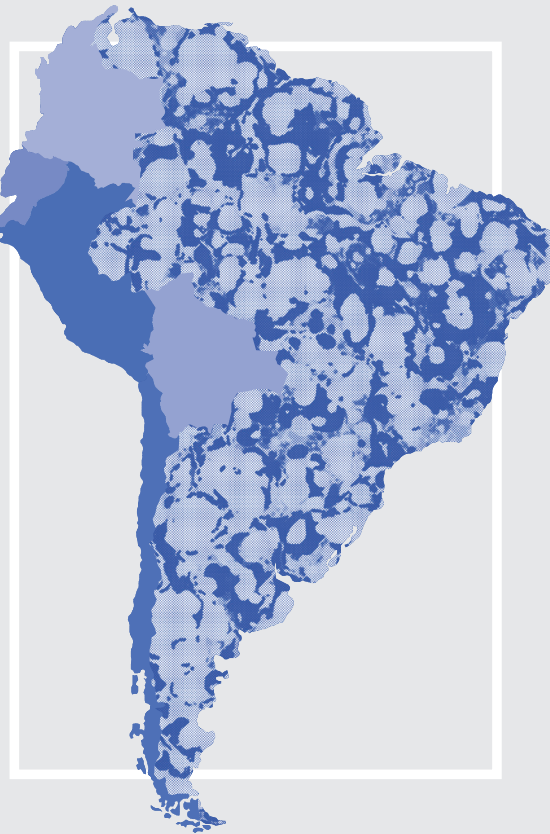


**Mining and Institutional Frameworks in the Andean Region.  
The Super Cycle and its Legacy, or the Difficult Relationships  
between Policies to Promote Mining and Hydrocarbon  
Investment and Institutional Reforms in the Andean Region**



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Mining and institutional frameworks in the Andean Region. The super cycle and its legacy, or the difficult relationships between policies to promote mining and hydrocarbon investment and institutional reforms in the Andean Region

March, 2017

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# Presentation

A number of years have passed since the end of the so-called “super cycle” of the extractive industries, which was characterized by high demand and high prices in international markets for minerals and hydrocarbons from the Latin American countries, and by an abundance of fiscal resources that their exploitation has generated for the governments of the producer countries.

The results from their impact in the region and the challenges stemming from the situation of falling prices have been focused on the productive and fiscal dimensions. To what extent have the economies of the region reaffirmed or returned to a primarily export character? What are the necessary paths towards productive diversification and tax reform in order to lessen dependence on the exportation of these commodities? Are ongoing policies in the producer countries the best response to the challenges posed by the post-super cycle era? These are undoubtedly fundamental questions to be analyzed, now that the passage of a few years has given us perspective about the super cycle and its legacy.

However, in this debate, the same attention has not been given to another set of questions, associated with the impact that the super cycle had on institutional reform processes that were already underway or that coincidentally began at the start of the rise in prices and in demand for our natural resources. What happened to the institutional mechanisms created to enable civic participation in a range of public decisions associated with natural resources? What happened with the decentralization processes implemented to transfer decision-making capacities to subnational governments about the exploitation of natural resources and management of the revenues that these generate? What happened with the processes for building environmental institutionalities in charge of managing the environment in our countries?

The research work entitled “Mining and Institutional Frameworks in the Andean Region. The Super Cycle and its Legacy, or the Relationships between Policies to Promote Mining-Hydrocarbon Investment and Institutional Reforms in the Andean Region” –is the result of a collaborative effort between GIZ, NRGi and a group of civil society organizations in the Andean countries (Bolivia, Chile, Colombia, Ecuador, Peru). It was proposed precisely to help fill that gap, investigating the impact that policies to promote extractive investments before and during the super cycle had on institutional reform processes that were conceived to give voice to local populations in public affairs in which they were interested, in order to give greater decision-making capacity to subnational governments and strengthen the capacity of the State to ensure sustainable use of natural resources.

GIZ and NRGi share a common concern for the governance of natural resources, understood as organization of the system for decision-making about their exploitation. From this perspective, at this time we felt that it was opportune to develop this reflection about the way in which civic participation, decentralization and environmental management have progressed, stagnated or moved backwards during the super cycle, in order to contribute towards the debate about which policies must be promoted now in these three fields to improve the governance of natural resources in the new context that is opening up following the end of the super cycle. We hope to have achieved this common purpose.

GIZ has been given the responsibility by the Federal Ministry for Economic Cooperation and Development of Germany, in tandem with the Federal Institute for Geosciences and Natural Resources (BGR, from its acronym in German), to implement the program entitled “Regional Cooperation for Sustainable Management of Mineral Resources in the Andean Countries”, in close cooperation with our counterpart, the ECLAC. One of the main topics in that program is Stakeholder Governance. GIZ, in the framework of the regional program, supports interaction among the different actors, the State, the private sector and civil society. Also, as in all activities of the program, the aim is to contribute towards the achievement of the 2030 development agenda, in this case, for example, supporting the creation of partnerships (SDG 17); and to lay the foundations of the discussion to achieve sustained economic growth (SDG 8).

The objective of this work has been to support regional discussion within the civil society and generate capacities as the basis for participation in a technical discussion with diverse points of view. This work is the fruit of an effort by civil society organizations in the five countries, and the efforts by the authors of this regional study to summarize the results from the five country analyses. The positions expressed are not necessarily shared by German cooperation or by GIZ, but rather express the analysis and interpretation of the civil society whose active and substantial involvement is an indispensable condition for better governance and greater sustainability in mining.

Natural Resource Governance Institute (NRGI) is a nongovernmental organization that helps people to obtain benefits from the existing oil, gas and mineral resources in their countries. We do this through technical advice, promotion, applied research, policy analysis and the development of capacities. We work with change agents within the governmental ministries, civil society, media, parliaments, private sector and international institutions, to promote governance with accountability and effectiveness in the extractive industries.

We do not want to end this presentation without first expressing our thanks to the counterpart institutions of NRGI in Latin America (Fundación Foro Nacional por Colombia – Colombia, Fundación Jubileo – Bolivia, Grupo Faro – Ecuador, Grupo Propuesta Ciudadana – Peru, and Terram – Chile), whose national reports were very useful in putting together this regional report; the Red Latinoamericana sobre las Industrias Extractivas (RLIE), whose regional venues for reflection have been the scenario for this collaborative and comparative initiative; our consultants Eduardo Ballón and Raul Molina, who contributed their previous experience in this field, reviewed all of the national materials, carried out additional research and undertook the final drafting; and Claudia Viale, of NRGI América Latina, who coordinated the project.

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NRGI Regional Director for Latin  
America



# 1.

## ANALYTICAL AND METHODOLOGICAL FRAMEWORK

### 1.1 The working hypotheses

This work is guided by two central hypotheses:

The first is that policies aimed at promoting a greater number of investments to capture the greatest amount of extractive revenue during the so-called super cycle<sup>1</sup> of commodities<sup>2</sup> have had a great impact on three long-standing processes of reform of the State in the Andean countries<sup>3</sup>: on decentralization, mechanisms for participation and consultation, and on the building of environmental institutionalality.

The second hypothesis is that governments are reacting to the end of the super cycle with common policies that make it possible to speak of a “race to the bottom”<sup>4</sup>, a set of policies to favor extractive investment in the new scenario, which negatively affect the many or few advances achieved (or maintained) during the above-mentioned boom in the field of decentralization, mechanisms for participation and consultation, and for building environmental institutionalality.

### 1.2 The conceptual framework

#### *About cycles and super cycles*

In the historical experience of Latin America, we can identify –for analytical purposes– the existence of multiple cycles over time and multiple types of cycles at each moment.

Regarding the existence of multiple cycles in modern history, recent evidence generated by the Economic Commission for Latin America and the Caribbean (ECLAC/CEPAL) shows that, speaking only of mining and hydrocarbons, over the past decades, Latin America has actively participated as an exporter of raw materials in four large worldwide cycles associated with a) industrialization of the United States of America (from the end of the 19<sup>th</sup> century to the beginning of the 20<sup>th</sup>), b)

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1 Cycle of high demand and high prices for minerals and hydrocarbons, which began at the turn of the 21<sup>st</sup> century and later declined, in the case of minerals since 2012, and in the case of hydrocarbons was abruptly cut off in mid-2014.

2 In this case, we basically refer to mining and hydrocarbons

3 We are talking about Colombia, Ecuador, Peru, Bolivia and Chile.

4 This refers to the way in which our countries compete with each other to attract investments in extractive activities through tax benefits and by making environmental standards and procedures more flexible along with participation and consultation with local populations.

the reconstruction of Europe and the industrialization of Japan following the Second World War, c) the wars of the Middle East and the pressures brought to bear by the Organization of Petroleum Exporting Countries (OPEC) to foster price rises, and d) the urbanization and industrialization of China and other Asian countries<sup>5</sup>.

But it is also important to stress that, within each historical cycle, there can be multiple types of cycles. This can be illustrated through the Peruvian experience, which combines:

- A long cycle of public policies to promote extractive investments, which range from structural adjustments, privatization of state mining and oil assets and the design and implementation of policies to promote investments in these activities (since the early 1990s and until now).
- A cycle of concessions, which is part of and an expression of policies to promote investments.
- A cycle of investments in response to those policies, which began in the 1990s and continues until now.
- A cycle of production that responds to the maturation of investments, which would constitute an “extractive boom”.
- A fiscal cycle of significant capture of mining revenues, which is an expression of the international super cycle of high prices and translates into increased weight for the extractive sector –above all in mining– in the export basket and in revenue generation.

José de Echave (of the Peruvian nongovernmental organization CooperAccion and a participant in the GIZ-NRGI discussion workshop on the draft versions for this research) has called attention on the importance of observing the couplings and decouplings between these different cycles. For example, in the Peruvian case, while the fiscal cycle has ended and the cycle of concessions and investments in exploration is now concluding due to the fall in international prices, pro-investment policies are maintained and becoming even more aggressive, while the maturation of investments already made with medium-term perspectives means that the production cycle is maintained<sup>6</sup>. In other words, there is a decoupling between a number of these cycles that had become concurrent between 2000 and 2015.

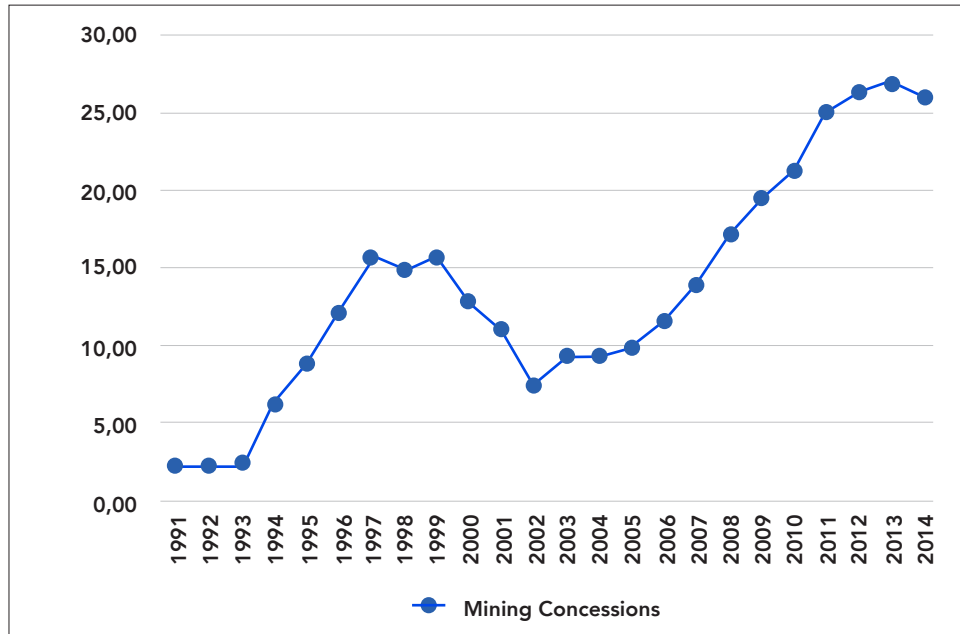
The graphs below illustrate this Peruvian experience. It should be clarified regarding this point that policies to promote investments come from the early 1990s with the privatization of mining and oil assets, which at that moment were in the hands of the State.

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<sup>5</sup> Acquatella, Jean. *Evidencia estadística de Super Ciclos en el precio real de los metales y el petróleo: 1900-2015*. Santiago de Chile: Comisión Económica para América Latina y el Caribe (CEPAL), 2016. Comisión Económica para América Latina y el Caribe (CEPAL). Presentación al Taller GIZ-NRGI, Santiago de Chile, May 13, 2016.

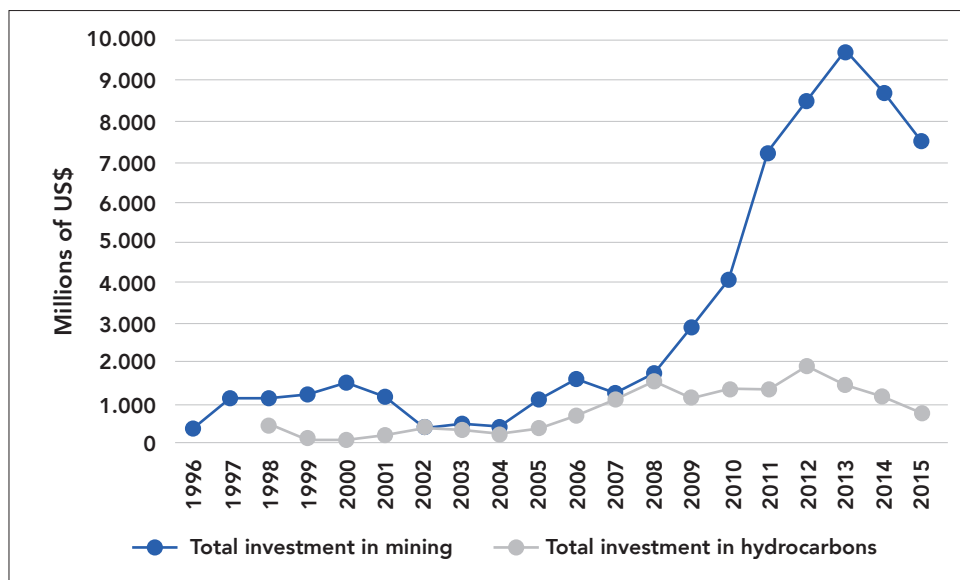
De Echave, José. *Súper Ciclo y Boom Extractivo ¿Es lo mismo?* Lima: CooperAccion, 2016. See at: <https://goo.gl/zLKwEO>

Graph No. 1  
Peru: Mining Concessions



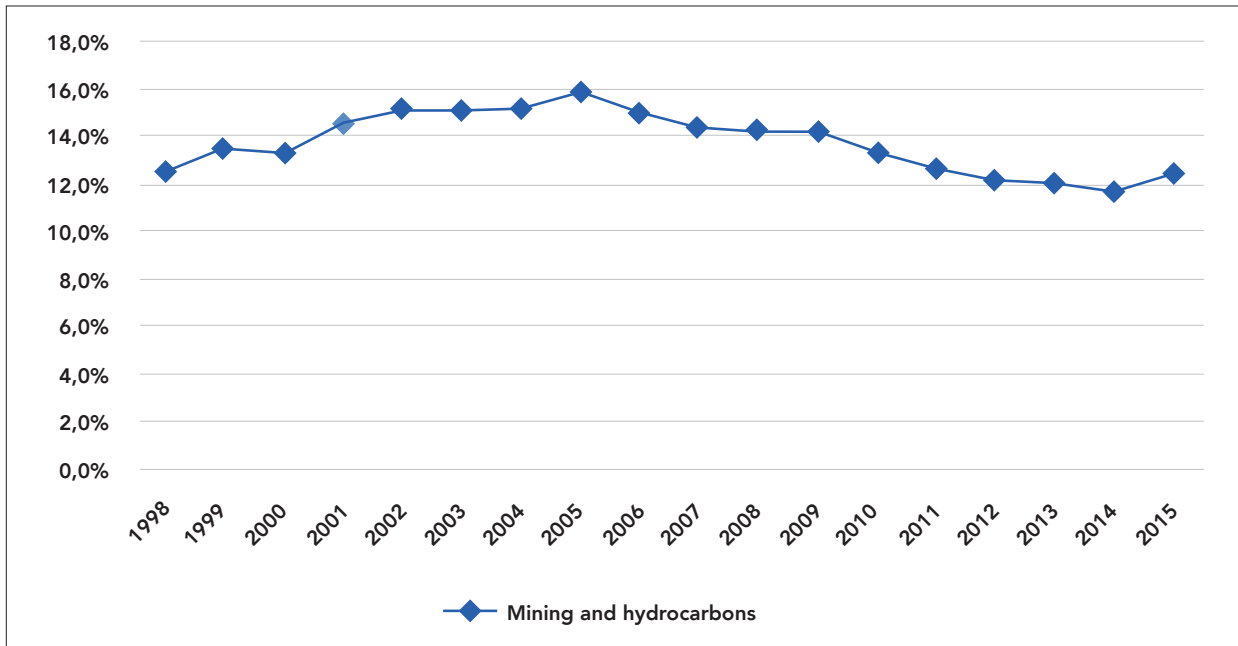
Source: Instituto Geológico, Minero y Metalúrgico (INGEMMET). See at: <https://goo.gl/W7sd3i>

