spending transparent and assuring that all public servants assume full responsibility for their actions.

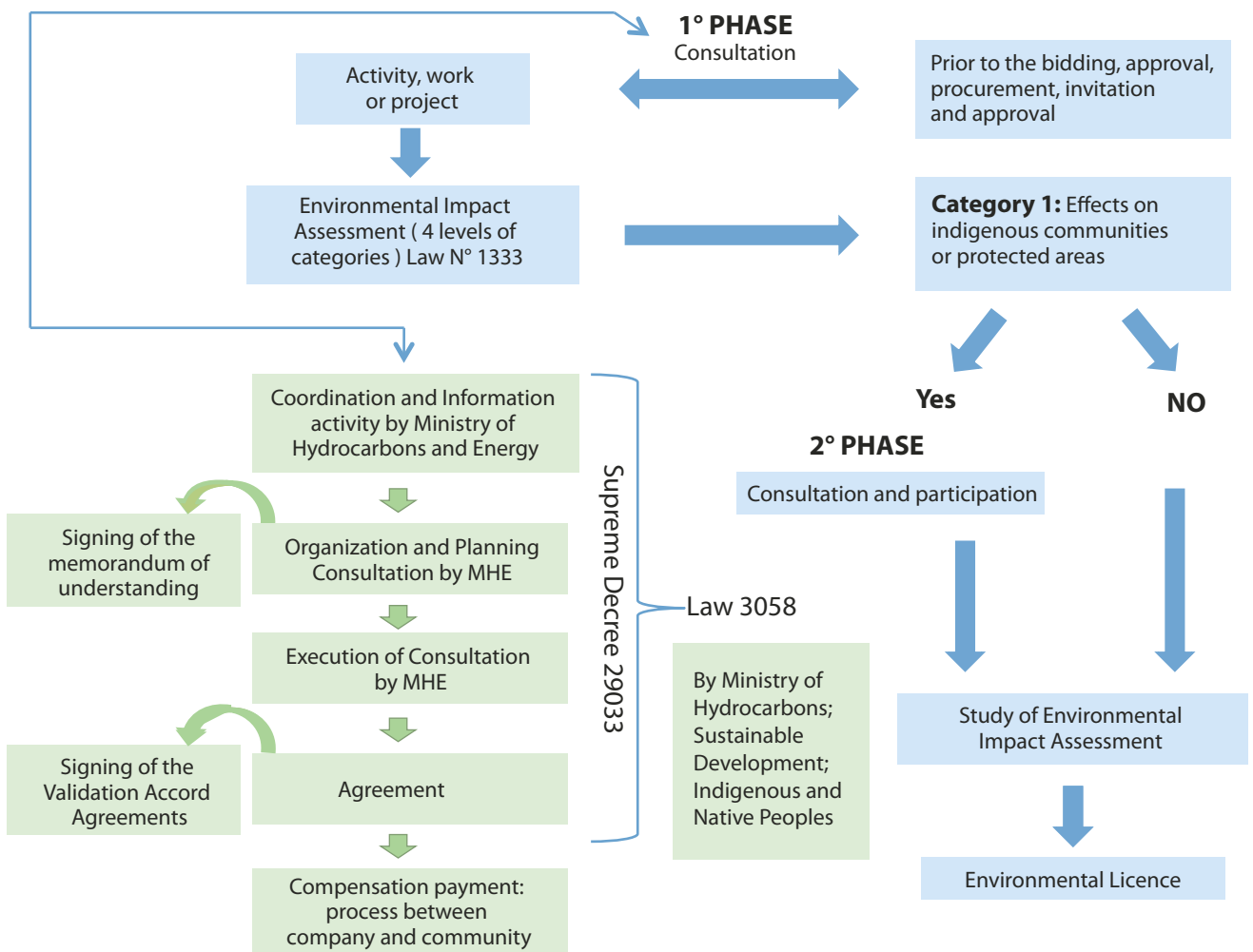


Figure 2: Process of consultation and participation in Law No. 3058.
Source: Own elaboration

This legal norm became the basis for a transparent, efficient and effective public administration, (Juárez and Comboni, 1997). There are two types of governmental control: internal and external. The highest executive authority of a given entity is to be responsible for implementing internal control. For example, in the case of municipalities, the responsible party is the mayor. External control is run through an external audit performed by the General Controller of the Republic (GCR) and other entities with overall responsibility. The GCR constitutes the governing body of this system. The purpose of this system is, among other things, to make certain that the authorities should be accountable for the results of their administration and to enhance the reliability of information about the use of public resources to ensure that this information is accessible by society (CENCAP, 2007). For this reason, this law can be interpreted as a first approach to social control, because it allows communities to access information about and evaluate the use of public resources.

Representatives of the Morales Government have argued that the SAFCO Law's two levels of control, internal and external, are insufficient in that they lack a social dimension. In other words, the Law allows no opportunity for citizens to exercise control. Therefore, the Morales Government is developing a draft of a Law on Public Management. This will replace the SAFCO Law and incorporate participation and social control throughout the public sector, thus combining the levels of internal, external and social control (La Prensa, January 11, 2010). "Social control" here means civil society control over the institutions of the state and the government.

Another law mandating community involvement through public consultation is the Law of the Environment. Without having social control as a main aim, the Law of the Environment grants certain rights to citizens to influence the decisions of the public sector. Citizen participation is regulated in Articles 92, 93 and 94, the first two being the most relevant:

Article 92

All individuals or groups are entitled to participate in environmental management under the terms of this law, and have the duty to intervene actively in the community to defend and/or preserve the environment and if it be necessary, to use rights that this law confers on him.

Article 93

Every person has the right to be accurately, timely and adequately informed on issues related to environmental protection and to make requests and promote initiatives of individual or collective character with the relevant authorities that relate to such protection.

Reading these articles, the aspect that stands out is the importance of information, meaning that community involvement is primarily through the right to be informed and to make requests for information. Therefore, it can be argued that the Law of the Environment includes a weak principle of participation, in that participation does not stipulate that citizens actually influence the planning process for extractive projects.

Supreme Decree No. 24176 regulates the community involvement in Environmental Impact Assessment (EIA) in Articles 160 to 166. The process that this regulation outlines does not go far beyond the provisions of the Law of the Environment, in that it only allows for affected communities to receive and deliver information, without any possibility of binding and substantive participation in the development of the EIA. For the impact identification of the EIA to be approved, it stipulates that the representative of the company must conduct a public consultation. However, it does not establish the mechanism through which participation is to be implemented, the time limit to exercise this right, or an obligation to include the observations of the community. While the importance of providing information to the public is repeated, the participatory principle only involves an informative or consultative level, without including a right to the community to influence final decisions.

Importantly, there is a difference between the process of public consultation in the Law of the Environment and the consultation and participation process established by the Hydrocarbons Law and Supreme Decree 29033. This difference was noted by the representative of the Department of Socio-Environmental Management of the Ministry of Hydrocarbons and Energy, who said that while the former is developed by the company and with actors who are not necessarily indigenous, the latter is carried out by a state institution and with the participation of communities and indigenous peoples (personal interview). With regard to public consultation the Environmental Inspector of the Ministry of Environment and Water, said in an interview:

There is just an article that says that you have to do the public consultation, nothing else; it doesn't say to whom, or how, or anything. And what happens in practice? As this isn't written, in short the public consultation is a meeting, there is a brief description of the project and the minutes of the meeting are signed, and that's it. And we as the State can do nothing because we have not established a procedure for public consultation So what I've seen is that public consultation is summarized in the minutes of meetings, to which sometimes representatives of the local oversight committees (OTBs) are invited, and hopefully the municipality, and sometimes indigenous communities. Then if that right is not respected there is no established procedure, no deadlines, there is nothing to tell you how to do it, it is free to the company.