Graph No. 2  
Peru: Mining Investments



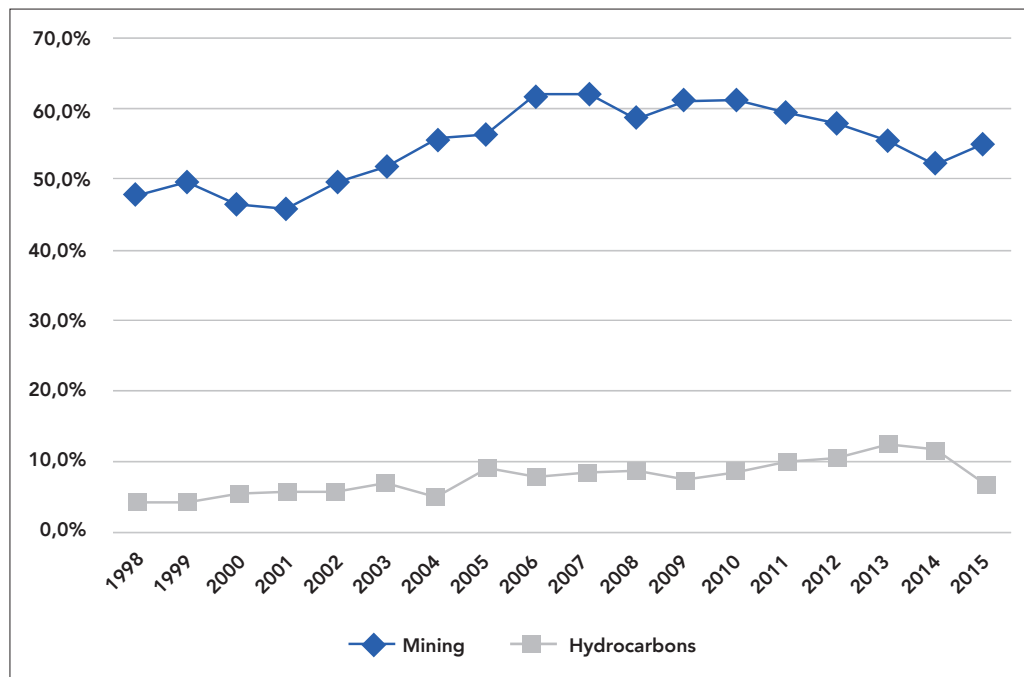
Source: Ministry of Energy and Mines (Minem); PERUPETRO S.A

**Graph No. 3**  
**Peru: Extractive Gross Domestic Product (GDP) (mining, oil and gas)**



Source: Instituto Nacional de Estadística e Informática (INEI). See at: <https://goo.gl/oh8y36>

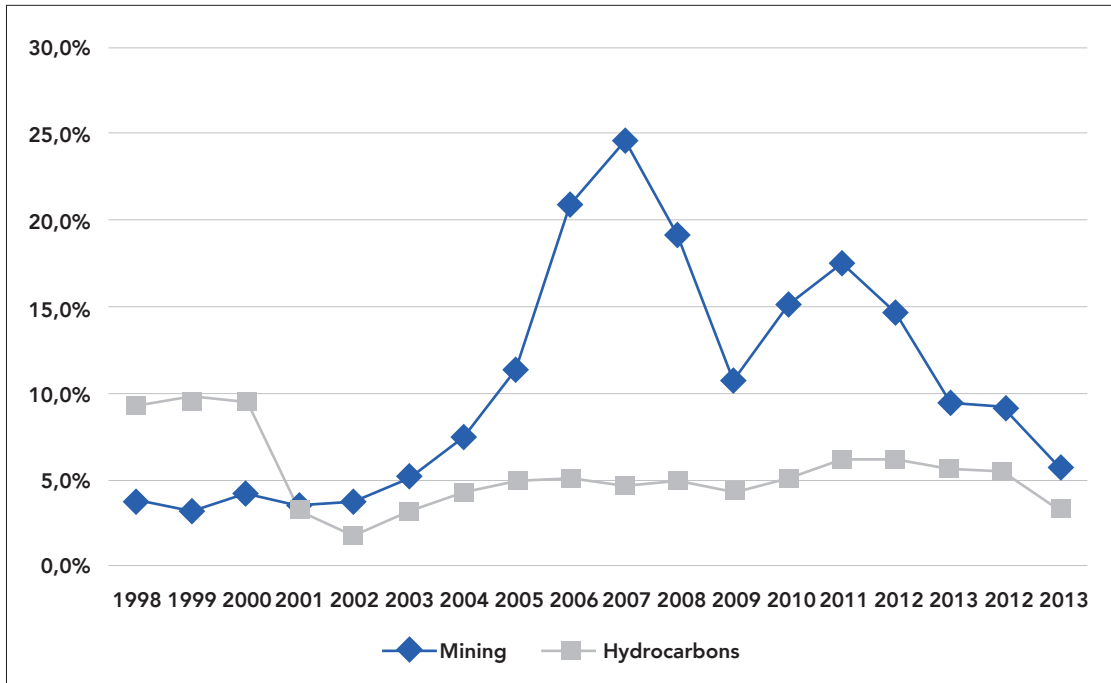
**Graph No. 4**  
**Peru: Extractive Industries as a Percentage of Exports**



Banco Central de Reserva del Perú (BCRP). See at: <https://goo.gl/AAlhqC>



**Graph No. 5**  
**Peru: Extractive Industries as a Percentage of Tax Revenue**



Superintendencia Nacional de Aduanas y Administración Tributaria (SUNAT). See at: <https://goo.gl/7MTI2n>

For the purposes of this research, we refer to the impact that policies to promote extractive investments have had before and during the recent super cycle (or the fiscal cycle), which began in the 2000s and lasted until 2014, on the three identified institutional reform processes: decentralization, participation and environmental management.

### **About the “race to the bottom”**

Our second hypothesis is that the countries in the Andean region are immersed in a “race to the bottom”, consisting of a set of fiscal, social and environmental policies that negatively affect the institutional reform processes under study.

Before getting into the analysis as such, it is important to clarify that by “race to the bottom”, we are referring to policies based on the impression that the actors involved have about their real impact, without our being able for the moment to fully evaluate their specific scopes. Once again, a Peruvian example dealing with Environmental Impact Assessments (EIA) may be useful to illustrate this point.

The government of Peru has decided to reduce the time and streamline the EIA approval process to make the country more attractive for extractive investment. Thus, while business sectors are satisfied with these measures, environmentalist sectors are severely critical. It should be pointed

out that we are not affirming that EIA approved prior to these measures, which took more time and included more procedural requirements, have necessarily been of good quality. Nor that EIA approved after implementation of the reductions and streamlining are necessarily of lesser quality than the previous ones. It is evident, however, that this involves easing requirements and accelerating processing and thus brings with it enormous risks.

Also, as long as we do not know if the slump has already ended or will continue, or when and to what extent there will be a recovery, we also cannot really know whether the above-mentioned measures that have been applied until now will be left as they are or complemented by additional ones aimed in the same direction. We also do not know what their results will be in terms of investment or the effects on the institutional reform processes being implemented. In short, we do not know if we are at the beginning, the middle or already at the end of this race, and it is therefore impossible to assess its final impact.

### ***About the relative autonomy of the State***

The processes under study for reform of the State (decentralization, participation and environmental management) respond to complex rationales that combine internal demands and negotiations with international trends and pressures in response to medium and long-term contexts.

They are thus medium and long-term processes that respond to endogenous social and political dynamics as well as large-scale international trends, and in many cases clash with the immediate interests of those who hold economic and political power under certain circumstances.

This is not to deny that business elites at all times have a great capacity to define which public policies are designed and put into practice, or that political elites are, in many cases, completely subordinate to economic ones. Nevertheless, it is acknowledged that the State, and the institutions of which it is composed, have a certain autonomy in relation to those same dominant or hegemonic sectors. This is because the need to protect the reproduction of the whole sometimes leads to a clash with the immediate interests of one of the parties, even when it is the dominant party.

In the Peruvian case, for example, the agricultural policy aimed at allocating part of the agricultural lands for crops (*cultivos de pan llevar*) and part for the production of cotton and sugar for the national food industry was maintained by ministers of agriculture who were also landowners during governments dominated by the agroexport oligarchy. Even though the landowners were directly harmed by these measures<sup>7</sup>, the prevailing logic was that the urban population must be kept calm because it was the only existing electorate.

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7 Monge, Carlos. *If the people are sovereign, the people must be fed*. Ph.D dissertation. Miami: University of Miami, 1992.

The mining lobby has therefore undoubtedly been important in Peru in defining public policies in recent decades. Because this is undeniable, it also follows that they regard the Ministry of the Environment as a hindrance to their interests. It is clear they would prefer that it would not exist. However, the creation of the National Environmental Council (Consejo Nacional del Ambiente) and then of the Ministry of the Environment did take place. It does not seem possible today, despite the expressed desire of these sectors, that this Ministry could be eliminated. The same thing happens in general terms in processes such as decentralization and civic participation, particularly with the prior consultation law.

Currently in Colombia, a similar situation can be seen: successive measures promoted by the government and with the approval of the mining and oil industry groups have been paralyzed by the Constitutional Court and the Council of State, because they contradict explicit constitutional mandates regarding consultations with indigenous peoples and the coordination of policy measures with subnational authorities.

It should be emphasized that the levels of autonomy and specific institutional transformation processes are not similar in every region of the world. Even so, certain similarities can be observed within them, even though the times and rhythms are shaped by the realities of each country<sup>8</sup>.

In Latin America, there was evident consensus after the Second World War about the fundamental importance of the State as a regulatory entity and a business entity, thereby seeking to balance the naturally asymmetric relationship between our national economies and the international economy, as well as between internal power groups and national majorities. The school of thought promoted by Raúl Prebisch and the proposals of the ECLAC (CEPAL) during the period are an important manifestation of that hegemony<sup>9</sup>. The policies applied by many of our governments during the international postwar period are an example of that.

The so-called Washington Consensus arrived later, which expresses the exhaustion of the previous agreement and the primacy of the market and of private economic agents as a space and as actors in decision-making<sup>10</sup>. The State had to withdraw and limit itself to ensuring basic public services. Thus, the application of neoliberal public policies in the region was to a large extent the expression of this new hegemony.

However, since the late 1990s, a new consensus emerged around the importance of institutions, beyond the centrality that the market could have as a space for action by economic agents. A

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<sup>8</sup> For Latin America, a good recent text that discusses state institution-building processes in Chile, Peru, Argentina and Uruguay is: Kurtz, Marcus J. *Latin American State Building in Comparative Perspective*. Cambridge: Cambridge University Press, 2013.

<sup>9</sup> Prebisch, Raúl. *El desarrollo económico de la América Latina y algunos de sus principales problemas*. Santiago de Chile: CEPAL, 1949. See at: [goo.gl/FzUr0d](http://goo.gl/FzUr0d)

<sup>10</sup> A good description of the origin of the concept, of the policies that inspired it and their subsequent evolution in: [goo.gl/Yha8D](http://goo.gl/Yha8D)

particular milestone that marks the death of the Washington consensus was the publication by the World Bank of the text *Beyond the Washington Consensus: Institutions Matter*<sup>11</sup>. Given that the World Bank had been one of the most enthusiastic promoters of the policies of the Washington Consensus, the publication by this same multilateral body issuing a call to give it up was generally viewed as its death knell.

In effect, since the 1990s, attention has primarily been focused on institutional reform processes that combine various objectives simultaneously: to improve the efficiency of public decisions, guarantee agency and voice to citizens who are the consumers of public services, ensure transparency as a barrier against corruption, and decentralize power to avoid concentration and authoritarian management, etc.

In more recent times, for example during the super cycle, a new hegemonic consensus has been generated that is located beyond the ideological boundaries that separate neoliberal governments, such as those of Colombia and Peru, from the so-called “progressives”, such as those of Venezuela, Bolivia and Ecuador. This involves the so-called “Commodities Consensus”, in the framework of which –with diverse levels of intervention by the State– they have all agreed that their priority is to extract and export natural mining, hydrocarbon, fishing and agricultural and livestock-raising resources<sup>12</sup>. With the end of the super cycle, this extractivist convergence beyond the ideological frontiers that separate our countries seems to have become even stronger.

### 1.3 The Selected state reform processes

In this report, we focus on three state reform processes in the Andean countries to assess their relationship with policies to promote investments in mining and hydrocarbons: (i) decentralization of the State; (ii) introduction of mechanisms for local populations to foster participation and consultation; (iii) building institutional environmental frameworks.

#### *Decentralization of the State*

The democratization of highly authoritarian societies such as those in Latin America and the Caribbean was frequently accompanied by decentralization processes<sup>13</sup>.

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11 Burki, Shahid Javed and Perry, Guillermo E., *Beyond the Washington Consensus: Institutions Matter*. Washington D.C.: World Bank, 1998.

12 Svampa, Maristella. *Minería transnacional, narrativas del desarrollo y resistencias sociales*. Buenos Aires: Editorial Biblos, 2009.

13 See in this respect: Fernando Carrión. “Interrogatorio a la Descentralización Latinoamericana: 25 años después”. In: Fernando Carrión, ed. *La descentralización en Ecuador. Opciones comparadas*. Quito: Facultad Latinoamericana de Ciencias Sociales (Flacso), 2007.

In most cases, we come from societies in which power was concentrated among relatively small elites that left out of decision-making not only urban and rural middle class and popular sectors but also rural and urban elites who had settled in territories remote from the centers<sup>14</sup>.

Additionally, we must mention that throughout much of the modern history of our countries, the exercise of power has taken the form of military dictatorships, which by the nature of the institution upon which they are based, makes them markedly centralist, hierarchical and vertical.

It should be pointed out that decentralization, in addition to facing the previously mentioned difficulties, is also a response to the need for modernization of the State, both to more efficiently deal with demands for inclusion and access to public services, and in response to the complexity of the management of clearly differentiated territories in the context of globalization.

In response to this situation, unitary republics such as Bolivia, Colombia and Peru have promoted important decentralization processes that began before the super cycle, during which they experienced advances and setbacks and which are now confronted by the centralist contents of the "race to the bottom".

In the case of Bolivia, we speak of a decentralization (in reality a municipalization followed by the establishment of elected governments in the departments) in a context of the promotion of neoliberal reforms. In the case of Colombia, it involves a constitutional agreement that is the result of a political agreement between the government and the M19 for incorporation of the latter into legal political life. In the case of Peru, we refer to a process of democratization in the wake of the military governments of 1968-1980, which included a frustrated early experience between 1988 and 1992, and a second experience (currently ongoing) that began in 2002, in the framework of a fundamentally neoliberal orientation.

The Ecuadorian case is different because in reality it involves a process of decentralization that began in the form of a municipalization in the early 1990s, which was later truncated in the 2000s to the extent that the new constitutional agreements did not give it a final shape.