The OTBs (Grassroots Territorial Organizations) are composed of peasant communities, indigenous peoples and local committees, and were created to consolidate the process of popular participation in the Law of Popular Participation, passed during the presidency of Gonzalo Sánchez de Lozada, in the year 1994. The rights of the OTBs are stipulated in Article 7 of this law, in which it is noted that the OTBs have the right to participate in a binding manner in the decisions or actions of the public sector when it is recognized that these actions are contrary to the interests of the communities. However, it does not establish the parameters for understanding the communities' "interest"

or how to ensure that interest is achieved, making it difficult to specify a process of binding participation. However, this law also establishes Oversight Committees, institutions with the right to oversee municipal governments, which are in turn a mechanism to exercise social control over the public sector. In practice, this institution has had serious problems in exercising this function due to a lack of resources (Ayo, 2004).

Finally, the role of municipal governments was strengthened by the Law of Popular Participation, as they were given greater authority and more resources to manage their activities. For Lopez (2007, p. 116), “with this Law, provincial communities, largely occupied by indigenous groups, have demanded quality in municipal administration. So this has been a way to decentralize public administration, but it is by no means the appropriate solution to the demands for autonomy of indigenous organizations.”

The content of the Law of Popular Participation has sparked divergent views among intellectuals. Some see the Law as the first step to what is now understood as social control. According to the former Deputy Minister of Mines, “social control, the participation of society in the production of control and intervention by different actors, it is a consequence of popular participation, and also of the nationalization of the mines, agrarian reform, universal suffrage in 1952” (personal interview). In conjunction with this argument, a scholar from the Bolivian Catholic University said, “(social control) is born with Law 1551, Law of Popular Participation. The LPP municipalized the national territory and broke the continuity of the subjection of the peoples” (personal interview).

Whether or not it is the basis of social control, the Law of Popular Participation is a law that has without doubt decentralized power, which has led to greater involvement of civil society in public affairs. Although the LPP has been controversial, it is undeniably a milestone in the historical development of citizen participation and accountability in Bolivia.

In the new constitution, the concept of social control is central to promoting the rights of the people to public participation and to holding the government accountable. Here social control implies participating in public policy formulation and overseeing the actions and interventions of the private and public enterprises that manage public resources. With regard to the conditions for social control, our informants state that there are still difficulties in relation to creating the proper institution for protecting this right. Some see it as a separate branch of power, in addition to the other four branches of government stipulated in the Constitution: legislative, executive, judicial and electoral. Others see it as a suprapower, in other words one that is above the four branches of government. So far the form, objectives or mission of an institution responsible for implementing this right are unclear. However, what can be gathered from the concept of social control of the Morales Government is that it is important to its discourse of being a government

of social movements. Despite these difficulties, social control is to some extent already being promoted in various government institutions. In an interview, the Minister of Institutional Transparency and Fight Against Corruption spoke of the importance of social control as a preventive measure to avoid corruption.

Representatives of the current Government argued that social control is an issue that originated in the context of the policies of the administration of President Morales. According to the Minister of Institutional Transparency and Fight Against Corruption, “the Multinational State Constitution recognizes the social control as a right. Never before a right was constitutionalized this way ... There have always been social organizations, but they never had the chance until now to maintain social control, that was impossible” (personal interview). The Project Administrator for the Consultation and Participation Project of the Ministry of Hydrocarbons and Energy sought to clarify the difference between the LPP and the social control, saying that the Oversight Committees created by the Law of Popular Participation have mostly been linked to the municipal level, to monitor the performance or non-performance of the municipalities, and that they are therefore not related to social control, which should apply to both a micro and a macro level (personal interview).

Others emphasize that social control is a phenomenon that has developed over time, beginning with the SAFCO Law, and argue that there are weaknesses in the way social control is currently written into the constitution. For ex-President Rodríguez, social control is an issue that has been regulated in a contradictory way. He said that although there is greater empowerment of people to participate in the design of public policies and the use of public funds, it is inconsistent that it is the same people who are intended to perform social control at the same time; this means that there will be no independence in the process. Another aspect noted by Rodríguez was that social control can not be incorporated into all governmental activity because there are technical aspects that require expertise and experience (personal interview).

It is clear that the concepts and rights around public participation and governmental accountability have not been invented by the Morales Government, but have been developed and implemented in different ways by different governments since the return to democracy. The result is that in the legal and institutional framework of the country several different layers of rights to citizen participation exist, and a complex and contradictory set of existing rights. It also seems that the implementation and practice of these rights are relatively contingent, by which we mean that they depend on the government in power to emphasize the different legal provisions differently. That is problematic, since these rights essentially exist for citizens to control the sitting government. It is also highly unclear how the rights to social control will work in practice. We concur with various informants that it is unclear how civil society can independently develop mechanisms to hold the government accountable.

4.3 WEAKNESSES IN THE CURRENT FRAMEWORK FOR PARTICIPATION IN THE GAS SECTOR

The current process of consultation and participation represents significant advances in terms of the guarantee and protection of collective rights in activities, works or hydrocarbon projects, in comparison both with previous regimes in Bolivia and with similar processes in other countries. The implementation of DS 29033, together with the Regulation of Socio-Environmental Monitoring and Control on Oil and Gas Activities within the Territory of Native Indigenous Peoples and Peasant Communities (Supreme Decree 29103), has been the engine for Bolivia to become the country with the most advanced legislation in terms of the guarantee and protection of collective rights in activities, works or hydrocarbon projects (Vargas, 2009). Reforms of this nature are important in that they give local communities a sense of ownership of the natural resources in their territories and oblige both governmental authorities and operating companies to take objections from local communities into account when planning projects.

At the same time, there are distinct weaknesses in the design of the regulatory framework that undermine substantive participation for these communities. Here we will discuss four such weaknesses, namely (1) the lack of independent monitoring of the process of consultation and participation, (2) the over-focus on compensation payments in the process and the lack of monitoring of what happens to the compensation payments, (3) the dependence of the process on local technical knowledge that often does not exist and (4) the lack of integration of municipalities into the process.

Firstly, the fact that the Ministry of Hydrocarbons and Energy is the governmental authority that oversees the consultation and participation process at the same time as it is the authority that promotes the industrialization of the sector represents a weakness of regulatory design. In a sense the Ministry of Hydrocarbons and Energy is both an actor and the judge in consultation and participation processes, in charge of both promoting extractive activity and overseeing participation. No other executive entity can in practice monitor whether the participation process is conducted in a satisfactory way. Further, this lack of independent monitoring and unclear division of responsibilities became worse when, after nationalization, the state enterprise YPFB became one of the main companies conducting projects. There are tight links between the Ministry of Hydrocarbons and Energy and the YPFB, so it is doubtful whether the Ministry of Hydrocarbons and Energy is sufficiently independent and disinterested to conduct participation processes in which the YPFB is involved. It appears that the YPFB is represented in the participation process on the invitation of the Ministry of Hydrocarbons and Energy even though the law does not stipulate this.

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Pablo Villegas (2010a, p. 10) argues that this process, by relying on the information from the company, is often flawed, as the information provided is mostly inclined according to the interests of the most

powerful actor, the company, therefore it is “more of a publicity stunt for the project, to convince people, than being informative.”

This is aggravated by the fact that the environmental authority, the Ministry of Environment and Water, is not given a central role in the consultation and participation process. Its role is subsidiary to that of the Ministry of Hydrocarbons and Energy and it is not clear what possibilities it has to intervene independently of the decisions made by the Ministry of Hydrocarbons and Energy.

There are legal provisions for environmental monitoring independently of the state, but they do not seem to have been implemented well in practice. Socio-environmental monitoring is regulated by Supreme Decree No. 29103 (2007), which stipulates that socio-environmental monitoring will be funded by the company engaged in the activity, work or hydrocarbon project. However, according to CEJIS (2010), it appears that so far no company has made such contributions.

This problem of the lack of independent monitoring is particularly visible in relation to the first phase of the process. In practice, the consultation during the first phase has often been simply skipped over without any involvement of the affected communities in cases when the YPF is one of the operating entities. The Chief of Staff of the Ministry of Institutional Transparency and Fight Against Corruption said that “for the first stage of consultation there are no procedures. [...] There is no involvement.” The opinion that there is an absence of participation in the first instance is also shared by the representative of the APG, who expressed, “in the consultation we participate only in the second phase, in the first phase we do not even know when they are doing the bidding, or who has signed it” (personal interview).

The way participation is incorporated into the second phase also precludes substantive participation in important ways, as the second stage is not for the community to take an active role in the development of the EIA, but only to assess the results of the consultation (Villegas, 2010a).

The consultation process will be seen as complete when a joint agreement is reached and the agreement validation certificates are signed. To achieve this end, the same Supreme Decree (29033) sets a deadline of three months. However, in practice the Ministry of Hydrocarbons and Energy attempts to shorten this time frame in order to move ahead with the projects more rapidly. The pressure to attract investment and to complete participation processes quickly has often meant that these terms are reduced to the minimum amount of time possible. The Environmental Inspector of the Ministry of Environment and Water said:

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Lately, in processes that have been carried out there has been pressure to do them so much more quickly. There have even been processes which have lasted two or three weeks, respecting all deadlines and procedures but cutting time, because they are strategic projects and

so their environmental license is prioritized. Because the hydrocarbons company is not interested in both consultation and participation process, it is interested in the environmental license, that is their concern, [...] the shorter the process the better. (Personal interview)

For the Ministry of Hydrocarbons and Energy, the shortened time limits for the consultation process have to do with an early and inclusive involvement of the community in the planning. Companies have often started to work with communities ahead of time and inform them even before the consultation process, which has served to reduce the time needed to reach an agreement (personal interview, Consultation and Participation Project Administrator, Ministry of Hydrocarbons and Energy).

Then there are examples of cases in which the participation process has to some extent been circumvented altogether, most likely due to their strategic character. According to Vargas (2009), this was the case for the seismic exploration project on the Lliquimuni Block developed by the consortium Petroandina YPFB (in cooperation with Venezuela). There the government did not conduct the consultation prior to the signing of the contract with the consortium partners, as was required. In the second phase the consultation was conducted, but only included those who were in favor of the process, leaving aside those who demanded more information (Vargas, 2009). It is not unlikely that the strategic partnership between the governments of Bolivia and Venezuela creates pressures on the Ministry of Hydrocarbons and Energy and other Bolivian state entities to speed up and even circumvent parts of the participation process.

Secondly, a weakness in the design of the process is that it is overly focused on the question of compensation payment, and that compensation payments are weakly monitored. The issue of compensation has generated considerable debate, as for many intellectuals it creates a tendency to reduce the participatory process to the subject of compensation. Thus, both the representative of the CEJIS and the Environmental Inspector of the Ministry of Environment and Water said it was necessary for these to be two distinct processes, in other words, while the consultation process is useful for identifying the impacts on the communities, there is a need to separate it from the compensation process (personal interviews). The importance given to the issue of compensation in relation to the right to participate undermines the principles of democratic and social control over environmental management, and leads some to suggest that the “social licence” is being replaced by an “economic licence.”

An important part of the problem is that the question of monetary compensation introduces perverse incentives for all the actors in the process. When the potential effects are divided into “mitigable” and “non-mitigable,” there is an incentive for community organizations to categorize most effects as “non-mitigable” because these will generate higher compensation payments. That serves the interests of the operating company, because compensation payments are “recoverable costs”

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and in turn ultimately refunded by the state. The operating company can therefore cause the state to cover compensation payments instead of making costly adjustments to the project. When the Competent Authority, the Ministry of Hydrocarbons and Energy, is interested in completing the participation process as quickly as possible, this is also an easy solution. The result is that socio-environmental impacts are compensated for rather than mitigated and that instead of being a participatory debate on how to minimize socio-environmental impacts from extractive projects, the consultation and participation process actually becomes an extended process of compensation negotiation. For the representative of CEJIS the consultation should be:

... a process of political participation that allows communities to go beyond the identification of mitigable or non-mitigable damage, to decide collectively the development model that is right for a community. [It should be about] how do I as an Indian want this activity to develop in my territory? [...] This would allow other rights to be strengthened, including the issue of self-determination, territorial management, and strengthen communities in political participation, positioning, strengthening organizational structures. (Personal interview)

We would argue that, due to the way compensation payment is organized, this process of consultation and participation is actually undermined and replaced by a less constructive process where the financial questions are at the center of attention. A GTZ (German Development Corporation) advisor working closely with these processes said, “the consultation does not extend the governance process, it only serves to leverage resources to get investments” (personal interview). The existing process creates incentives for all the participants to use or receive money as a way to overcome problems relating to the industry. As the CEJIS representative states, the process of consultation should be a broader debate on development models and an interchange between the local communities, who know the local environmental conditions best, and the authorities and company representatives, who are more familiar with the technical issues of the projects, on the best way to move forward.

This is partly a problem that will persist almost regardless of how the process is organized. Operating companies can always be expected to seek to pay compensation rather than go through the more difficult, time-consuming and costly process of socio-environmental mitigation. It is also understandable that local communities seek tangible results when capital-intensive projects are being developed in their territories. However, the authorities should look for ways of organizing the process of consultation and participation that reduce the incentives for all the participants to focus on monetary compensation and increase the likelihood that the process will be more substantive in form.

41.

A related issue concerns the character of compensation payments. It is unclear whether compensation payments are used to the benefit of the communities that receive them, as there seems to be no assurance that the payments are distributed to those who are entitled to them or

that they are spent in the long-term interest of the social and economic development of these communities. In this regard, the representative of the General Directorate of socio-environmental management of the Ministry of Hydrocarbons and Energy said:

We as government recognize that there is a great weakness. We must resolve this issue in a legitimate way, but it is being distorted in process. That is, that resource is not being invested for the benefit of the community, but ends up being a resource that benefits a small group of leaders who ultimately end up benefiting from most of those resources, without it reaching the communities. So right now, for example, there are cases of leaders who got more than 100,000 dollars, which have not been accounted for, who are now challenged by their communities [...]. (Personal interview)

This aspect was also expressed by the representative of the Ombudsman:

I think that there is no equity in the distribution of this resource to communities. This is an issue which must be worked on, it is a process, which I do not criticize, but I've had many comments from that point of view from the people, from the communities. (Personal interview)

There are divergent accounts of how these resources are spent. While governmental authorities and representatives of various organizations expressed skepticism as to whether the compensation payments actually benefited most people in the communities, representatives of the communities themselves stated that they were indeed used for productive projects such as agricultural development and distributed through democratic decision-making processes. The APG representative stated that in five years they had received more than nine million dollars, and that the resources received for compensation are distributed between the Capitanías (grouping of several communities), each Capitanía distributing them among its communities. The APG requires that the community presents projects to receive funds, but does not require formal plans or budgets (personal interview).