In Chile, this topic has been debated since the beginning of the decade, although without significant progress, except for the experience of municipalization of education, which is currently under review. More recently, it was announced that the general process of decentralization and the elections for regional intendents will be relaunched during the current period of government of President Bachelet.

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14 A classic text in this respect is: Grindle, Merilee S. *Going Local: Decentralization, Democratization, and the Promise of Good Governance*. Princeton: Princeton University Press, 2007. The text may be accessed at: [goo.gl/R8VhWt](http://goo.gl/R8VhWt)

### *Civic participation*

In Colombia, Bolivia and Peru, recent decentralization processes have been accompanied by the establishment of mechanisms for civic participation. In all of these cases, the ideal was to democratize the power of the State by giving participation to subnational elites while at the same time strengthening the citizenry to enable it to exercise control over them.

It must be considered regarding this point that in Peru and Brazil, civic participation processes began simultaneously (in the early 1980s) in large urban municipalities such as Porto Alegre, in Brazil, and in intermediate cities and districts, such as Villa el Salvador (Lima) and Ilo (Moquegua), in Peru. These processes are not part of a national process stipulated by legislation or a central policy, but are instead spontaneous initiatives that arose from below as a result of civic mobilizations combined with political initiatives from the left.

In the Peruvian case, civic participation was maintained between 1980 and the 2000s as a dynamic that resulted from social and political initiatives unsupported by a national policy or law. Only recently, with the decentralization of 2002 and the subsequent Participatory Budget Framework Law (*Ley Marco del Presupuesto Participativo*) is there national legislation that supports it.

In the Bolivian case, civic participation arrived with the decentralization of 1995, both elements being parts of the same design, the same policy and the same legislation, as in the Ecuadorian case. However, in Bolivia, there have been phases, beginning with a launching marked by the municipalization of 1995, followed by a stage in which the departmental governments were designed and implemented (with advances and setbacks in their treatment), until a current phase more centered on autonomies.

In Ecuador, participation is a social and political demand that comes from below during neoliberal governments and is exercised in an unregulated manner depending on the coincidence of will among social movements and local authorities. Recently, with the 2008 Constitution of Montecristi, civic participation has been institutionalized, although, –paradoxically or in reverse, as a consequence of that same situation, it is weakened when formalized.

All of these experiences are undoubtedly complex, in that they combine attempts “from below” in response to the democratic deficit that was observed<sup>15</sup>, with the search “from above” in response to the socioeconomic deficit and lack of effectiveness of public policies<sup>16</sup>.

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15 Boaventura, Santos and Avitser, Leonardo. “Introducao: para ampliar o canone democrático”. In: Boaventura de Sousa Santos, coord. *Democratizar a democracia. Os caminhos da democracia participativa*. Rio de Janeiro: Civilização Brasileira, 2002.

16 Inter-American Development Bank (IDB). *Libro de consulta sobre la participación*. Washington D.C.: IDB, 1997.

## **The building of environmental institutionalality**

The building of environmental institutionality in Latin America began in a sectorial matter in the 1970s, giving environmental responsibilities (conservation, standards associated with public health) to certain ministries. Subsequently, in the 1990s, there was the creation of crosscutting institutions, such as national environmental councils, to have crosscutting coordination of environmental management.

Then, in the years immediately before and after the first Earth Summit (Río de Janeiro, 1992), ministries of the environment were created in most countries of the region<sup>17</sup>. In this way, in each country an international consensus was expressed in terms of the need to recognize that management of the environment and of natural resources must be carried out by a body at the highest level of the State, and not be subordinated to other economic or productive sectors.

### **1.4 The countries considered**

The countries considered for this research project are Bolivia, Colombia, Chile, Ecuador and Peru. The following is a brief description of the importance of this research for each of them:

#### **Bolivia**

The Bolivian government has historically depended on the mining industry for much of its financing, although in recent years, oil revenues have become the most important for that purpose. Extractive industries as a whole contribute 29% of government revenues, and constitute 82% of exports and 18% of Gross Domestic Product (GDP). Bolivia became a natural gas exporter in the 1990s and is now the third-largest producer in South America. It also produces zinc, tin, silver, gold and lead.

#### **Colombia**

The extractive sector represents approximately 70% of Colombian exports as of 2014. The oil industry is particularly important. However, in the last decade, interest has increased in coal, nickel, gold and other Colombian mineral resources. Tax incentives and market reforms have created attractive conditions for foreign direct investment, and recently a number of multinational extractive companies have begun operations in Colombia.

#### **Chile**

Chile is the world's largest copper producer, with more than 5,000,000 tons produced during the decade. Mineral exports represented nearly 2/3 of total exports and 40% of GDP in 2011, with

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<sup>17</sup> Valdez Muñoz, Walter. "Marco institucional para la gestión ambiental en el Perú". *Revista Derecho PUCP*, n.º 70. Lima: Pontificia Universidad Católica del Perú - Facultad de Derecho, 2013.

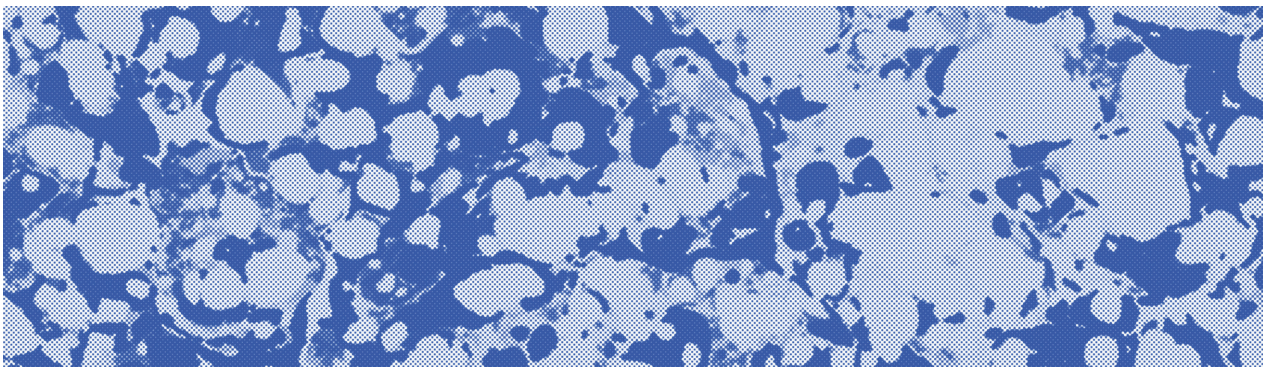
a decrease since then. And while the state mining company CODELCO (which is unique in Latin America and one of the few in the world) continues to carry great weight because of its contribution to the country's treasury, it is the private mining sector that has grown the most. Chile produces almost no hydrocarbons but has a state company in charge of investing abroad in order to import for supply of the domestic market.

### *Ecuador*

The economy of Ecuador is highly dependent on oil, which accounts for 20% of GDP and 58% of exports in recent years. Historically, mining has been limited to artisanal mining. The government is currently also promoting large-scale mining, but with little success until now in that only one large-scale project is now underway.

### *Peru*

Peru is an important mineral producer, particularly gold and copper. Extractive industries generated 11% of GDP and 64% of exports in 2011, before prices and demand for mining began to decline. And while Peru also produces oil, it has to export heavy crude and import lighter varieties to be able to refine them for internal consumption.





## 2.

# THE EXTRACTIVE INDUSTRIES DURING THE SUPER CYCLE IN THE ANDEAN COUNTRIES

## 2.1 A general appreciation

As stated above, the super cycle of commodities occurred in the early 2000s and the mid-2010s, during which high demand and high prices were maintained for minerals and hydrocarbons produced by the region, a situation fundamentally explained by strong demand from China and Asia in general.<sup>18</sup>

The years of the super cycle have been accompanied by high and sustained GDP growth, greater in countries that are more specialized in the exportation of commodities than in those with more diversified economies, as shown in the graph below.

Chart No. 1

**Latin America and the Caribbean: median annual GDP growth rates (simple average) by groups of countries classified according to their economic specialization and size, 1970-2012. In percentages**

Groups of countries	1980-2012	1970-1979	1980-1989	1990-1996	1997-2002	2003-2008	2009-2012
Specialized in the exportation of minerals and metals	3,3	3,0	1,1	3,5	2,7	5,6	4,8
Specialized in hydrocarbons exports	2,8	5,9	0,8	3,4	2,6	6,1	2,7
Specialized in services exports	3,2	3,0	3,9	3,3	3,0	4,2	3,3
Large diversified economies	2,7	5,9	1,5	3,1	1,5	4,1	2,6
Specialized in the export of agricultural and agroindustrial products	2,7	5,1	1,3	3,3	2,6	4,9	3,3
Latin America and the Caribbean	2,9	4,8	2,2	3,1	2,7	4,6	2,9

Source: Knight, Juan Alberto (Editor). *Inestabilidad y Desigualdad. La vulnerabilidad del crecimiento económico en América Latina y el Caribe*, pp22. Santiago de Chile: CEPAL, 2014

With economic growth there has been a decrease in poverty and inequality, an especially relevant fact for our region as it is the most unequal of the planet.

<sup>18</sup> Comisión Económica para América Latina (CEPAL). *Panorama inserción internacional 2016*, pages 74. Santiago de Chile: CEPAL, 2016.

**Chart No. 2**  
**Latin America and the Caribbean: evolution of poverty and indigence, 1980 – 2011. In percentages of the population below the poverty and indigence lines**

	Total percentage	Total indigence	Urban poverty	Rural poverty	Urban indigence	Rural indigence
1980	40,5	18,6	29,8	59,8	10,6	32,7
1986	43,3	20,7	35,5	59,9	13,5	36,0
1990	48,4	22,6	41,4	65,2	15,3	40,1
1994	45,8	20,9	38,8	64,4	13,7	40,1
1997	43,5	19,9	36,4	63,8	12,2	38,3
1999	43,8	18,6	37,1	64,1	12,0	38,7
2002	43,9	19,3	38,3	62,4	13,4	38,4
2005	39,7	15,4	34,0	59,8	10,3	33,3
2006	36,2	13,3	30,9	55,2	8,5	30,4
2007	34,0	12,5	28,8	53,0	8,0	28,9
2008	33,5	12,9	27,7	55,0	8,1	31,0
2009	32,8	13,0	27,2	54,3	8,3	31,0
2010	31,0	12,1	25,5	52,4	7,6	29,5
2011	29,4	11,5	24,2	49,8	7,2	28,8

Source: CEPAL. *Pactos para la Igualdad*. Santiago de Chile: CEPAL, 2014

It should be stressed on this point that the above-mentioned economic growth with the decrease in poverty and inequality is not sustainable over time, for two fundamental reasons.

First of all, because it depends on continued high demand and high prices for commodities by the economies of China, Asia and the developed countries in general.

History shows that commodities markets for energy and minerals are very volatile, subject to rises and falls determined by demand on the part of large-scale consumers and the supply of large producers, and are beyond the control of second rank producers, such as those of Latin America. In this case, mineral prices began to drop beginning in 2011, whereas between June and December of 2014, international hydrocarbon prices collapsed. As a result, projections for growth in the region are falling –particularly for countries more specialized in commodities exports<sup>19</sup>–, so that it is possible that much of the progress achieved in terms of poverty and inequality will be reversed.

The second reason is because large internal gaps are generated in terms of productivity and access to quality employment. The ECLAC (CEPAL) has documented this situation for the Latin American region, observing how productivity per worker is much greater in the mining and quarrying sector

<sup>19</sup> CEPAL. *Estudio Económico de América Latina y el Caribe, 2015*. Santiago de Chile: CEPAL, 2015.

(which generates almost no direct employment) and much lower in sectors such as agriculture, which employs a much larger number of people<sup>20</sup>.

In the Peruvian case, this subject was first documented by Jurgen Schuldt<sup>21</sup>, and his proposals were used as a central argument for the National Productive Diversification Plan (*Plan Nacional de Diversificación Productiva*) approved by the government in 2014<sup>22</sup>. The Peruvian evidence shows that at the national level, most of the Economically Active Population (EAP) is involved in activities such as agriculture and commerce, which have very low levels of productivity, whereas levels are much higher in sectors such as mining and manufacturing. For example, in the most rural region of the country, Cajamarca, high productivity is concentrated in mining compared to an EAP of very low productivity in agriculture and services, which is where the immense majority of people in the region are employed<sup>23</sup>.

In our countries, productivity gaps become gaps in access to quality employment. In effect, large sectors of low productivity are subsistence economies, populated by small informal productive units that are unable to provide quality jobs, in which workers cannot get access to basic rights such as work hours, payment for overtime, pensions, social security and vacations, conditions that are enjoyed by formal sectors of the economy.

During the super cycle, the ECLAC (CEPAL) documents that at the regional level, employment has grown, above all in the formal sector<sup>24</sup>. In the Peruvian case, official data show not only that the weight of the informal EAP continues to be enormous, but that it has remained unchanged during the years of the super cycle.

A less studied aspect of the super cycle is its economic and social impact in the territories in which extractive activities are carried out. Based on the association between the super cycle, economic growth and the decrease in poverty and inequality, it has been affirmed that large investments in mining and hydrocarbons are a fast track so that territories that contain those natural resources can emerge from poverty and overcome inequality. However, there is growing evidence that this is, in the best of cases, an erroneous affirmation, and, in the worst of cases, intellectual contraband to justify extractive investments that certain populations reject. In the Peruvian case, for example, there is emerging evidence that questions this association.

20 CEPAL. *Pactos por la Igualdad*. Santiago de Chile: CEPAL, 2014.

21 Schuldt, Jurgen. "Futurología de la economía política peruana". In: Universidad del Pacífico, editor. *Cuando despertemos en el 2062: Visiones del Perú en 50 años*. Lima: Universidad del Pacífico, 2012.

22 Ministerio de la Producción. *Plan Nacional de Diversificación Productiva*. Lima: Ministerio de la Producción, 2014.

23 Ministerio de la Producción. *Plan Nacional de Diversificación Productiva*. Lima: Ministerio de la Producción, 2014.

24 CEPAL. *Desarrollo social inclusivo. Una nueva generación de políticas para superar la pobreza y reducir la desigualdad en América Latina y el Caribe*. Santiago de Chile: CEPAL, 2015.

In the first place, territories dedicated to extractive activity do not necessarily show better indicators for growth than territories that are not extractive. In fact, certain mining and oil regions grow more than the average, but others do not, so that, in general, extractive regions grow less than non-extractive ones.

In the second place, in regions dedicated to mining and/or hydrocarbons, a primary productive structure is consolidated, without generating value chains that would diversify the internal offering and create bases for balanced development. In this respect, Mario Tello, economist at the Pontificia Universidad Católica del Perú (PUCP), has determined that:

The evidence indicates that natural capital measures have had a positive effect on regional growth and on employment, but only in the primary sector, and on the concentration of export products. On the other hand, the composition of exports shows a high degree of concentration in just a few intensive products for the use of NR, very distant from each other, high levels of relative internal productivity and that it has an enormous potential for export products as yet unexploited or undiscovered<sup>25</sup>.

The same author summarizes his conclusions, indicating that:

The exploitation of natural resources has been a determining factor in the economic growth recorded over the past 15 years in Peru. Analysis of the regions that exploit these resources has found growth but not a regional development that would generate employment and productive diversification<sup>26</sup>.

A more up-to-date look at the regional level, based on data generated by the Grupo Propuesta Ciudadana (Civic Proposal Group), based on the evolution of the Human Development Index (HDI) of the United Nations Development Program (UNDP) in the regions of Peru, leads to the same conclusion: the need to question the myth of mining + hydrocarbons = well-being<sup>27</sup>.

Finally, a study by the Centro Bartolomé de las Casas del Cusco<sup>28</sup>, which focuses on the impact that local allocation of resources from the mining industry has on microeconomic well-being (understood as household income and consumption), concludes that:

- The mining industry increases income and consumption for households in Peru. However, the positive impacts are heterogeneous.
- Evidence has been found that the mining industry increases extreme poverty. Based on

25 Tello, Mario. *Recursos naturales, diversificación y crecimiento regional en el Perú*. Lima: Pontificia Universidad Católica del Perú (PUCP) - Consorcio de Investigación Económica y Social (CIES), 2014.