It may be true that the distribution of compensation payments is decided democratically; we have not researched this question in depth. The point here is that there are no mechanisms to monitor that this is actually taking place, and since compensation payments are transferred in a lump sum to a bank account specified by a community representative, it is difficult for community members to hold their leaders accountable in this respect. Therefore, for the Chief of Staff of the Ministry of Institutional Transparency and Fight Against Corruption, “proper investment of these resources depends on the quality of the institution. The State does not monitor because it is not its responsibility” (personal interview). An example of what happens when the community suffers from a lack of competence and experience in project management is found in Villamontes, where compensation payments were used to pave all the streets in a town, instead of productive projects that could potentially generate more vital economic development (interview, representative of CARITAS working in Camiri).

Research carried out in Peru on a similar situation, large sums of compensation paid to community leaders, found that community leaders had been able to appropriate most of the compensation payments and that this created conflict, increasing intra-community inequality and community fragmentation (Incháustegui, 2010).

The issue of monitoring how compensation payments are spent is of course a thorny issue, because as the Chief of Staff indicates in the quote above, compensation is and should be the property of the community. A baseline principle is necessarily that communities themselves decide how to use the compensation payments. At the same time, however, we would argue that some guidelines and monitoring mechanisms should be introduced that increase the likelihood that the funds will be spent in the long-term interest of all the members of the communities.

Thirdly, a problem with the process is that it depends on local communities having the technical and organizational knowledge, as well as the resources, to conduct independent surveys and studies of the potential socio-environmental impacts of the project. The EIA is a highly technical document and it is doubtful that representatives of local communities can understand it sufficiently; it is also doubtful that representatives of the Ministry of Hydrocarbons and Energy can present it in ways that are understandable to local communities. The consequence of this could be either that people are excluded from participating effectively, that information is misrepresented by forces seeking to promote the gas project or that there is dependence upon those in the communities who have some technical competence (such as a technical team). It can happen that EIAs are conducted by private consulting firms that do not know the area and are not obliged to visit it, and then evaluated by community representatives who do not have enough technical knowledge or resources to conduct a proper evaluation of the EIA.

Given the relatively peripheral role of the environmental authorities in the process, there seems to be insufficient quality control of the EIA, so the dependence on local technical knowledge that is unlikely to exist in most communities is both a problem of the democratic deficit and a problem of insufficient quality control of environmental impact assessment.

The final problem in the design of the participation process, in our opinion, is the lack of integration of municipalities. The legal framework for participation includes only indigenous and peasant communities. Municipal governments have an ambiguous, or even non-existent, role in the participation process. We observed this during our fieldwork in Camiri, which we will return to later, and our informant from CEJIS confirmed it as well (interview); municipalities are merely listeners to the process, or in some cases not even aware that a participation process is being conducted in the vicinity. This is unfortunate, because hydrocarbon projects have large consequences for many of the areas of responsibility of municipal governments, such as the infrastructure, environment and local economy. Separating indigenous communities as

distinct entities in this process can make it less likely that municipalities will take the needs of indigenous communities seriously, and can make it more difficult for municipalities to mitigate the problems related to extractive activity.

5. THE NEW HYDROCARBONS LAW DRAFT

*- THE PURPOSE OF THE
LEGISLATION IS BASICALLY
TO IDENTIFY THE IMPACTS
AND EVALUATE MITIGATION
MEASURES.*

45.

5.1 THE NEW DRAFT

The Morales Government is in the process of passing a new Hydrocarbons Law, and a draft (anteproyecto) is currently circulating among state agencies. We will survey this draft here and outline some criticisms that have been directed towards the aspect of participation. The draft, like the current law, grants a “Right to Consultation and Participation of Indigenous Peoples and Native Peasants.” In this legislation the purpose of the consultation is basically to identify the impacts and to evaluate mitigation measures, eliminating, therefore, an obligation to reach an agreement or consent of the communities and indigenous peoples, as established in the current law.

Article 132

The Consultation is mandatory in character and the decisions resulting from the consultation process must be accepted and respected, and aims to identify the impacts that a plan, program, activity, work or project may cause on the environment and the population to determine measures to avoid or mitigate negative impacts and encourage positive ones, through the Environmental Impact Assessment.

As for the phases of consultation established in the current law, this draft reduces participation to only the stage prior to obtaining the environmental permit, eliminating the participation established for the approval stage of the project (Article 134). Another feature of the draft of the new law is that, unlike the current law, it provides that the Competent Authority responsible for carrying out the consultation process and the signing of the final agreement will be the Ministry of Environment and Water. This change addresses to some extent a weakness that exists in the current legislation, as we have argued above. As in the current legislation, the compensation is negotiated after an agreement has been reached. However, unlike the current law, the draft of the new law stipulates that compensation reaches a maximum of 1.5% of the total investment of the company (Article 139). The amount is determined by the Development Plan of each community (Article 140). For the Consultation and Participation Project Administrator at the Ministry of Hydrocarbons and Energy, the draft law is aimed at adapting to the political and social reality of the country. This involves seeking to accelerate the consultation process, to avoid a drawn-out process being an obstacle to investment (personal interview). The process of consultation and participation in the draft is illustrated in Figure 3.

The Hydrocarbons Law draft has been criticized by various institutions and analysts, including the Bolivian Forum on Environment and Development (FOBOMADE), the Centre for Bolivian Documentation and Information (CEDIB) and the Centre for Legal and Social Research (CEJIS), which have pointed to the limited nature of the rights to prior consultation and participation. For Arandia (2010) and Rodríguez (2010b), this means a clear contravention of the ultimate goal pursued by nationalization. The various observations on the draft are that, firstly, there is still a limitation to the types of individuals who have the

right to participate. Rodríguez (2010b) points out that according to the new Constitution, all citizens have the right to participate and be consulted on decisions that may affect the environment. However, this draft is limited solely to the participation of the peasant and indigenous population, like the existing legislation.