26 See: [goo.gl/TNXwn1](http://goo.gl/TNXwn1)

27 Chart prepared by Gustavo Ávila of the Grupo Propuesta Ciudadana.

28 Del Pozo, César; Guzmán, Esther and Paucarmayta, Valerio. *¿Minería y bienestar en el Perú?: Evaluación de impacto del esquema actual (ex-post) y esquemas alternativos (ex-ante) de re-distribución del canon minero, elementos para el debate*. Cusco: Centro de Estudios Regionales Andinos Bartolomé de las Casas (CBC) - CIES, 2013. See at <http://cies.org.pe/>

additional analysis of the impact of the mining industry on family income distribution, it has been found that the positive impact of the industry is concentrated among the highest percentiles (the least poorest households), which suggests that the current scheme for mining revenue redistribution that has been in effect since 2005 has generated, or at least exacerbated, income inequality among households in Peru.

- There is evidence that suggests that an increased level of transference of mining revenue increases public employment at the local level, which would imply that the local labor market is a pass-through mechanism for the impacts of that revenue on household income, assuming that local governments, which are in contexts of extraordinary money transfers, are the main users of the labor force.
- Regarding the impact on access to basic social infrastructure (health services and electricity), evidence has been found that the mining industry increases access to such services, although these positive impacts are also heterogeneous.
- Evidence has been found that an increased level of transfers of mining revenue, probably associated with a greater intensity of mining activities, would imply less access to water for rural households, which would show the relationship of competition for the use of natural resources, limiting the expansion of infrastructure for access to water.

Faced with the end of the super cycle, while economic growth rates fall along with tax revenues and export income, as well as the depreciation of the currencies of the region, we have observed that certain governments have begun to implement measures that could be described as inherent to a “race to the bottom”<sup>29</sup>.

We use this concept to describe competition among countries to attract or maintain foreign investment in their territory, by deregulating or streamlining social, labor and environmental standards or granting tax benefits to companies as a way to reduce their costs compared to other countries.

In effect, certain countries have approved modifications or new additions to the regulatory frameworks associated with the environment, decentralization, social and labor standards, and prior consultation with indigenous populations, which further weaken them, in order to compensate extractive companies for the decline in prices and ensure that they will continue to invest and produce. Our hypothesis is that more and more countries will join this race as long as the negative impacts from the fall in prices continue to spread.

The country that seems to be leading this race is Peru, where former president Ollanta Humala, prior to finishing his term of office, approved four packages of measures to “reactivate” the economy, which included a weakening of the environmental oversight body, acceleration of procedures to improve EIA, and decreases in income tax rates, among others<sup>30</sup>.

<sup>29</sup> Text based on an article by Claudia Viale and Carlos Monge presented at the Foro Nacional por Colombia. See: [goo.gl/TmpFSB](http://goo.gl/TmpFSB)

<sup>30</sup> Viale, Claudia and Carlos Monge. “Industrias extractivas: continuismo y carrera hacia el fondo”. En: *La*

That is also what is happening in Ecuador, where in 2014 the Ministry of the Environment stopped being coordinated by the Ministry of Coordination of the Heritage (*Ministerio Coordinador de Patrimonio*) to instead be supervised by the Ministry of Coordination of Strategic Sectors (*Ministerio Coordinador de Sectores Estratégicos*), which in turn regulates the Ministry of Hydrocarbons and Mining. Additionally, it must be recalled that in 2013, Ecuadoran President Rafael Correa made the decision to exploit the crude oil of the Yasuní National Park, as well as to proceed with the 11<sup>th</sup> Southwestern Oil Round (*XI Ronda Petrolera Sur Oriente*), which seeks to adjudicate oil fields in the southwestern part of Amazonia, a zone that is considered environmentally vulnerable.

In the case of Bolivia, recent measures herald the beginning of pro-hydrocarbon exploration activities in protected natural areas<sup>31</sup> –including Madidi, the jewel of the Bolivian conservation system– and a reduction in consultations with indigenous peoples, which will be converted into an expedited administrative process.

This context, even though it represents a risk that the “race to the bottom” will continue, also represents an opportunity to promote debates in the region about a new path and a new development model that would not be dependent on the extractive sector. For example, a proposal for a change in direction that comes from a multilateral body such as the ECLAC (CEPAL), and which is summarized in its call for agreements for equality and to now place equality at the center of sustainable development, seeks to surmount sectorial gaps in productivity and achieve massive and sustainable generation of quality employment in all productive sectors, this being an initiative that also takes into account the need to affirm labor rights, clean the energy matrix and care for the environment<sup>32</sup>.

Governments have also approved a multitude of plans or strategies for productive diversification, such as the National Diversification Plan in Peru (2014) or the Productive Transformation Program in Colombia (2008).

But, in general, what we need for a change in the model for growth and development in the countries of the region are clear political leaderships that would have a defined vision of how to achieve sustainable well-being for the majorities that would not clash with the environment or the rights of indigenous peoples in order to obtain short-term social achievements.

## 2.2 A look at each component

As stated when presenting the topic of extractive cycles, within the general cycles it can be seen that over time it is possible and advisable to distinguish among diverse components that at times come together into one single dynamic but at other times present different dynamics.

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*divina tragedia*. Serie Perú Hoy N°27. Lima: DESCO, 2015.

31 Decreto Supremo No. 2366, of May 20, 2015 and Decreto Supremo No. 2298, of March 18, 2015.

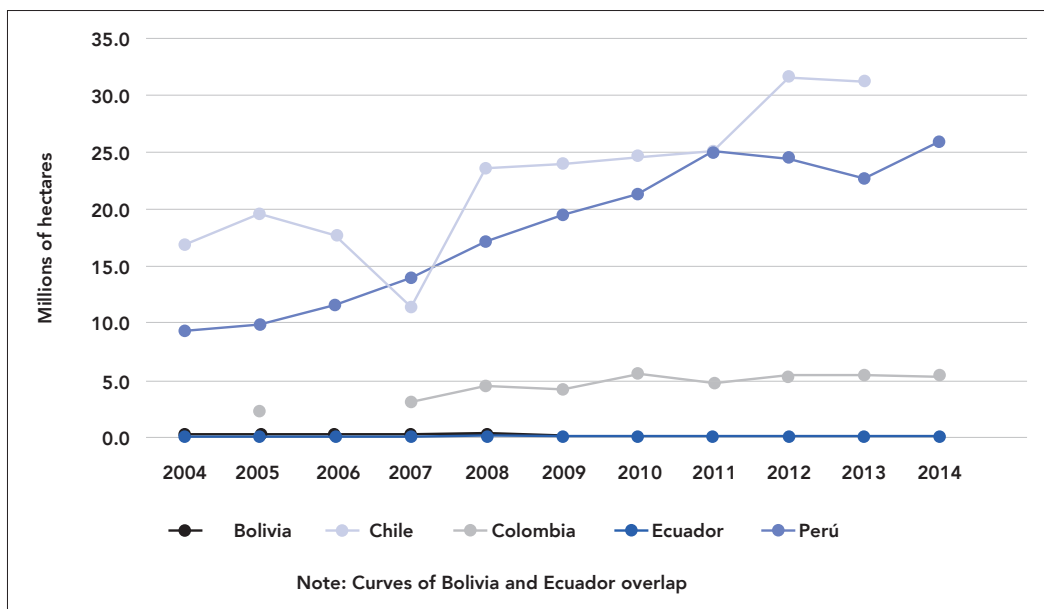
32 See: CEPAL. *Pactos para la Igualdad*. Santiago de Chile: CEPAL, 2014; and *Horizontes 2030: la Igualdad en el Centro del Desarrollo Sostenible*. Santiago de Chile: CEPAL, 2016.

## Concessions and contracts

As already stated, an early manifestation of the policies to promote extractive investments is the increase in the number of concessions required to carry out activities of exploration and then of extraction and processing and/or exportation.

In Ecuador and in Bolivia, the number of concessions has remained unchanged. In Ecuador because the policy for concessions for small scale miners has been halted and because the promotion of large-scale mining projects has not worked. In Bolivia because the sector is highly informal and it is probable that much of the mining does not go through formal paperwork procedures. In contrast to these, in Colombia and, above all, in Peru and Chile, there has been significant growth in the amount of land surface that has been adjudicated in concessions for mining activities throughout the super cycle.

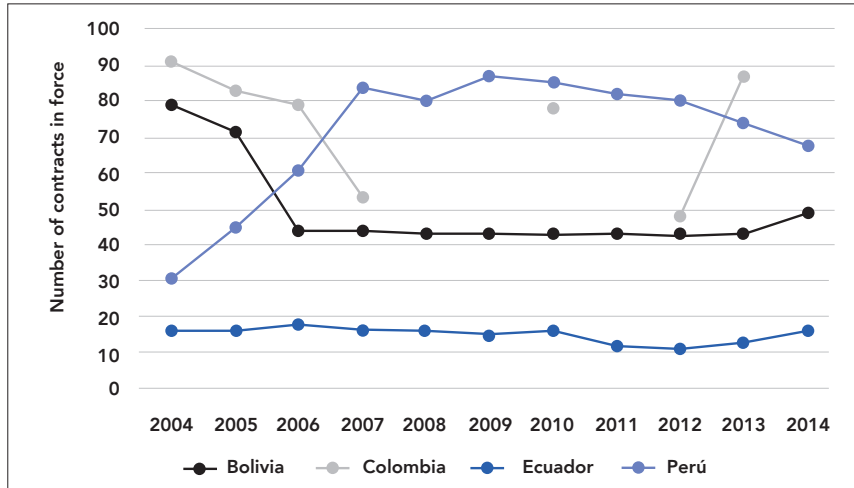
**Graph No. 6**  
**Mining Concessions<sup>33</sup>**



In relation to oil contracts, the situation is totally different and quite heterogeneous, because there has been a considerable decline and then a recovery in the Colombian case; growth followed by stagnation and decline in the Peruvian case; and an inverse situation in the Bolivian case, where a considerable initial drop was followed by stagnation and then a slight recovery. As in the mining concessions, the number of oil contracts has remained stable in Ecuador.

<sup>33</sup> Comparative graphs Nos. 6 to 12 were created by NRGi based on official sources from each country.

**Graph No. 7**  
**Oil Contracts**

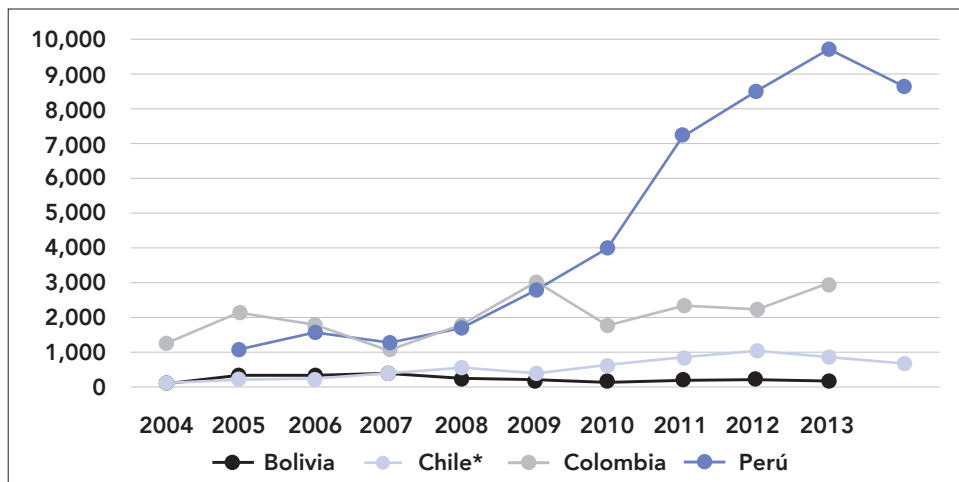


**Investments**

As a result of these same policies to promote investments, there has been a notable increase in the region of mining investments in Peru and the same thing must have occurred in Chile, although we have only official data on investment in exploration activities, which is growing slightly after having declined towards the end of the super cycle.

Colombia demonstrates more erratic behavior, whereas in Bolivia investment is maintained with slight ups and downs. In this respect, we must note that Bolivian mining production is fundamentally based on cooperatives and has a high degree of informality, so that statistics for the sector are less reliable and probably underreport a major part of its production.

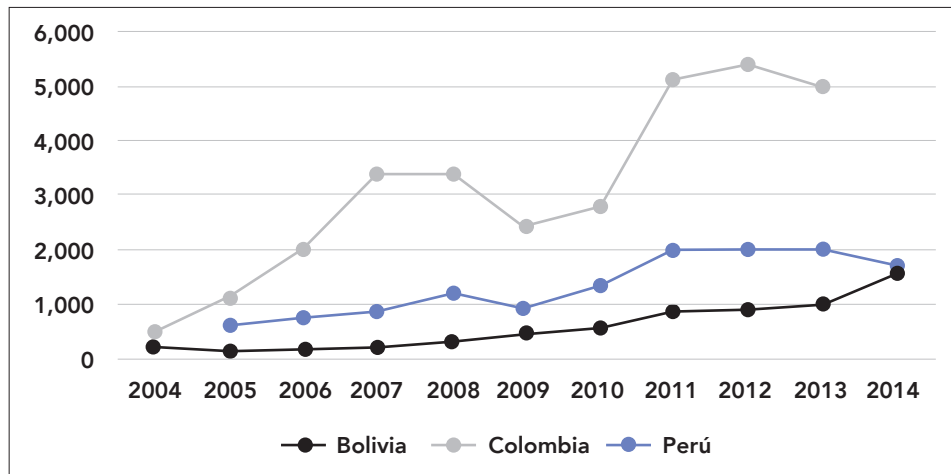
**Graf No. 8**  
**Total Investment in the Mining Sector (Millions of USD)**





Chile produces almost no hydrocarbons (although the State company ENAP does invest in productive processes and refining and commercialization activities in other countries of the region); in Ecuador there have been no new investments during this period in which fiscal contributions increased and contracts with private companies were renegotiated, so that the oil rounds did not translate into new investments. In the cases of Bolivia and Peru, there has been a slight increase in investment whereas in Colombia there has been strong growth, although with pronounced ups and downs.

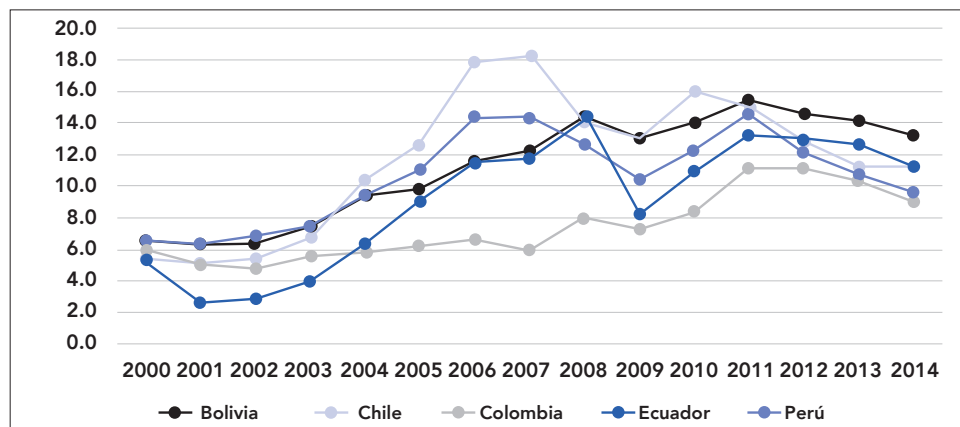
**Graph of No. 9  
Hydrocarbons**



**Gross Domestic Product**

As a result of policies and investments, production in diverse countries has grown throughout the super cycle, but containing two cycles within it. First of all, the one that began in the early 2000s and lasted until the worldwide crisis of 2008, and, secondly, the one that began with the recovery of 2009 and included the mining decline from 2012 and the oil decline beginning in 2015.

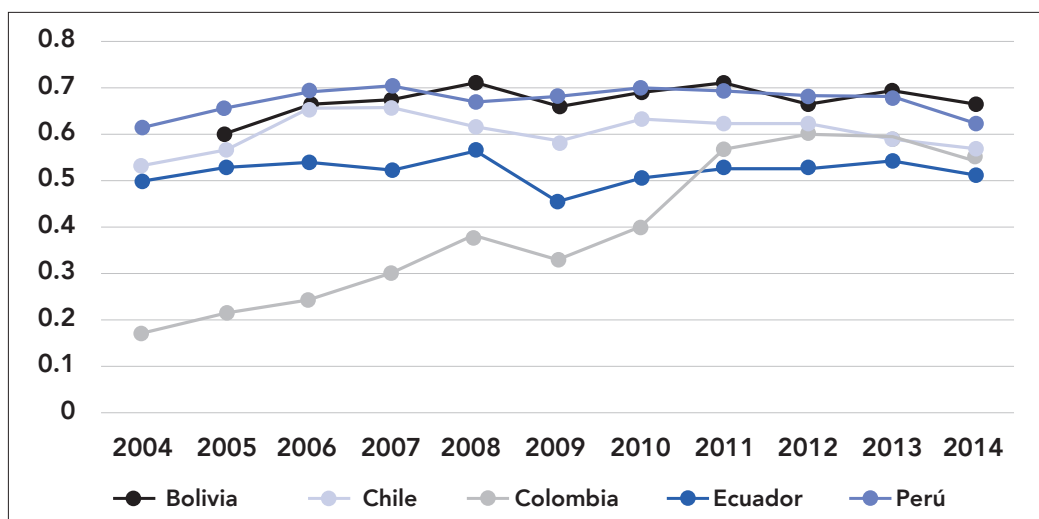
**Graph No. 10  
Weight in the Gross Domestic Product (GDP)**



## Exportations

As a result of high prices for minerals and hydrocarbons in international markets, during the super cycle, the weight of minerals and hydrocarbons in export baskets has remained very considerable, falling towards the end because of decreases in these prices. The exception is Colombia, which began at a lower level, with very aggressive growth until 2012, to later join the falling trend of the other countries.

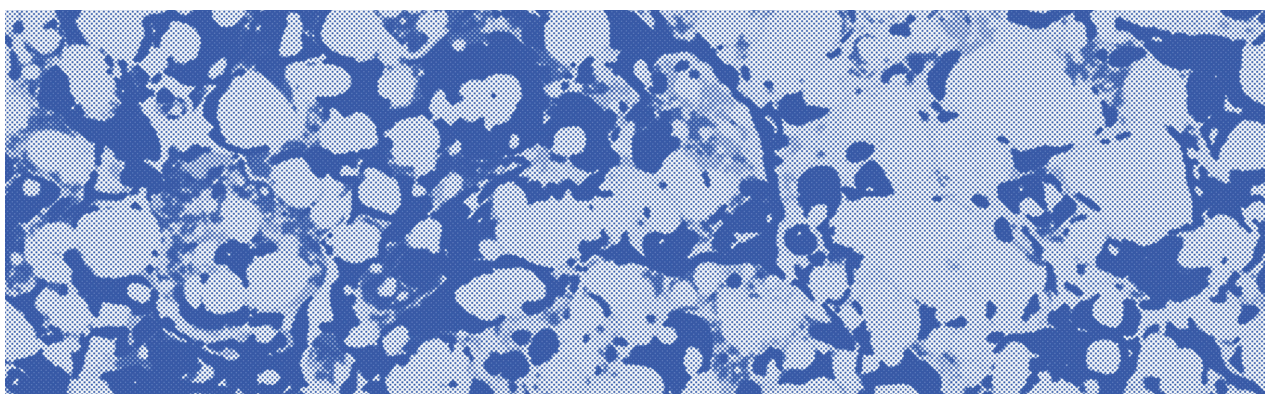
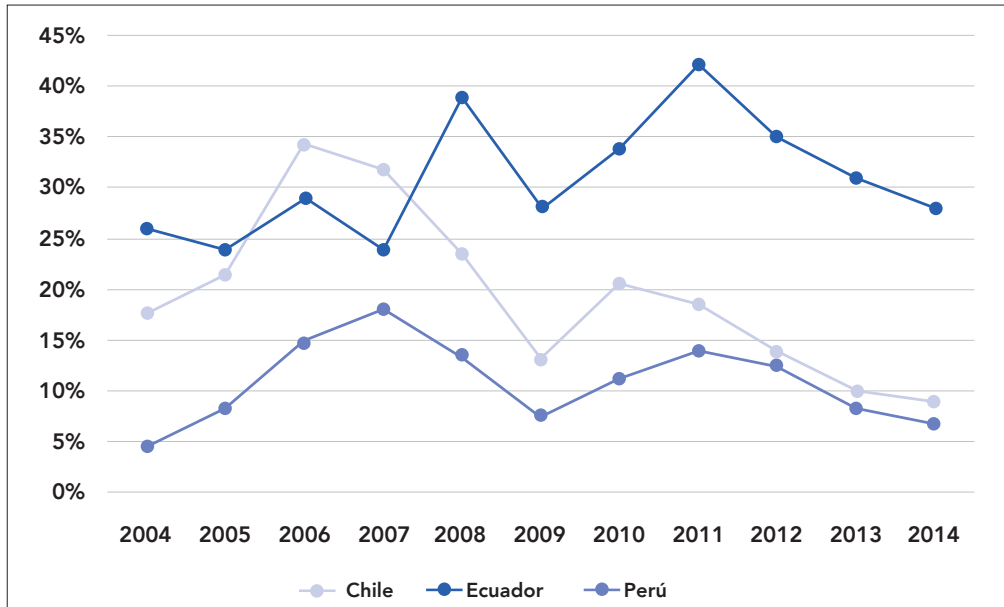
**Graph No. 11**  
**Weight in the Export Basket**



## Tax revenue

Finally, in relation to the weight of these activities as generators of tax revenue, we have data only for Peru, Chile and Ecuador, where we observe relatively similar behaviors among these countries, with growth in fiscal contributions from minerals and hydrocarbons until 2007, falling and rising in 2008/2009 until 2010 or 2011, to then fall since then. It is very probable that the drop in the price of oil in 2015 would have accentuated this loss in the relative weight.

Graph No. 12  
Weight in Tax Revenue



## DEMOCRATIZATION AND MODERNIZATION PROCESSES IN STATES DEPENDENT ON PRIMARY EXPORTS: THE NATIONAL CASES

Since the early 20th century, although with big differences among the diverse countries, there has been a combination of structures and institutions that has resulted in economies of low productivity and high segmentation that are tremendously unequal societies marked by forms of exclusion. Over time, this process, which is characterized by the coexistence of structures with little diversification that are relatively deficient in technology and knowledge, have inefficient institutions and are frequently captured by groups with greater economic and political power, led to an unequal distribution of resources that was affected at different times, although marginally, by the tax system and social policies.

Obviously, the relationship between the structure and the institutions is quite complex given that, over time, they became interconnected and mutually influence each other in very diverse ways. At certain times, there is a balance between the diverse institutions and the productive or social structure, but this has always been transitory and subject to shocks; when the bases that sustain them change, these shocks at different times drive institutional change along with certain characteristics of the structure<sup>34</sup>.

The most recent economic history of the region, specifically of the five countries in the present study, has brought about a combination of structures and institutions that are beginning to show their limitations. In the early 1980s, as reiterated in diverse and successive reports and studies by the ECLAC (CEPAL) and academia, the external debt crisis and the imposition of a new growth paradigm put an end to the institutions of important state leadership that had been built during the previous cycle, coinciding with the return of democracy in several of the countries (Bolivia, Chile, Ecuador and Peru). The resulting institutional framework was marked by “privatization” of the State and deregulation of the economy, assigning a central role to the market.

With the specificities of the history of each country, as the 1990s progressed, the limitations of the reforms and of the so-called Washington Consensus halted many of the reforms that had been undertaken. Full liberalization and privatization never reached the concentrated sectors that carry weight in generating significant tax revenues (the case of the Chilean copper or Bolivian hydrocarbons), whereas deregulation generated significant social, production and employment costs. “Reform fatigue” led to new measures, and progress was made in macroeconomic stabilization. Simultaneously, throughout the 1990s, the international community affirmed a development policy that sought to protect the rights of diverse social groups through commitments by the States (Millennium Development Goals, ILO Convention 169), along with growing concern

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34 CEPAL. *Pactos para la igualdad. Hacia un futuro sostenible*. Santiago de Chile: CEPAL, 2014.

over the relationship between the environment and development (from Río 92 to the successive Climate Change Summits).

Since then, as part of globalization and more than ever before, those institutionality-building dynamics were expressly promoted and attempts were made to mold them on the part of diverse international bodies and venues, such as the different multilateral agencies (Inter-American Development Bank, World Bank), United Nations system, diverse international Nongovernmental Organizations (NGOs) and large think tanks, along with the different Free Trade Agreements (FTAs) that were negotiated among the different countries.

The diverse processes and actors mentioned above, sooner or later encouraged the creation in the five countries of public institutions associated with the multilateral agenda, which in turn opened up important spaces for participation by the civil society and diverse social organizations.

In that context, at the beginning of the present century there was already a new exogenous shock: the emergence of China as a great world player, the increasing changes in patterns of trade and significant increases in the prices of oil and raw materials beginning in 2004. The super cycle and exploitation of revenues in the five countries then “came face to face” with an unequal dynamic of processes of change linked to modernization of the organization and management of their States and the building of new institutionality, which would have its own rhythm and intensity in each country as part of the response to the particularities, strengths, interests, conflicts and past history.

Of the different processes of institutional change, for the purposes of this study, we will focus on processes of decentralization of States, the creation of mechanisms for civic participation and consultation, and the building of institutionality for environmental management.

### **3.1. Decentralization, civic participation and building environmental institutionality**

During the 1980s, coinciding with the transition to democracy and the end of a cycle of dictatorships in many countries of the region, decentralization, understood as a political-administrative model that would redistribute the power of the State from the central level towards the territories, arrived in the region at different speeds and intensities. It was often encouraged by multilateral bodies and frequently demanded by varied processes of social mobilization and organization in the territories<sup>35</sup>.

With decentralization, in a closely interrelated manner, also came demands for participation. With the transition to democracy, this involved responding to the fragility of its institutions and to the crisis of legitimacy of the political system, the absence of a recognition of equality and the scars of political violence implicit to dictatorships. Generically understood as people’s daily, not just

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35 For more about this see: Carrión, Fernando. “Interrogatorio a la Descentralización Latinoamericana: 25 años después”. In: Fernando Carrión, ed. *La descentralización en Ecuador. Opciones comparadas*. Quito: Facultad Latinoamericana de Ciencias Sociales (Flacso), 2007.

occasional or delegative, involvement in public affairs, civic participation was increasingly adopted by diverse actors as the main strategy for modifying those weaknesses and responding to the “democratic deficit” found in many of these countries, both locally and nationally. It even came to be seen in the more radical interpretations, which we do not share, as an “alternative” or as an “overcoming” of representative democracy<sup>36</sup>. Simultaneously, civic participation was encouraged in the discourse of the multilateral bodies as the common denominator in many strategies in the struggle against poverty and in diverse processes of “self-generation” of better living conditions for diverse populations<sup>37</sup>; at the same time, the goal was to affirm the rights of indigenous populations<sup>38</sup>. On both tracks, in response to the “democratic deficit” and in dealing with the “economic deficit”, participation was also installed in the region.

The building of environmental institutionalality, also in an unequal process, began early, although in a sectorial manner, in the 1970s, through environmental conservation responsibilities and public health standards in different sectors. As the topic became part of the international agenda, since the late 80s and clearly in the 90s, most of the countries of the region became concerned with making the topic crosscutting through varied institutions that, generally, took the form of national councils. Subsequently, and under the influence of the Earth Summit (Río, 1992), environmental ministries began to be created under different denominations in the countries of the region<sup>39</sup>.

In all of these processes, the approval of public information access laws in several countries (Peru, 2002; Ecuador, 2004; Chile, 2008; and Colombia, 2014) facilitated diverse institutional changes, giving citizens more information about certain important state institutions<sup>40</sup>. The chart below summarizes the main milestones in the regulatory/institutional changes that we have identified in the five countries, which supplement the description by institutional fields and by country that we provide in this chapter.

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36 In this regard, see: Santos, Boaventura de Souza y Avtitzer, Leonardo. “Introducao: para ampliar o cânone democrático” In: Boaventura de Sousa Santos, org. *Democratizar a democracia. Os caminhos da democracia participativa*. Río de Janeiro: Civilização Brasileira, 2002.

37 Inter-American Development Bank (IDB). *Libro de Consulta sobre la participación*. Washington D.C.: BID, 1997.

38 Organización Internacional del Trabajo (OIT). *Aplicación del Convenio num. 169 de la OIT por Tribunales Nacionales e Internacionales en América Latina*. Lima: OIT, 2009.

39 Rodríguez-Becerra, Manuel; Espinoza, Guillermo and David Wilk. *Gestión ambiental en América Latina y el Caribe: evolución, tendencias y principales prácticas*. Washington D. C.: División de Medio Ambiente del BID, 2002.

40 Grupo Propuesta Ciudadana – RLIE. *Balance: Transparencia de las industrias extractivas en América Latina durante el superciclo de las materias primas*. Lima: RLIE - GPC, 2016.

## PRINCIPAL MILESTONES IN INSTITUTIONAL REGULATORY CHANGES

Institutional change	Bolivia	Colombia	Chile	Ecuador	Perú
<b>Decentralization</b>	<ul style="list-style-type: none"> <li>1994: Popular Participation Law determines municipal decentralization (system for sharing taxes and royalties).</li> <li>1995: Administrative decentralization law.</li> <li>2005: Election of departmental prefects</li> <li>2006: Referendum (on autonomy for four departments)</li> <li>2009: Political Constitution of the Plurinational State of Bolivia constitutes a plurinational, decentralized and unitary State.</li> <li>2009: Referendum (autonomy for the five remaining departments)</li> <li>2010: Framework Law for Autonomies and Decentralization</li> <li>2011: Law for Tax Classification and Creation conserves and establishes tax centralization.</li> <li>2012: Civic Security Law (violates autonomy)</li> <li>2014: Law of Municipal Autonomous Governments</li> <li>2015: Intergovernmental Commission to define fiscal pact methodology</li> </ul>	<ul style="list-style-type: none"> <li>1986: Election of mayors and consultations in municipalities</li> <li>1991: Progressive, liberal, multiethnic and pluralist Constitution distributes power equally among the three branches of government.</li> <li>1994: Organic Planning Law</li> <li>1997: Law 388: actions by local authorities in Territorial Organization (OT)</li> <li>2001: Mining Code. Breaks with the decentralized structure and prohibits territorial entities from excluding mining.</li> </ul>	<ul style="list-style-type: none"> <li>2005: Reform of the Constitution.</li> <li>2007: Laws creating two new regions</li> <li>2013: Law 20678 establishes direct election of regional counselors</li> <li>2013: FONDENOR Project paralyzed in the Senate</li> <li>2014: Decree creating the Regional Development and Decentralization Advisory Commission, whose report proposes Chile as a decentralized State</li> </ul>	<ul style="list-style-type: none"> <li>2008: New Constitution</li> <li>2010: Organic Code of Organization, Territory, Autonomy and Decentralization</li> <li>2011: Strategic Ecuador EP</li> </ul>	<ul style="list-style-type: none"> <li>1981: Election of municipal authorities</li> <li>1989-1992: Regionalization truncates</li> <li>1994: Municipal Taxes Decree Law (executive order)</li> <li>2001: Royalties Law</li> <li>2002: Constitutional Reform, Law of Decentralization Bases, Regional Governments Law</li> <li>2003: Municipalities Law</li> <li>2004: Fiscal Decentralization Decree L (executive order)</li> <li>2005-2012: Royalties Boom (50% Royalties for subnational governments/Rules of distribution foster inequality.</li> <li>2009-2016: Reconciliation of national government funds</li> <li>2012: Failure of Fiscal Decentralization Commission.</li> <li>2013: Return of labor jurisdictions and artisanal mining to national government</li> <li>2013: Law 30230 (reduces jurisdictions and functions of regional and local governments regarding occupation and sustainable uses of territories, limiting organizational plans to become referential)</li> <li>2014: The regulatory capacity of the Territorial Organization (OT) is deactivated</li> </ul>