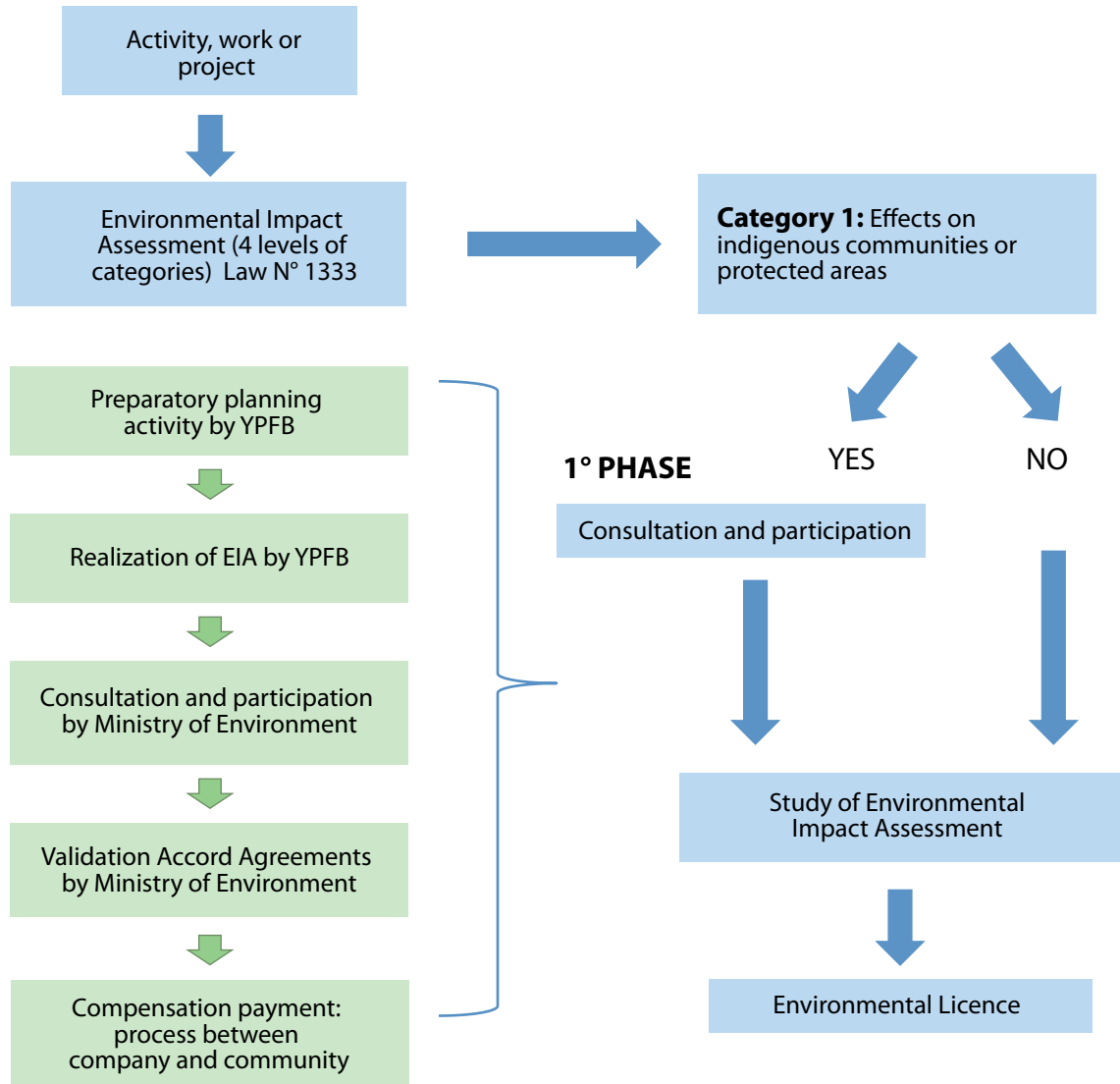


Figure 3: Consultation and participation process in the draft law.
Source: Own elaboration

A second point regards the purpose of the consultation process (Article 132). This purpose appears to conflict with the goals for consultation processes as set out in ILO Convention 169, which states that “(the) purpose of the consultation is to reach an agreement or consent on the proposed measures” (Article 6). That international convention states that although the consultation does not grant the power of veto, it must generate the necessary mechanisms to achieve a consensus (Organización Internacional del Trabajo, 2003). In this regard, Rodríguez

(2010a) and Villegas (2010a) note that in practice, consultation is not being regulated in a binding manner but only for information purposes, which contradicts not only the progress already made, but also the UN Declaration on Indigenous Rights and the ILO Convention 169, both signed by Bolivia.

On the issue of socio-environmental monitoring, it is notable that the content of the arrangements in the draft does not differ greatly from what is already established in the current Hydrocarbons Law. It maintains that both the representatives of peasant and indigenous peoples in each municipal section in the relevant area and the operating company will form an Area Committee for Socio-Environmental Monitoring. This will evaluate the potential impacts that may arise and manage the actions needed to mitigate any externalities. When there is disagreement with an Area Committee, it should be reported to the National Committee for Socio-Environmental Monitoring.

We are somewhat surprised that this structure is being maintained, since to date neither of these institutions appears to have been functioning. This shortcoming was noted both by the representative of the Environmental Inspector of the Ministry of Environment and Water and by the representative of the APG. To overcome this shortcoming the APG, together with various ministries, including the Ministry of Hydrocarbons and Energy, the Ministry of Autonomy and the Ministry of Development, signed an agreement that while the monitoring issue is settled, the community negotiates directly with the company. For the Environmental Inspector of the Ministry of Environment and Water, this agreement creates insufficient independent monitoring, as monitoring is overseen and financed by the company without state supervision (personal interview). Thus, Villegas (2010b) states that socio-environmental monitoring, despite its democratic appearance, has become an instrument of co-optation.

Finally, it appears that the preparation of the draft law did not entail an inclusive process with the participation of the social sector. The representatives of the APG and of CONAMAQ, in personal interviews, said they had not been consulted about the development of the new legislation, even though government representatives claim otherwise (interviews). Because of this, these organizations have developed their own draft laws (which could not be obtained by the authors).

In sum, it can be concluded that the draft of the new law does not represent significant advances in deepening and securing rights to participation. The draft, in its current form, does not appear to overcome the problems that we have pointed out in the existing framework. In fact, many of the existing problems seem to be reproduced in what is likely to become the new Law of Hydrocarbons.

6. EXPERIENCES FROM THE KAAMI, ALTO PARAPEJÍ AND IUPAGUASU CAPITANÍAS CONSULTATION CASE

*- THE INDIGENOUS
COMMUNITIES IN THE AREA
HAVE A LONG HISTORY
OF ENGAGEMENT WITH
HYDROCARBON ACTIVITIES.*

6.1 THE PROCESS OF CONSULTATION

So far this report has surveyed, analysed and critiqued the legal and institutional framework for participation in the Bolivian hydrocarbon sector, on the basis of reviews of laws and public documents as well as interviews with public officials. In order to gain a better insight into how this process works in practice, we will now focus on one particular case of a participation process. Upon our request, the Ministry of Hydrocarbons and Energy allowed us to take part in meetings with communities for this purpose. The process in which we participated was that of the 2D Seismic Prospecting - Iñau Block Project, which comprises the departments of Santa Cruz and Chuquisaca. The company responsible for creating the project was the Bolivian YPFB and the Venezuelan state company PDVSA, comprising the consortium Petroandina YPFB. The project is for seismic prospecting, meaning that it aims to search for hydrocarbon reserves in the subsoil and estimate whether and where a profitable exploitation project can be operated.

We participated in the second phase of the process, in which the identification of impacts and the negotiation of an agreement with the Capitanías of Kaami, Iupaguasu and Alto Parapetí were started. This process took place in the municipality of Camiri, located in the Department of Santa Cruz. The municipality of Camiri has a long history in terms of relations with oil companies, as such activities date back to the early 1900s. Camiri is known as the former “oil capital” of Bolivia, and has grown up around the hydrocarbon activities. In turn, the indigenous communities in the area have a long history of engagement with hydrocarbon activities.

6.2 IMPACT IDENTIFICATION

In the case of the consultation process with Capitanías de Kaami, Iupaguasu and Alto Parapetí, meetings took place over two days. The first day was spent on the identification of impacts of the proposed project, and the second on debate and signing of the agreement. For the first part, the identification of impacts, the regulations state that it must involve both the representatives of indigenous peoples and communities (affected) and the government. In this specific process, the communities decided to identify the impacts without the presence of representatives of the ministries. Present were the Minister of Hydrocarbons and Energy, the YPFB and the Ministry of Environment and Water. However, as a result this decision, the process was carried out only with community members on the first day.