Institutional change	Bolivia	Colombia	Chile	Ecuador	Perú
<p><b>Consultation and participation</b></p>	<ul style="list-style-type: none"> <li>1991: Law 1257 approves ILO Convention 169</li> <li>1994: Law of Popular Participation (determines municipal decentralization)</li> <li>1995: Law of Administrative Decentralization (departments) 2007: Law 3760 (raises the UN Human Rights declaration to the range of Law).</li> <li>2007: DS 29033 (regulates participation and consultation in Hydrocarbon activities)</li> <li>2009: Constitution</li> <li>2013: Law of Participation and Social Control: each governor's office and municipality must approve its regulation: accountability and transparency reach the Ministry of Hydrocarbons and YPBF</li> <li>2014: DS 2195 (limits self-determination of indigenous peoples, power to apply their own rules and territorial organization)</li> <li>2014: Mining and Metallurgy Law (limits consultation to exploitation phase)</li> </ul>	<ul style="list-style-type: none"> <li>1991: Law 21 (ratifies ILO Convention 169)</li> <li>1991: Constitution raises rank of civic participation.</li> <li>1998: Decree 1320 (regulates prior consultation)</li> <li>1998: Constitutional Court declares Forestry Law unconstitutional due to lack of participation by indigenous peoples and Afro-descendants.</li> <li>2009: Constitutional Court ruling of Carepero suspends mining exploitation</li> <li>2015: Law 1757: Updates regulation of direct participation mechanisms</li> <li>2015: Statutory Law on Democratic Participation</li> </ul>	<ul style="list-style-type: none"> <li>2009: ILO Convention 169 enters into effect. DS 124 of the Ministry of Planning (regulates consultation and participation by indigenous peoples).</li> <li>2010: Law on Associations and Participation in Public Management and Consultative Councils of Civil Society</li> <li>2012: Law 19300 on the General Bases of the Environment (establishes participation in the Environmental Impact Assessment System)</li> <li>2012: Regulation of the Environmental Impact Assessment System (distances itself from the minimum standards of Convention 169)</li> </ul>	<ul style="list-style-type: none"> <li>1998: Right of consultation for indigenous peoples (incorporated into the Constitution). Ratification of ILO Convention 169</li> <li>2008: New Constitution ratifies and establishes function of transparency and social control.</li> <li>2010: Hydrocarbons Law and its regulation</li> <li>2010: Organic Law of Civic Participation</li> <li>2012: Executive Decree 1247: Regulation of Hydrocarbon Prior Consultation.</li> <li>2012: Convocation of 12th Southwest Oil Round for exploration and exploitation of 21 lots (affects 3 million ha, including territories of seven nationalities)</li> </ul>	<ul style="list-style-type: none"> <li>1995: ILO Convention 169 enters into force.</li> <li>2011: Prior Consultation Law</li> <li>2012: Regulation of Prior Consultation Law violates previous Prior Consultation Law.</li> </ul>



Institutional change	Bolivia	Colombia	Chile	Ecuador	Perú
<p><b>Environmental institutional</b></p> <ul style="list-style-type: none"> <li>• 1992: Environmental Framework Law</li> <li>• 1995: Regulations of Environmental Law (regulates civic participation)</li> <li>• 1997: Regulation for mining</li> <li>• 2003: DS 2173 (establishes EIA)</li> <li>• 2005: National Area Environmental Monitoring Partner Committees.</li> <li>• Environmental Evaluation Service (not implemented)</li> <li>• 2009: Constitution of Plurinational State (environmental and environmental participation law)</li> <li>• 2009: Ministry of the Environment and Water</li> <li>• 2014: Mining and Metallurgy Law (facilitates partial water use and exploitation).</li> <li>• 2014: DS 2366: Part of a larger package that violates ecological protection zone, modifying the structure of the protected area.</li> </ul>	<ul style="list-style-type: none"> <li>• 1993: Environmental Framework Law (creates the decentralized National Environmental System). Ministry of the Environment</li> <li>• 2001: Mining Code (cedes management of the sector to large mining companies)</li> <li>• 2002: Ministry of the Environment, and Territorial Development (weakens national environmental system and affects Regional Autonomous Corporations)</li> <li>• 2011: Ministry of the Environment and Sustainable Development in the framework of Law 1444</li> <li>• 2014: National Hydrocarbons Agency authorizes zones for hydraulic fracturing using lites and the Ministry of the Environment</li> <li>• Development adopts ToR for the EIA.</li> <li>• 2014: Decree 2041 (streamlines processing and timeframes for environmental licenses)</li> <li>• 2015: National Development Plan Law (creates better conditions for hydrocarbons exploitation and proposes tax reforms without contemplating socioenvironmental risks and conflicts.</li> </ul>	<ul style="list-style-type: none"> <li>• 1994: Environmental Framework Law</li> <li>• 1995-2000: Frei Doctrine ("suspends" application of preventive principle of Environmental Framework Law)</li> <li>• 2010: Modification of 1994 Law that created Ministry of the Environment, Superintendence of the Environment and Assessment Service in response to OECD - CEPAL</li> <li>• 2012: Law 20600 (creates specialized and independent environmental tribunals)</li> </ul>	<ul style="list-style-type: none"> <li>• 1997: Ministry of the Environment</li> <li>• 2004: Environmental Management Law</li> <li>• 2007: Yasuni Initiative</li> <li>• 2013: To speed oil exploitation and mining, different environmental processes are violated in the concession and exploitation stages.</li> <li>• 2013: End of the Yasuni project and decision to exploit crude beneath the National Park</li> <li>• 2014: Ministry of the Environment to be coordinated by the Ministry for Coordination of Strategic Sectors, which regulates the Ministries of Hydrocarbons and Energy.</li> </ul>	<ul style="list-style-type: none"> <li>• 90: INRENA, CONAM, Law for Sustainable Exploitation of Natural Resources. National System of Protected Areas Law</li> <li>• 2001: Environmental Impact Assessment System Law</li> <li>• 2004: National Environmental Management System Framework Law.</li> <li>• 2005: National Environmental Management System Regulatory Framework Law</li> <li>• 2008: Creation of Ministry of the Environment, Office of Environmental Oversight and Assessment and of the Law of the System and the National Natural Protected Areas Service.</li> <li>• 2009: Regulation about transparency, participation and environmental consultation</li> <li>• 2012: Law creating the National Service of Qualifications for Sustainable Investments</li> <li>• 2013: DS 060-2013-PCM (streamlines procedures for approval of the EIA)</li> <li>• 2013: Law 30230 (limits budgets and functions of the Environmental Assessment and Oversight Office, takes away the power to establish reserved zones from the Ministry of the Environment, creates difficulties for conservation of key sites, reduces timeframes for expressing opinions about the EIA and weakens the National Environmental Impact Assessment System (creating difficulties for the management of vulnerable systems)</li> <li>• 2013: Ministry of the Environment loses the function of Territorial Organization (OT), which is given to the Presidency of the Council of Ministers. It is established that neither the Ecological and Economic Zoning (ZEE) nor the OT may establish exclusion of the use of lands and that environmental and pollution quality standards shall also be based on the regulatory and economic impact on industries and populations.</li> </ul>	

Institutional change	Bolivia	Colombia	Chile	Ecuador	Perú
<p><b>Promotion and extractive investments</b></p>	<ul style="list-style-type: none"> <li>2005: Hydrocarbons Law and greater capture of oil revenues. YPBF</li> <li>2006: DS 28701 (nationalizes hydrocarbons)</li> <li>2006: National Development Plan with mining as backbone</li> <li>2007: Royalties Law</li> <li>2009: National Hydrocarbons Agency (only for natural gas). YPBF for the rest</li> <li>2009: Constitution eliminates concept of concessions and establishes right of use and exploitation</li> <li>2014: New Mining Law</li> </ul>	<ul style="list-style-type: none"> <li>2013: 2014-2018 Colombian National Development Plan (considers mining and hydrocarbons as strategic and increases powers of Ministry of Mines and Energy)</li> <li>2014: DS 041 (creates "express window" to streamline mining and environmental processing).</li> <li>2014: Establishment of reserve areas for mining development, whose adjudication is by objective selection.</li> <li>2015: Government launches plan of assistance for oil companies, extending investment timeframes, streamlining guarantees and tax measures.</li> </ul>		<ul style="list-style-type: none"> <li>1978: Hydrocarbon Law: Hydrocarbon Regulation and Control Agency. EPPP</li> <li>Petro Amazonas and Petro Ecuador</li> <li>2009: Mining Law: Mining Regulation and Control Agency. National Mining Company.</li> <li>2011: Creation of EP Ecuador, strategic institution for investment of extraordinary extractive revenues</li> <li>2015: Ministry of Nonrenewable Natural Resources (gives rise to Ministry of Mines and Ministry of Hydrocarbons)</li> </ul>	<ul style="list-style-type: none"> <li>1992: Organic Law of the Ministry of Energy and Mines</li> <li>2004: Mining Royalties Law</li> <li>2011: Special Mining Tax (supposedly to capture revenues from the super cycle. Affects royalties.)</li> <li>2013: DS 054-2013-PCM (facilitates mining investment and creates obligation to provide certificate of nonexistence of archaeological resources in a derisory timeframe).</li> <li>2013: Law 30230 (establishes a set of incentives for extractive industries, new tax stability contracts and modifies minimum investment amounts and exploration timeframes.)</li> </ul>

## The case of Bolivia

After its transition to democracy in the 1980s following a long period of dictatorships, Bolivia arrived at the super cycle after an eventful process of macroeconomic stabilization and various reforms in the field of modernization of the State during the 1990s, which did not generate changes in the country's structural conditions. Between 1994 and 1997, different institutional changes were promoted: privatization of public companies, including that of hydrocarbons, through a process of capitalization; a process of administrative decentralization from the central government, policies aimed at decentralization of revenue and of the framework of jurisdictions at the subnational level; affirmation of popular participation and of certain mechanisms for accountability, along with reform of land distribution in the country; etc.

The economic crisis in the early 2000s was followed by considerable national political instability and a struggle between relatively strong social actors, with a redefinition of the partisan political system. The triumph of Evo Morales and of the Movimiento al Socialismo (MAS) party in 2006 in many aspects ended the previous historical cycle. Based on the coca-growing movement and on emerging periurban sectors (El Alto), and no longer based on peasant and trade union movements, his proposal was aimed at a *pluricultural* (multicultural) and redistributive State, which would guarantee social inclusion and be able to respond to the challenges opened by the reforms begun during the 1990s<sup>41</sup>. Under his mandate, the country began a constituent process and approved its new Constitution.

The Bolivian decentralization process, which determines the current organization of public management and the structure of the public sector, first bore fruit through a package of reforms in the 1990s. In 1994, Law No. 1551, on Popular Participation, was approved, which established decentralization at the local or municipal level (instead of the 24 existing municipalities, 311 were created), territorializing state power in a venue for planning and administration, recognizing the jurisdiction of the municipalities of the provincial section and decentralizing the jurisdictions of power. That law created the municipalities, with budgets of co-participation in national taxes, establishing their own financial regimes with determined percentages of distribution, increasing their functions and tax collection capacity, and transferring part of the social infrastructure to them<sup>42</sup>. The law, which made the municipalities the backbone for popular participation, was supplemented by others, including Law No. 1654, on Administrative Decentralization (1995), which defined decentralization at the departmental level with the creation of the new prefectures, to which budgets were allocated, and defined specific jurisdictions for investment in certain sectors, although lacking autonomy from the central government.

41 In this respect, see: Archondo, Rafael. "La ruta de Evo Morales". *Nueva Sociedad*, n.º 209. Caracas: Fundación Foro Nueva Sociedad, 2007. See also: Programa de las Naciones Unidas para el Desarrollo (PNUD). *Informe Nacional Sobre Desarrollo Humano 2007. El estado del Estado en Bolivia*. La Paz: PNUD, 2007.

42 Fundación Jubileo. *Reporte Nacional sobre los procesos de reforma institucional durante y después del superciclo de los commodities. Caso: Bolivia*. La Paz: Fundación Jubileo, 2016.

The attempted limited processes of modernization and development were unable to respond to the varied cultural forms of Bolivia or to the secular levels of inequality, poverty and exclusion that have characterized it since its republican beginnings. Different additional factors, such as high rates of corruption and social exclusion, undermined the political system. In that context, and amidst a significant social mobilization whose initial milestone was the so-called “water war” (Cochabamba, 1999) against privatization of that service, a significant number of social movements arose (miners, coca growers, indigenous peasants, etc.), generating a situation of increasing ungovernability. The diverse protests that transpired centered on three main demands: nationalization of hydrocarbons, autonomy for the regions—initially promoted by four of them that sought to go beyond administrative decentralization— and the demand for a new Constitution.

The second government of Sánchez de Lozada (2002-2003) ended after the so-called “gas war”, which began because of the decision by his administration to export natural gas by way of Chile. The main demands in that conflict—no exportation until the domestic market was supplied and dissatisfaction over the low intended export prices (one dollar per 1000 BTUs)— incorporated the demand for convocation of a new Constituent Assembly<sup>43</sup>. After the forced resignation of the president, his vice president, Carlos Mesa, had the main objective of preserving democracy and serving as a bridge to a new situation, but was then also forced to resign because of his isolation in the Congress, continued pressures from different movements that demanded autonomy for diverse departments, and trade union pressures. In that context, diverse deliberative processes were multiplied: the referendum on exportation of gas (2004), which determined the recovery of hydrocarbons and of the shares of the state company Yacimientos Petroleros Fiscales; the election of departmental prefects (2005); the referendum for departmental autonomies (2006); and the election of representatives to the Constituent Assembly (2006).

In 2005 a new Hydrocarbons Law was approved, which created the Direct Hydrocarbons Tax (*Impuesto Directo a los Hidrocarburos - IDH*), recovering 32% of the production value for the State, which was added to the royalties. The IDH, which was distributed to all levels of government and all of the regions, in contrast to the royalties, and allocated to the producing department, made it possible to take advantage of international prices and contributed to substantial improvements in public finances and the economy.

In 2006, the Constituent Assembly was installed, which, after a long and conflictive process lasting three years, in 2009 approved the new text. Autonomy was one of the most highly debated topics as a process for intensifying decentralization. The new Constitution established autonomy for the departmental and municipal governments, for the jurisdictions at each level of government and assigned economic and social planning to the State, along with direct participation in the economy. That same year, the five remaining departments opted for autonomy. In this way, the following year the Framework Law on Autonomies and Decentralization was approved, which maintains the system for co-participation in taxes along with the same percentages of distribution

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43 In this respect, see: Laserna, Roberto. *La trampa del rentismo*. La Paz: Fundación Milenio, 2002.

determined by the Popular Participation Law and the Administrative Decentralization Law of the 1990s, conserving the systems and processes of administration and control, defined and regulated at the central level.

Thus, autonomy was defined as the quality of a territorial entity, which implies equal constitutional rank among autonomous territorial entities, the direct election of their authorities, administration of their resources, and exercise of legislative, supervisory and executive powers by their governing bodies in the realm of their territorial jurisdictions, while excluding regional autonomy from their legislative powers. Accordingly, the Ministry of Autonomies was created, theoretically to strengthen departmental, municipal and regional autonomies<sup>44</sup>, along with the autonomies of original indigenous peoples and peasants, 11 of which currently exist.

In 2011, the Tax Classification and Creation Law was approved, which in practice prevents the subnational governments from generating additional revenues or decentralizing certain taxes, thus maintaining centralization of the tax system.

In terms of the relationship among mining and hydrocarbons sectors, the process is quite clear. The decisions about whether or not mining is to be carried out in a particular territory correspond to the national government, with control over operations and the process of consultation with the communities also centralized, along with the reversion of hydrocarbon fields. The new Mining Law (2014) establishes that the autonomous departmental and municipal governments may not constitute mining companies or participate in any of the activities of the value chain. In the strictest sense, the only things that have been decentralized are royalties and their management. In this way, the strategic character of nonrenewable natural resources exploitation is affirmed.