Before the officials left, the technical team, representatives of the Ministry and the YPFB gave introductory speeches and outlined the expectations they had of the process. The technical team member from Kaami, in her speech, gave some background to the process and emphasized the importance of active community participation in the identification of impacts:

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The spirit of the consultation is first and foremost to inform those communities where will hydrocarbon activities go through, where they will impact, (...) to report that activity will be developed on their territories, how long it will last, what impact will this activity lead to, will it close water holes? Will there be soil degradation? If we do not know the activity we can only be silent, we can not comment, we can not become familiar with the extent of this activity. That is what the consultation and participation is for.

The General Director of Socio-Environmental Management of the Ministry of Hydrocarbons and Energy stressed the importance of moving ahead with the participation process, that there was no right for communities to veto extractive projects, but also that the Ministry was committed to a transparent and participatory process:

... it is not that we are here just talking and that everything that is said is taken by the wind, that's not what we want. We want all that is said to be incorporated into the study. Then we are the government authorities, the social and environmental monitors, that you will have during the development of the project, we will observe whether there is compliance with these observations, with those recommendations that have been incorporated.

The representative of the YPFB also emphasized the need for the process to move forward according to the schedule:

They've done a good job to identify potential socio-environmental impacts that will result from the project, and this will allow us to move forward, because the project has to start as scheduled according to plan and according to action plans that YPFB has

After the state authorities left, members of the communities presented the findings of an independent study they had conducted on the potential damages of the proposed project. Much of the first day was spent explaining to the other community members how the proposed project could impact on their environment and livelihoods, and reaching a consensus on a list of mitigable and non-mitigable effects. Impact identification was performed on the basis of the Public Information Document (DIP) provided by the company executing the project.

For the analysis and understanding of the DIP, the communities require a technical team that is able to transmit the contents of this document and the process to follow. In this case, the community had the help of four professionals: a journalist, a lawyer, a veterinarian and a biologist. Without specific training and without much support from the state or the company (according to the interviews), this technical team could present the findings of an independent study and a list of suggestions for inputs into the environmental study. A member of the technical team stressed that the independent study had been conducted with the participation of community members in the field. Another member of the technical team said that they had worked intensively for a month before the meetings to gather and analyze the information and to

create the presentation of the data to be used in the meeting. They had been promised salaries from the Ministry, but at the time of the meetings it had not been established how much they would receive. The technical team and the representatives of the communities said they had a decent relationship with the Ministry, but they perceived the Ministry to be aligned with the company rather than with themselves, and they felt that they had to defend their own interests vis-à-vis the Ministry (interviews).

It was clear that the quality of the participation process was heavily dependent on the qualifications and work of the technical team. The members of the technical team needed both a personal background in the area, familiarity with the community organizations, knowledge of the local indigenous language (Guarani) and technical competence from formal education. In addition, they had to be willing to work in a rural area, with little and unstable pay. In this context, it should be expected that not all communities have the presence and assistance of a technical team. As one member of the technical team said:

... I have studied in Tarija. In Tarija I could stay and work, may be in a public institution, or private ... But I wanted to work for the organization, I returned, and the easiest thing for professionals is to join the parent organization, in this case the APG or a Capitanía, and ask them how many trained people they have or how many trained personnel or at a professional level already work for them, [...] what specialties they have and so on. In the community there are professionals, but not many. They are mostly bilingual teachers, but bilingual teachers are just there, they stay at home and do not collaborate. (Interview)

As a technician told us, faced with this situation, “the community is vulnerable to decisions of the company and the Ministry. Because the APG does not have many technicians to assist in this process” (personal interview, Alto Parapetí technician).



Photo: Process of impact identification in Camiri

While in the process in which we participated there was a technical team that seemingly made a very good job of gathering data, presenting them to the communities and organizing the discussion, it seems highly unlikely that most communities can count on this level of technical support. This is worrisome, because technical competence seems lacking among the community members in general. During our presence in the meeting there was little or no active participation on the part of the other community members. Even though the independent study carried out by the technical team was presented in a pedagogical way, there were few questions and little input that could indicate that the information was understood and reflected upon by the other community members. There were very few women present, and those that were present were primarily taking care of children. These problems may weaken formal participation, because such participation relies on external factors such as technical competence and gender balance, which seemed to be lacking.

The identification of impacts and their subsequent categorization into “mitigable” or “non-mitigable” were reached through community consensus within one day. It seemed that the suggestions made by the technical team were more or less accepted by the community members without much debate or disagreement. We noted that several of the impacts that the community wanted to categorize as “non-mitigable” actually seemed to be mitigable.

6.3 SIGNING OF THE AGREEMENT

The second day of the meeting was planned for negotiating and signing the agreement between the representatives of the communities and the Ministry of Hydrocarbons and Energy. The final agreement document should contain the observations, suggestions, additions and recommendations put forward by the indigenous communities. In the case of the lupaguasu, Kaami and Alto Parapetí a number of observations on the environmental study were raised, on the basis of the work of the technical team. It was first raised that the information contained in the document was incomplete, as it did not include the Capitanías of lupaguasu and Kaami. An error had been made earlier in the process (during the first phase), when only Alto Parapetí had been considered part of the affected area. Second, people from the community expressed dissatisfaction regarding how the Environmental Impact Assessment had been conducted and questioned the information presented in it, claiming that the EIA did not reflect the reality in the communities and that not enough information about the process had reached the community members. Community leaders and one of the few female participants spoke on these points:

We do not know who did this work, or whether the consultant has actually come here to do this consulting, because only they have given us a completed document. So we have different observations on this document: our organizational structure is not recognized, and to some Capitanías the information has not arrived and not been spread within the communities. (Local chief)

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... We are victims of mistakes, and I believe that the EIA should be given to each of the Capitanías to be analyzed. We as homeowners know where we are sleeping, where we are standing, on what ground we are treading. What we are rejecting and what we are tired of, is that other people design [the projects] behind our backs. How many thousands of dollars must the consultancy have cost, and it is still poorly done, and we can not be victims of that (Community woman)

You have to give us respect. We don't want to happen what has happened to our brothers. They have finally signed, and then at the end [the company] has done what it wanted. (Local chief)

These objections were broadly popular among the participating community members, and they decided not to sign the validation agreement until they had been presented with a revised environmental study in which all their comments were taken into account. The government representatives argued strongly against this decision and urged the communities to sign the agreement. Speaking first, the representative of the Ministry of Hydrocarbons and Energy recognized that there were procedural and substantive errors in the document, but asserted that the purpose of the process was precisely to incorporate such observations into the final document. To secure the signature of the agreement, the representative offered concessions, such as personally making sure that each and every observation of the community would make it into the final document and allowing the community to review and approve the document again before the environmental licence was granted.

Secondly, the representative of the Ministry of Environment and Water argued that not signing the agreement would be a breach of what was decided in the memorandum of understanding, in which the communities had already agreed to a date for signing. Breaching this agreement could be grounds for nullifying the entire process. The Ministry of Hydrocarbons and Energy's representative again made a similar statement to convince the communities to sign:

Our suggestion that in the agreement there will be a commitment from the Ministry of Hydrocarbons and Energy and the Ministry of Environment and Water to forward the EIA to the APG and to the Kaami, Iupaguasu and Alto Parapetí Capitanías before approval of the environmental permit. In 15 days, the time in which the Environmental Impact Assessment is evaluated, you can verify that any comments you have made have been corrected and you can approve that we proceed with the approval of the Environmental Impact Assessment. That's the only suggestion, and is as stated by the Ministry of Hydrocarbons. (Representative of the Ministry of Hydrocarbons and Energy)

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Thirdly, the YPFB representative also argued for the communities to sign the agreement (despite the participation of the operating company not being stipulated in the regulations). He stated that his role consists of

being an observer of the procedure, to verify that it complies with the legal norm and is conducted in accordance with the law. With regard to the consultation process for the Iñau Block he argued that it had been conducted in accordance with the law, and that the communities' decision not to sign the agreement was without justification.