The case of hydrocarbons is similar. Decentralization of hydrocarbon policy was established in the Hydrocarbons Law (2005), strengthened in the Decree governing their nationalization (2006) and enshrined in the Constitution. The subnational levels of government were not consulted about the definition of areas for exploitation or markets for commercialization, limiting their decision-making capacity to the redistribution of revenues received as royalties within each department. In the context of the decrease in prices, setbacks have occurred: the decision that liquefied petroleum gas produced by two plants (Río Grande and Gran Chaco) is not subject to royalties, so that their revenues belong completely to the central government and are not transferred to the regions (2013); as well as the creation of incentives for investment in exploration and exploitation of hydrocarbons based on a fund created with resources from the IDH (12% before their distribution to the beneficiaries).

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<sup>44</sup> Regional autonomy is constituted by the will of the citizenry of a region for the planning and management of its comprehensive development. This consists of the election of its authorities and the exercise of regulatory and administrative powers, as well as executive and oversight powers, which are conferred by explicit regulations. The only one that has been constituted is that of the Chaco Tarijeño.

In this scenario, and in the face of pressures from diverse sectors, in 2015 an intergovernmental commission was installed to define the methodology for a fiscal pact, the Gordian knot for decentralization in any country.

The institutionalization of civic participation, as in the case of decentralization, had its most immediate precedent in the Popular Participation Law, which decentralized public management at the municipal level, creating a mechanism for both participation and control, and territorially designed based on the Grass-roots Territorial Organizations (*Organizaciones Territoriales de Base* - OTB), which were neighborhood boards in the urban municipalities and among the indigenous peoples and peasant communities in the rural municipalities. Participation was based on development plans, annual operations programs and budgets, with an emphasis on participation and social control of the educational sector. The OTB obtained legal status, which gave them the right to meet in oversight committees that approved the above instruments prior to their execution.

The Constitution of 2009 establishes that the sovereign people take part in the design of public policies by means of the organized civil society, stipulating that the determination of public expenditure and investment shall be made through civic participation mechanisms and State technical and executive planning. The Framework Autonomies Law (2010) is barely mentioned, and in a very general manner, regarding participative management, which is limited to the realm of the seven subnational governments, and leaves the 1994 law in suspense, while establishing that the subnational governments must develop the framework for participation and social control in their autonomous statutes and organic charters.

In 2013, the Law on Participation and Social Control was approved, and progress was made in defining the objectives, powers and rights of the organized civil society for participation and social control, reiterating the responsibility of the autonomies in that field. In a strict sense, progress in this process has been very slow, possibly because, in contrast to what occurs in other countries of the region, it has always come from the government without any clear correlation in the dynamics of the society<sup>45</sup>.

Regarding prior consultation, it must be recalled that Bolivia ratified its signature of International Labor Organization (ILO) Convention 169 by means of a law in 1991. The Hydrocarbons Law (2005) recognizes that peasant and indigenous peoples and communities must be previously, obligatorily and opportunely consulted when any hydrocarbon activity is planned, establishing two time periods: prior to the tender, authorization, contracting, consultation and approval of the measures, works or projects; and prior to approval of the Environmental Impact Assessment Studies. The Regulation for Participation and Prior Consultation (2007) established that the Ministry of Hydrocarbons and Energy is the competent authority for the consultation process in hydrocarbon activities, whereas the Ministry of the Environment and Water is the competent authority that issues the environmental

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45 Fundación Jubileo. *Reporte Nacional sobre los procesos de reforma institucional durante y después del superciclo de los commodities. Caso: Bolivia*. La Paz: Fundación Jubileo, 2016

license after the consultation, it being the responsibility of both Ministries to direct the processes of consultation and participation.

In mining, it should be remembered that in Bolivia, the original (indigenous) peoples are the majority and occupy much of the national territory, in addition to being part of mining operations for centuries. The Environmental Framework Law (1992), its regulation (1995) and the specific mining regulation (1997), standardized the consultation with communities as a requirement for the adjudication of environmental licenses. Although the Constitution contemplated it, five years passed before the consultation could be made operational, because the mining cooperatives opposed the social license that should result in an agreement with the owners in the territories, without state intervention, with the resulting conflicts.

Finally, the Mining Law (2014) makes this consultation operative and establishes its procedures, making the Administrative Jurisdictional Mining Authority responsible for convoking, directing and formalizing consultations with the communities, although limiting them to the exploration phase.

In terms of environmental institutionalization, as in other countries of the region, state structures were established to face the challenges that would arise in the world order and which became explicit in the Earth Summit (1992). Between 1988 and 1996, sectorial institutional adjustments were made; in 1990 the Ecological Defense Law was approved along with the Supreme Decree, which established the historic ecological pause (paralyzing forestry concessions to promote proper management of the forests and maintain the rivers and streams). In 1992, after a relatively participative process, the Environmental Framework Law was approved, with a sustainable development approach, which included the spheres of renewable natural resources and environmental impacts management, establishing institutions and regulations for protected areas, territorial organization, plans for the use of municipal lands, etc., thus decentralizing environmental management. The regulation of that law (1995) included certain provisions for participation in environmental management.

In 1997, the Environmental Regulation for Mining Activities developed a set of measures to preserve the environment. In 2003, the Environmental Impact Assessments were established, whereas in 2005, the Hydrocarbons Law established that activities involving the environment are subject to the Environmental Law and its regulations, the Forestry Law, the protected areas regimen and special international environmental agreements. The Hydrocarbons Law established that for each oil contract, there shall be a socioenvironmental monitoring committee from the area to implement actions to boost positive impacts and mitigate negative ones in the zone. In practice, those committees were not implemented.

The Constitution of 2009 incorporated the right of all people to a healthy, protected and balanced environment, and their power to take legal actions in its defense, establishing that it is the duty of the State and of the people to conserve, protect and sustainably exploit natural resources and biodiversity, as well as to maintain the balance of the environment. The Constitution

recognizes the right of participation in environmental management, as well as the consultation and prior information before decisions are made that could affect environmental quality. That same year, the Ministry of the Environment and Water was created, charged with developing and executing policies, regulations, plans, programs and projects for the conservation, adaptation and sustainable exploitation of environmental resources, as well as the development of irrigation and basic sanitation with a comprehensive approach to watersheds, preserving the environment and guaranteeing priority use of water for life while respecting customs and traditions.

Despite its weaknesses, the institutionality created in Bolivia during the super cycle expressed the political will contained in the Constitution. However, despite its anti-neoliberal rhetoric and commitment to the protection of Mother Earth, with the fall in commodities prices, setbacks have begun to be seen in this regard in this highland country. In 2013, the government announced its decision to open up protected areas to hydrocarbon activity, heralding a new oil frontier that would overlap 11 of the 22 existing protected areas in the country. In that regard, DS 2195 (2014) limited the self-determination of indigenous peoples, their power to apply their own regulations and territorial organization and management, through the awarding of compensation for environmental impacts on their lands. That same year, the Mining and Metallurgy Law empowered the use and exploitation of water and limited consultation to the exploitation phase.

In 2015, DS 2298 reduced the consultation of indigenous peoples for oil activities to a mere administrative process and DS 2366 violated the protected areas and modified their structure by establishing that the discovery of any hydrocarbon field with commercialization characteristics in a protected area enabled the company to demand reconfiguration of the internal characteristics of the park.

### **The case of Colombia**

With a long period of democratic stability, although afflicted by a cruel and prolonged internal conflict, Colombia went through the super cycle following approval in 1991 of a "liberal, progressive, multiethnic, diverse and pluralistic Constitution"<sup>46</sup> that distributed power equally among the three branches of government, affirming the modernization and democratization of a strong State, with new entities of control and justice, an organized and mobilized society, and a relatively diversified and quite open economy.

The implementation of decentralist reform in the country was related to exhaustion of the bipartisan model that had previously characterized it, the threat of being overwhelmed by drug trafficking and the social discontent that demanded changes in the management of public administration. Thus, in 1986 the election of mayors was approved along with the holding of consultations, beginning a process of transference of functions and jurisdictions to the municipalities and, to a lesser extent,

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46 Foro Nacional por Colombia. *La herencia del superciclo de precios de las materias primas en la institucionalidad del sector extractivo en Colombia*. Bogotá: Foro Nacional de Colombia, 2016.



to the departments. The Constitution of 1991 enshrined a decentralized State and strengthened territorial autonomy, providing for the election of mayors and governors and strengthening political participation through the departmental assemblies, municipal councils and local administrative boards, in addition to creating the necessary mechanisms for territorial organization.

This process was strengthened in 1994 with the Planning Law (which established participative drafting of municipal and departmental plans) and the Territorial Organization Law of 1997, enshrining a concept that forms the basis for Colombian public management. This initiative, however, was in contrast with the implicit tension in a Constitution that guarantees social rights and a neoliberal style economic model, which has greater strength in the case of mining and hydrocarbons, particularly in the context of the super cycle.

In this context, the need to attract foreign direct investment and promote the extractive sector for economic growth led to the Mining Code Law (2001), which reaffirmed the role of the national government in decision-making, regulation and concessions, ignoring the subnational entities which, because of their previous regulations, have as their principal responsibility territorial organization and working with the government for the promotion and control of policies aimed at mining and hydrocarbons. As is obvious, in the tension generated in this process, decisions were centralized and control bodies were weakened because local leaders, who are in charge of monitoring the practices and the social, economic and environmental impacts generated by public and private operators in the territories, in addition to promoting the prior consultation for projects in ethnic zones and defining the parameters for the negotiation of environmental and social licensees, lacked the required tools and capacities for such purposes.

Thus, between 2001 and 2006, a logic of violation of the territorial autonomy that had been established by the Constitution came into play, which was expressed in the promulgation of decrees in the field of mining and hydrocarbons without the necessary public debate and with the gradual weakening of instruments for coordination among the levels of government. Different rulings by the Colombian Constitutional Court have shown this<sup>47</sup>. In those years, and as part of the promotion of the extractive sector, in 2003 the National Hydrocarbons Agency was created and assigned to the Ministry of Mines and Energy, to encourage modernization of the oil sector.

Beginning in 2007, taking advantage of the international prices, Colombia determined that in practice, mining and hydrocarbon activities would lead the country's economic growth. They therefore reorganized the institutional structure and created new public agencies based on the National Mining Development Plan of 2006, beginning a process that made the Mining Code (Law 1382 of 2010) even more flexible and modified the structure of the Ministry of Mines and Energy, assigning it the responsibility of formulating, directing, adopting and coordinating all policies, plans and programs associated with the sector by means of Law 1440 (2011).

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47 Foro Nacional por Colombia. *La herencia del superciclo de precios de las materias primas en la institucionalidad del sector extractivo en Colombia*. Bogotá: Foro Nacional de Colombia, 2016.

To formulate and implement the mining and hydrocarbons policy that had been adopted, in 2012, the existence of attached and linked entities was established: the former advise and provide technical support for promotion and organization of the activity, in addition to implementing decisions about the assignation of projects, formalization of small and medium-sized production and the gathering of geological and planning information; the latter, which include ECOPETROL and the electricity generators, enjoy budgetary autonomy, although they have participation by the Executive Branch, which intervenes in their operational strategy.

In this process, the centralist strategy implied by many of these measures directly affects the municipalities, as is the case with Supreme Decree 2691 (2014), which gives local authorities a very short timeframe in which to present their studies on the possible effects of extractive projects in their territories, formally complying with a Constitutional Court decision in defense of the principle of territorial autonomy, but stripping it of content because of the technical and financial incapacity of local authorities to comply within the stipulated timeframe. That strategy is extended to public policy instruments, such as the 2014-2018 National Development Plan, which generates such mechanisms as the “express window” (to streamline mining and environmental processing), shortening of the timeframe for response and review of contracts and concessions, tax breaks and renewal of payment of the service royalty, along with diverse systems for conditional operation.

From a tax perspective, the Colombian strategy contemplated exemptions and breaks for private investment as a condition for capturing revenue in order to mobilize the sector, including tax deductions for the payment of royalties (2005) and their elimination in the remittance of profits (2006). Creation of the General System of Royalties (2011) contributed to revenue centralization: the administration of resources was concentrated, implying a decrease in royalties directly allocated to the territories; a percentage of these was allocated to the Savings and Stabilization Fund managed by the Ministry of Finance, which in practice serves to cover the fiscal deficit generated by the end of the super cycle and which was incorporated into the Collegiate Bodies for Administration and Decision, made up of mayors and governors (charged with defining projects financed with royalties), and representation at the national level, which thus influences the allocation of resources.

In short, it is clear that Colombian decentralization has come into conflict with, and has been weakened by, the super cycle, and even more so during its decline, given that extractive activities and the State, in its decision to promote them, regard the functions and jurisdictions of territorial organization as factors of “delay” or simply “obstacles” for development, generating diverse conflicts because, while the executive branch defends a policy of large-scale extractive projects that generate revenue for the well-being of the population, most of the departments and municipalities with potential in these resources experience the overlap of institutional actions, deficient State control in the territory, multiplication of actors with conflicting interests, weakness in existing venues for dialogue and the growth of informal and illegal mining.

The institutionalization of civic participation was another of the strategies for democratization of the Colombian regimen and the search for new legitimacy during the 1980s. Encouraged by social



mobilization and demands by the population in the peripheral zones of the country through the so-called “regional civil strikes”, in 1980 the first steps were taken in that direction by means of diverse laws and regulations that incorporated it into urban development plans and in various decisions in the environmental field at the municipal level. In 1986, the new norms in the municipal field regulated the functioning of Local Administrative Boards and created mechanisms such as the municipal popular consultation and participation by users in certain domestic public utilities.

The Constitution of 1991 elevated civic participation to the constitutional rank, establishing it as a fundamental civic right and as a principle of the organization and functioning of the State. In 1994, the Statutory Civic Participation Law was approved and the Ministry of Government, now the Ministry of the Interior, was charged with designing the policy, which among other things, created the Civic Participation Fund to promote it and to strengthen the citizenry through financed projects. This wide-ranging offering encouraged a legislative “cascade” of more than 50 laws approved between 1993 and 2000 in the fields of socioeconomic planning and territorial organization, design of public policies, participative budgeting and civic monitoring of the results of public administration.

That interest had been exhausted by the early 2000s, when diverse venues that had been generated showed signs of bureaucratization and inefficacy in channeling the interests of diverse civic sectors, distancing themselves from the groups that they had represented and being displaced by alternative and non-formal routes that people began to build in an unequal matter in order to deal with the public authorities<sup>48</sup>. These non-institutional forms of participation compensated for exhaustion of the regulated forms such as the Territorial Organization Consultative Councils (created in 1997) and the Planning Councils (established in 1994), making it necessary to review the current framework in order to breathe new life into politics. Thus, in 2011, the Vice Ministry for Civic Participation was created as part of the reform of the Ministry of the Interior.

More importantly, led by the Foro Nacional por Colombia (National Forum for Colombia), more than 450 civil society organizations, business associations and certain State entities promoted reformulation of the regulatory framework. In this regard, in 2012 the Congress enacted a new law, which finally came into effect in 2015. Its main elements include the obligation of the three levels of the State to include specific measures in their development plans to promote civic participation; redefinition of the character, requirements and procedures for use of this mechanism; the inclusion of accountability and social control as fundamental components; the creation of institutionality for the design, execution, follow-up and evaluation of public policy to promote civic participation; strengthening of participative budgets and planning as scenarios for lobbying government; etc.

Civic participation in the extractive sector has always been weak, institutionally speaking, given that, as previously stated, the government controls all of the links in the value chain, thus excluding

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48 Velásquez, Fabio and González, Esperanza. *¿Qué ha pasado con la participación ciudadana en Colombia?* Bogotá: Fundación Corona, 2003.

the population from decision-making. This in spite of the legal framework in force since 1991, the prior consultation and public hearings created by the Environmental Law in 1999, the popular consultation regulated by Law 1757 of 2015 and the “partnerships for prosperity” (mechanisms for dialogue between the citizenry, municipal administrations, national governments and companies that undertake extractive projects to reach agreement and monitor the handling of mining and energy projects in the municipal realm), established by that same law.