It was clear from the discussion that the representatives of the different agencies of the Government (the Ministry of Hydrocarbons and Energy, the Ministry of Environment and Water and the YPFB) were closely aligned in opposing the decision of the communities. This is notable, since these institutions have different responsibilities. The responsibility of the Ministry of the Environment and Water, for example, is the protection of the environment, not the promotion of an extractive project. Nevertheless, they all used the argument that it was important that the agreement was signed that day and not postponed, as this would jeopardize the project as a whole and the investment agreements of the YPFB. The community leaders emphasized that they were not trying to block the project, but that they were interested in signing an agreement once the EIA had included the other two communities.

Finally, despite the authorities' attempts to have the agreement signed, the result was the postponement of the signing of the agreement until early 2011. It was agreed that the observations and suggestions of the community would be included in the EIA of the project, and that the Ministry of Hydrocarbons and Energy would commit to following up and making sure that the observations would be included.

The agreement was signed in a later meeting in Camiri on January 13, 2011. The agreement has three main parts: one listing the potential impacts and categorizing them as "mitigable" and "non-mitigable"; one listing general recommendations for the project; and one with specific recommendations to be included in the EIA. Roughly half of the potential impacts are listed as "non-mitigable" in the agreement. Those that are mitigable are primarily those related to transportation and some of the effects of perforation and the use of explosives. It is agreed that transportation has to take place during certain hours of the day, that the company has to maintain the roads and that the use of explosives should be avoided within 150 meters of areas vulnerable to soil erosion. Other effects of explosives and the influx of personnel are among the non-mitigable effects. It is stated in the agreement that these aspects of the project will lead to the destruction of natural habitat, disrupt the reproductive cycle of animal species important to local livelihoods, increase livelihood costs and introduce new cultural and economic forms that disrupt traditional ways of life. The agreement also established that the socio-environmental monitoring would be conducted by a committee, formed by the three communities in question. The company is committed to providing accurate and timely information to assist the work of the monitoring committee.

6.4 THE ACTORS IN THE PARTICIPATION PROCESS

The final agreement of the consultation and participation process is signed exclusively by representatives of the Ministry of Hydrocarbons and Energy, the YPFB and the affected indigenous communities. The socio-environmental effects that are considered are also exclusively those that pertain to the indigenous communities. Considering the long petroleum tradition and trajectory that the city of Camiri has and the importance of the petroleum industry to this city and municipality, it is surprising that municipal and other actors are not included in the process. The representatives of the municipality whom we visited, including the Director of Economic Development, were not aware of the ongoing participation process in the same city. In an interview, the Director said that the municipality never played an active role in the consultation and participation processes in the hydrocarbon sector.

Other interviewees, such as the representatives of the APG and the German Development Corporation, GTZ, said that cooperation between indigenous communities and municipalities in matters of extractive industries depended on the political “colour” of the municipal government and personalized relations. There is no formal integration of the municipalities beyond this. Neither does the municipality play a role in the phase after the consultation and participation process, when the amount to be given as compensation is negotiated. Municipalities have no influence over how compensation payments are spent. As an APG representative said:

On the subject of participation we almost do not interact with municipalities, since municipal governments have their own jurisdiction, and Capitanías have their communal territories, with separate jurisdiction and titles. (APG representative)

While it is true, as the representative of the APG indicates, that the extractive projects subject to the participation process are within the jurisdiction of the community organizations and not the municipalities, it is clear that many of the potential impacts affect the municipal jurisdictions as well, for example job markets, the influx of personnel, work migration, roads and infrastructure. The lack of integration of municipalities signals a democratic deficiency in the participation process, since citizens who are not defined as members of an indigenous community are not able to voice their opinion about a project developed in their vicinity. It is also a problem of environmental governance, since the technicians in the municipality would most likely have identified further environmental impacts that could have been mitigated.

6.5 SUMMARY OF THE PARTICIPATION PROCESS OF THE 2D SEISMIC PROSPECTING - IÑAU BLOCK PROJECT

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The experience of the consultation and participation process in the 2D Seismic Prospecting - Iñau Block Project illustrates both the empowerment and the disempowerment of the affected communities in relation to their rights to participation. The legal framework

establishes some formal rights and a formal process that the state agencies are bound to follow. There is no right to veto, but the power of the communities is related to their ability to delay the process or to threaten to do so. The refusal to sign the agreement in November 2010 made it clear that the Ministry of Hydrocarbons and Energy is under pressure to finish participation processes quickly, and that it is open to incorporating different demands of the communities in order to obtain an agreement. In this case, the input from the communities made it into the agreement and establishes some limitations on how the company conducts the project. The power of the communities is that the state authorities have to listen to their concerns and take at least some of these into account.

However, the experiences from this participation process also make visible the disempowerment of the communities. Community members without formal training had very little opportunity to assess the potential damages of the project and had to trust a small team of technicians that worked with very little resources. The communities were also pressured by the threat that the project could be cancelled, and that the development of the country in general would be interrupted, if they did not sign the agreement according to the schedule (even though the error in the EIA was not the fault of the communities). The representatives of the state agencies (the Ministry of Hydrocarbons and Energy, the Ministry of Environment and Water and the YPFB) appeared as a united force dedicated to pushing the agreement through. Although the agreement contains important input on the mitigation of potential impacts, it cannot be said that the communities had substantive opportunities to participate in the design of the project.

58.

7. CONCLUSIONS

- OUR POINT IS RATHER THAT A PROPER AND SUBSTANTIVE PARTICIPATION PROCESS WITH MECHANISMS THAT ALLOW CITIZENS TO HOLD LEADERS ACCOUNTABLE AND RESOURCES TO BE DISTRIBUTED IS THE BEST WAY TO ACHIEVE THESE BROAD DEVELOPMENT GOALS.

7.1 GENERAL REFLECTIONS

Mechanisms that allow citizens to participate in the design of natural resource extraction and to have a share in the benefits that are generated from such extraction are of vital importance to social, economic and political development, as well as to environmental sustainability. Bolivia is one of the most advanced countries with regard to granting rights to participation and consultation in extractive projects. Therefore, it is of general interest to assess the participation process in the hydrocarbon sector of this country in order to learn from policy innovation and from enduring constraints on the democratization of natural resource governance. In this report we have attempted to assess the current process of participation in Bolivia by focusing on both the legal and the institutional framework and on a particular case showing how this legal framework is implemented in practice. We have identified several limitations to this framework that potentially undermine democratic participation and efficient governance.

At the most general level, we find the concept of a “double discourse” used by some of our informants to summarize well the current situation for participation in the Bolivian gas sector. This concept illustrates well how the Morales Government has, on one hand, promoted and partly implemented a radical discourse on the people’s ownership of natural resources, indigenous people’s rights to their own territories and bottom-up democracy. New rights have been written into the new Constitution and legal norms establish processes for communities to participate in project design. This discourse has spread internationally, and Bolivia is seen as being at the forefront of democratic ownership of natural resources. On the other hand, Bolivia is seeking foreign investment in the hydrocarbon sector and is pushing for a heavy expansion of extractive activity. Representatives of the Government, including Vice-President García Linera, have stated publicly that the expansion of the gas sector is imperative in order to generate the revenues to finance social programs and general welfare, and that communities are often obstacles to achieving what is in the interest of the country as a whole.

In our opinion it is clearly understandable that Bolivia, one of the poorest countries on the Latin-American continent, is seeking to use its ample natural resource reserves to generate economic and social development for its citizens. We are not suggesting that some local communities should be able to hold back the development prospects of the country as a whole. After all, the subsoil resources are the property of all Bolivians, not just those who happen to be living directly above them. Our point is rather that a proper and substantive participation process with mechanisms that allow citizens to hold leaders accountable and resources to be distributed is the best way to achieve these broad development goals, and the best way to avoid the “resource curse” traps that other resource-rich countries have suffered. Instead of a “double discourse” that poses economic development and democratic participation as two distinct and incompatible goals, the government should aim for a more integrated strategy of conceiving substantive participation as a pillar in the broader process of inclusive development.

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This means that participation has to involve a deeper debate on local development and that compensation payments are used for purposes of local development.

In practice, what is called “participation” is often merely a right to be informed. In Bolivia, the rights of indigenous communities go beyond simply a right to be informed. However, at the same time, there are also important weaknesses, both in the legal framework and in practice, which undermine substantive participation. We have a series of criticisms and suggestions regarding the current process of participation, reached on the basis of the study described above, which can hopefully contribute to making the participation process in Bolivia more substantive and effective. The following summarizes the weaknesses in the current process:

- Insufficient independent monitoring: the Ministry of Hydrocarbons and Energy is both an actor and the judge in consultation and participation, in charge of promoting both extractive activity and participation. This problem is made worse by the fact that the YPFB (with its strong links to the Ministry of Hydrocarbons and Energy) is increasingly the company that operates projects. The Ministry of Environment and Water is subsidiary to the Ministry of Hydrocarbons and Energy in the process and it is not clear what possibilities it has to intervene independently of the decisions made by the Ministry. In practice, there seems to be no entity that can make sure that the Ministry is conducting the participation process properly.
- Overemphasis on compensation payments and a lack of monitoring of compensation payments: compensation payments create perverse incentives for all the actors in the process, potentially resulting in environmental damages being compensated for rather than mitigated. For communities the result is a quick and tangible outcome, for the Ministry of Hydrocarbons and Energy it makes it easier to reach an agreement and for companies it is probably easier and cheaper to compensate than to mitigate. Nevertheless, even though this is an “easy solution” for the actors involved, the longer-term effects on environmental sustainability are worrying. Participation becomes a question of money rather than a more substantive debate about local development. It is also unclear what happens to compensation payments once they are paid out; there are no mechanisms to ensure that they are not captured by local elites or that they are used for local development purposes. If compensation payments can be captured by local elites, this creates another perverse incentive, as local leaders are in a position to “negotiate away” environmental mitigation for higher compensation payments.
- The lack of capacity in the general population of communities to participate effectively: as was clear in the case of the participation process of the 2D Seismic Prospecting - Iñau Block Project, community members are not able to participate in an active and informed manner in the assessments of impacts, and this assessment depends on a team of technicians working with few resources. The EIA is a highly technical

document that requires technical competence to understand, and it is doubtful whether most communities possess this.

- Failure to include municipalities in the process: the lack of integration of municipalities creates unclear structures of rights and responsibilities, and is both a problem of democratic inclusion and one of environmental governance. Local citizens who are not defined as members of an indigenous community do not have the opportunity to voice their opinions about projects developed in their vicinity, and the municipalities that are affected are not given a chance to suggest methods of mediation or to plan their own mitigation properly.

7.2 RECOMMENDATIONS

On the basis of what we see as the weaknesses of the process, we will propose the following recommendations for strengthening substantive participation and development outcomes in the hydrocarbon sector:

- The community representatives conducting independent studies, assessments of the EIA and monitoring should be properly trained and funded. This training should not be undertaken by the Ministry of Hydrocarbons and Energy but by the Ombudsman (possibly with the assistance of the UNDP), which appears to be more independent, has fewer vested interests in extractive activity and has more experience of working with communities. There are already legal requirements for companies to fund the participation process and monitoring, but capacitation should be included as an element in these requirements. Authorities have to improve their compliance with these requirements.
- The role of the Ministry of Environment and Water in the environmental assessment and monitoring should be strengthened. The Ministry should function as an independent authority in these issues, countering the strong pro-extraction position of the Ministry of Hydrocarbons and Energy and the YPFB.
- The establishment of mechanisms to monitor compensation payments to communities should be considered, as well as some broad requirements for how the funds are spent. The primary goal of this monitoring should not be to micro-manage how compensation payments are spent, but to avoid corruption and discretionary spending by local elites. Communities receiving compensation payments should be required to create investment plans through democratic decision-making processes within the communities and have these audited by an independent authority.

APPENDIX 1: LIST OF INTERVIEWS

No.	Name	Position	Location
1	Roberto Quiros	Legal Advisor, Human Rights Permanent Assembly	La Paz
2	Teddy Cuentas	Former Vice Minister of Mining	La Paz
3	Farit Rojas	School of Law Academic, Bolivian Catholic University	La Paz
4	Eduardo Rodríguez Veltzé	Dean of Law, Bolivian Catholic University and Former President of State	La Paz
5	Omar Quiroga y Lourdes Calla (Head of Prevention and Socio-Environmental Control Unit)	Director General for Social and Environmental Management, Ministry of Hydrocarbons and Energy (MHE)	La Paz
6	Marcelo Oropeza	"Consultation and Participation" Project Manager of the MHE	La Paz
7	Nardy Suxo	Minister of Institutional Transparency and Corruption Combat (MTILCC)	La Paz
8	Crispín Mamani	Socio-Environmental Consultant, MHE	La Paz
9	Reynaldo Morales Medina	Secretary General of the FSTPB Union of La Paz	La Paz
10	Olmer Torrejón	Chief of Staff MTILCC	La Paz
11	José Domingo	Executive Secretary, National FSTPB	La Paz
12	Paloma Gutierrez y Jonni Tola	Social Demand Attention and Monitoring Responsible, Vice Minister of Coordination with Social Movements and Civil Society	La Paz
13	Boris Bismarck Antezana	Representative Ombudsman La Paz	La Paz
14	Pedro Calisaya	Complaints Unit, Ombudsman	La Paz
15	Hugo Fernández	Director of Finance, Camiri Town Hall	Camiri
16	Jorge Campos	Productive Economic Development Director, Camiri Town Hall	Camiri
17	Maria Isabel Canedo	Consultant, Youth Theme, GTZ	Camiri
18	Roselyn Flores	Social Area, Social Pastoral Caritas	Camiri
19	Nelson Bartolo	Secretary of Natural Resources, Guarani People's Assembly (APG)	Camiri
20	Hugo Molina (technician, Alto Parapetí) + Fidel (natural resources leader, Alto Parapetí) + Iguapasu Technician	Technical Team Member, Alto Parapetí	Camiri
21	Fidel, man from community	Leader, Alto Parapetí	Camiri
22	Reynaldo Gómez	Local technician, monitor	Camiri
23	Freddy Hurtado	Representative, YPFB, Chaco region	Camiri
24	Angélica Sarsuri	Authority, Support for the organization, CONAMAQ	La Paz
25	Analia Guachalla	Environmental Inspector, responsible for Consultation and Participation, under the Directorate General of Environment and Climate Change	La Paz
26	Miguel Angel Vargas	Legal Area, La Paz Regional Office, CEJIS	La Paz
27	Eugenio Mullucundo	Nations and Indigenous Peoples' Human Rights Program Coordinator, native farmer	La Paz

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