Strictly speaking, despite the incorporation of ILO Convention 169 into Colombian legislation beginning in 1990, successive norms did not define conditions or procedures for the prior consultation. Only more recently through a presidential directive of 2010 was the protocol for their implementation defined. However, the State, through its agencies, ignores the presence of communities in territories claimed by them, the information with which it provides them is precarious and responsibility for the consultations is “outsourced” to the private sector, so that they become a mere formality, increasingly perceived by the government as an obstacle for development, and by business sectors as an uncomfortable requirement that generates increased costs.

Contradictorily, the final approval of Law 1757 generates a significant volume of structures of opportunity for participation in public life, particularly in decisions involving the extractive sector, including improvement of requirements for the use of mechanisms and systems for participation, such as the prior consultation. Additionally, the agreements about the end of the armed conflict with the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia - FARC) involve considerable challenges for carrying out extractive activities due to the presence of armed actors in territories with nonrenewable natural resource exploitation.

Finally, regarding environmental institutionalization, the first significant milestone has been the Constitution of 1991, nicknamed “green” because it includes an environmental and ecological approach in 50 of its articles and incorporates the perspective of sustainable development. In line with the new social contract and the Declaration of Río of 1992, the following year the Colombian General Environmental Law was approved and the Ministry of the Environment was created, which replaced the National Institute of Renewable Natural Resources and of the Environment. Complementarily, the Law also created the National Integrated Environmental System (SINA) to implement the general environmental principles, as well as the Regional Autonomous Corporations (CAR), charged with administering the environment and natural resources within their jurisdictions. Three instruments were derived from that law, which became significant: the Land Use Statute, the formulation of policy for human settlements and urban expansion in coordination with the Ministry of Economic Development, and regulation of the system<sup>49</sup>.

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49 Guhl, E. and P. Leyva: La gestión ambiental en Colombia, 1994-2014: ¿un esfuerzo insostenible?, Friedrich Ebert Stiftung y Foro Nacional Ambiental, Bogotá, 2015.

In 2002, driven by the financial crisis experienced by Colombia between 1998 and 2001, the Colombian Government decided to group together housing, basic sanitation, potable water and the environment, creating the Ministry of Environment, Housing and Territorial Development, which downplayed the environmental dimension, relying on the housing and territorial development sector to fulfill the goals of the government's National Development Plan and drive economic growth.

The resulting weakening of the SINA particularly affected the CARs, whose resources to fulfill their functions were significantly decreased, particularly those involving the issuance of environmental licenses and evaluation, follow-up, control and environmental supervision of mining and hydrocarbon activities. Additionally, in 2003 the financing of that Ministry was reduced by more than half, with only one fifth of its budget allocated for environmental matters. Essentially, the 2002-2006 National Development Plan sought to attract foreign investment in oil activity and streamline bureaucratic processes for mining investors.

In that framework, in the context of increased prices for commodities, mining titles were indiscriminately granted that did not comply with minimum requirements in terms of environmental regulation, with increases in the number of such applications until 2011. The already-mentioned 2001 Mining Code, in addition to breaking the structure of decentralization, defined specific rules for handling environmental management, introducing clear exceptions so that environmental conservation would not be an obstacle to mining development. In this scenario, environmental institutionality was greatly affected by this constant weakening, while at the same time being affected by accelerated expansion of mining and energy. Thus, although the National Development Plan that year aimed to make mining and energy the locomotives for Colombian growth, President Juan Manuel Santos, in the framework of Law 1444 (2011), obtained extraordinary powers to modify the structure of public administration, making the Ministry of the Environment and Sustainable Development separate from that of Housing, City and Territory, which maintained the power to manage water.

Despite the optimism that had been generated and the creation of the National Authority for Environmental Licenses –with jurisdiction over all oil activities and mining macro projects–, as well as exclusion of the *páramos* (moors) from mining activity, no progress was made. The National Development Plan Law 1753 (2015) places its bets on Strategic National Interest Projects (infrastructure, hydrocarbons, mining and energy) to spur development. In that context, in 2014, Supreme Decree 2041 was issued, which streamlines the timeframes and procedures for obtaining environmental licenses, generating mechanisms such as the previously-mentioned “express licenses”.

Observing the evolution of environmental institutionality, it is clear that if initially environmental management was able to position itself as an important attribute for development of the country, starting from the beginning of the administration of President Álvaro Uribe, the priorities changed and the need for economic growth displaced the consideration of environmentally responsible sustainable development.

## *The case of Chile*

Chile has a very long-standing mining tradition, mostly focused on copper exploitation. The fall of the dictatorship of Augusto Pinochet implied the country's return to democracy of a negotiated form, with the legacy of a strongly conditioned Constitution (1980). The country arrived at the super cycle as a strong and highly centralized State; an open and growing economy, with early progress in free trade agreements that maintained its previous structure; a "contained" society in terms of its mobilization, although relatively organized; and a system of parties in redefinition, but with significant capacity to build strong alliances.

Decentralization is a change that remains far off in Chile, which is a paradigmatic example of extreme centralization at the organizational administrative level. It is a democratic, unitary and presidential State, whose constitutionally defined administration is functional and territorially decentralized and deconcentrated, structured by means of a central administration, headed by the president, the ministries and the regional ministerial secretariats, who are named by the president from a list of three proposed by the intendent, and act as collaborators as well as representatives of the sector in the region.

According to the Constitution, the country is divided into regions for governance and administration of the State (DL 575 of 1974), and the regions are divided into provinces, which are then divided into communes. The regional governments administer the regions and have the mission of social and economic development, and consist of the intendent and the Regional Council. The former serves as the president's direct representative in the territory and as the executive organ of the regional government, presiding over the Regional Council, which is a regimented, decision-making and supervisory body in the realm of jurisdiction of the regional government. The Council consists of the regional counselors, who are directly elected since 2013. Until then, the counselors were chosen by the counselors of the communes, acting as a provincial electoral college.

In each province, there is an office of the governor which is a deconcentrated body of the intendent, directed by a governor who is named by the president, with the duty to supervise public services in the province, in accordance with the instructions of the intendent. At the base of this design are the communes, which are administered by the municipalities. The communes are responsible for satisfying the needs of the local community and are governed by the Organic Municipalities Law (2006), and consist of the mayor and counselors, who are directly elected in each commune.

Throughout the extractive super cycle, this institutionality has undergone major changes. In 2007, laws were used to create two new regions and, subsequently, in 2013 a law was approved that established direct election of regional counselors, who can approve or modify the projects and proposals of the intendent for plans, development strategies, the regional development budget and distribution of funds from the National Regional Development Fund that correspond to the region. The fund is a public investment program for the purposes of territorial compensation aimed at social and economic infrastructure actions. That same year, the regional counselors were elected for the first time.

More recently (2014), President Michelle Bachelet, by means of a decree, created the Advisory Commission for Decentralization and Regional Development, responsible for drafting a national decentralization plan. The report proposes to define the State as decentralized, with the election of regional authorities, transference of jurisdictions programs and services; creation of a system for administration of metropolitan areas, a regional revenues law, the constitution of a convergence fund for interregional equity; the creation of regional human capital systems, strengthening of regional public institutionality and regional and local democracy, as well as stimulus for civic participation. In other words, to take the path that other nations in Latin America have already taken or are currently traveling.

Obviously, these timid changes are not directly related to the super cycle, but were spurred by historic demands for decentralization that have been expressed in recent years through diverse movements demanding greater regional autonomy (Magallanes, 2011; Aysen, 2012), greater resources and better public services (Arica, Chaitén, Chiloé, etc.), as well as better distribution to the producing regions of the revenues obtained from copper (Calama and the regions and communes of the northern part of the country). It is partly from these demands that the relationship is observed which is not found in the modest institutional changes undertaken<sup>50</sup>.

In response to some of these demands and as a mechanism for compensation for the territories and their communities, the Chilean Executive branch presented draft legislation that would allocate funds to create a Development Fund for the North and for the mining communes of Chile (FONDENOR), to be distributed over 13 years to mineral communes with revenues from mining patents greater than 2.5% of the annual total of their own permanent revenues, to be freely used for investment projects that have received the relevant evaluations. Until now, the draft legislation has been paralyzed, showing lack of interest by a significant part of the actors involved but also the lack of strength of the organizations in the territories that would have benefited.

In terms of civic participation, the situation is not very different. The Law of General Bases of the Environment (1994) is the first legislation that establishes the notion at the regulatory level of civic participation based on a set of principles that include participation. The law enables civic organizations to formulate observations regarding Environmental Impact Assessments in the process of environmental authorization, which will be weighed by the authority, although they are nonbinding. The law also created the so-called Consultative Councils (consisting of representatives of business, the workers, NGOs, academics and the government) at the national and regional levels, with the duty to represent civil society in a series of aspects before the main environmental authorities.

Although slowly, greater will was generated to deal with civic participation as a State policy. In 2000, President Ricardo Lagos constituted the Civic Council for strengthening of the Civil Society, aimed

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50 Martínez, Ignacio and Liberona, Flavia. *Reporte nacional sobre los procesos de reforma institucional durante y después del superciclo de los commodities*. Santiago de Chile: Fundación Terram, 2016.

at drafting a report that would point to measures to give civil society organizations a new role in the country's development, committing the government to create a legal framework to facilitate their functioning, create special funds to finance them and other measures to aid their integration.

President Bachelet (2006) presented the so-called participative agenda that involves diverse actions to promote participation, the exercise of civic rights, associativity and respect for diversity, by means of a participative public management, through access to timely public information and nondiscrimination. To advance in that direction, the president issued instructions insisting on the need to establish a general norm for civic participation and create civil society councils to accompany decision-making processes regarding public services. Finally, in 2011, the Law on Associations and Participation in Governance and Civil Society Consultative Councils was approved.

Previously, in 2010, as part of the new environmental institutionality created by law, civic participation was increased with respect to Environmental Impact Declarations (DIA from the Spanish acronym) that are under evaluation, establishing the possibility to present observations regarding projects viewed as generating environmental burdens for nearby communities. However, this participation must be requested by at least two organizations because it does not operate automatically. The norm incorporates social impact evaluations for projects and activities and establishes strategic environmental assessments for plans and programs through public hearings. The State has the obligation to facilitate participation and the environmental authority must consider the observations and respond based on them. The social impact evaluations and environmental impact declarations permit complaints to be made if the observations are not recorded.

In relation to the prior consultation, the Chilean Congress approved ratification of Convention 169 (2007), which finally came into force in 2009. Because the country lacked mechanisms to carry out prior consultations, it opted for a transitory type, promulgating a decree by the Ministry of Planning and Cooperation to regulate the consultation by means of a regulation (2009) that would restrict the scopes of the Convention and exclude investment projects undertaken on indigenous lands from the consultation process, establishing that they would be subject to the consultation or participation procedures contemplated by the respective sector. From that moment on, diverse conflicts were generated and brought before the courts and initially dismissed by the justice system, which has more recently begun to change its behavior.

In 2011, President Piñera announced a new instrument that would include a new Environmental Impact Assessment System (SEIA) and regulation of the consultation procedure, which subsequently had to be suspended because of the rejection that it caused. In 2012, the regulation of the SEIA was approved, which included a specific regulation for consultations with indigenous peoples when evaluating investment projects within the above-mentioned system. Subsequently, in 2014, the Ministry of Social Development published a decree that regulates the procedure for consultations with indigenous peoples. Both regulations, which remain in force, are not in accordance with the minimum standards required by ILO Convention 169. In the first case, application of the consultation is limited to certain cases associated with significant impacts stemming from investment projects in



indigenous territories; in the second, it is established that only those measures that would directly cause a significant and specific impact on indigenous peoples will be subject to prior consultations.

Chilean environmental institutional had its first milestone in the General Law on Bases of the Environment (1994), which had been preceded by the decree creating the National Environmental Commission (CONAMA). The CONMAIMA had an inter-ministerial composition and the task of making studies, analysis and evaluation of matters associated with environmental conservation and protection (1990). The Technical Secretariat of the Commission was responsible for formulating the ultimately approved Law on Bases.

The most important instrument contained in that law was the creation of the Environmental Impact Assessment System for investment projects, which made most investments that could generate environmental impacts subject to an environmental qualification project. Delay in the approval of the regulation for the System facilitated a shift in application of the law in favor of investment without clear environmental safeguards. The CONAMA, as the governing body for environmental policies and regulations, was incapable of managing the diverse conflicts that arose between 2002 and 2006.

The weaknesses of existing institutional determined that evaluations of the country's environmental performance by the Organization for Economic Cooperation and Development (OECD) – CEPAL (ECLAC), prior to the entry of Chile into the OECD, were quite critical, particularly in relation to Environmental Impact Assessments. The combination of environmental tension in Chile and the above-mentioned report encouraged the reform of environmental institutional.

The government submitted its bill in 2008. Negotiations for the reform were plagued by pressures and bargaining, with final approval in (2010), including the creation of three institutions: the Ministry of the Environment, Superintendence of the Environment (SMA) and the Environmental Assessment Service. Along with the above-mentioned Ministry, the Law also created the Council of Ministers for Sustainability. The Council is presided over by the Minister of the Environment and incorporates various ministries, including those of Energy, Mining, and Planning and Economics. It functions as a deliberative body for public policy and general regulation in environmental matters, charged with proposing policies to the president for the use and exploitation of natural resources as well as sustainability criteria in the policies.

The new institutional was completed with the creation of the Environmental Tribunals (2012), specialized and independent jurisdictional bodies under the supervision of the Supreme Court. They resolve claims against resolutions issued by the SMA, decrees that establish quality and emissions regulations, declare latent or saturated zones, and establish prevention or decontamination plans, in addition to resolving lawsuits for environmental damages. It must be pointed out that the SMA did not begin to function until creation of the Environmental Tribunals, which was the political agreement that permitted approval of the new institutional as part of the pressures from diverse lobbies that supported the president. In 2013, the president created the Investment Streamlining

Committee (Comité de Agilización de Inversiones), whose role was to prioritize projects for approval in the framework of the Environmental Impact Assessment System.

In summary, Chile embarked on a complex path in which tensions between economic power and effective environmental institutionality are evident. Such tensions were present throughout the process, before and during the super cycle, and are being further accentuated as it approaches its end.

### *The case of Ecuador*

Ecuador, following its return to democracy in the late 1970s, went through a long period of political instability that began in 1996, strong economic populism and a crisis that ended with the dollarization of its currency (2000), exhaustion of its system of political parties, and an intense process of social mobilization and diverse coup d'états, including the so-called "Revolution of the Outlaws", arriving at the super cycle amidst great uncertainty and significant social discontent.

Ecuadorian decentralization began with the new Constitution of 2008, according to which Ecuador is a unitary and centralized republic with an administrative political division involving provinces, cantons and parishes. The provinces can combine to form autonomous regions; each has an elected governor and a provincial government composed of all of the mayors of the province (or a delegate counselor). The cantons are divided into parishes, which can be urban or rural; the rural parishes have an elected mayor and municipal government. The set of parishes is organized under the legal form of a municipality, which is the jurisdictional authority of the Canton in administrative matters. Its executive power is the parish government and chairperson, all of whom are elected, whereas its legislative power is the parish assembly, whose members are also elected.

This territorial organization was regulated by the Organic Code for Organization of the Territory, Autonomy and Decentralization (COOTAD, 2010), which determines the functions of all of the country's decentralized autonomous governments. In addition to the four levels, there are three types of special regimens: the Council of Government of the Province of Galápagos, the Metropolitan Districts and the Special Indigenous, Afro-Ecuadorian and Montubian constituencies, in accordance with the needs of environmental conservation, cultural ethnicities and population size. The regions have not yet been effectively created, with a time limit until 2018, according to the Code.

With approval from the COOTAD, jurisdictions were established for each subnational level of government, with certain jurisdictions exclusive to each one. Thus the regions are responsible for coordinating the work at each level of government, so that it will be aligned with the central government; the provinces have similar jurisdictions in coordination with the cantons and parish boards within their territories, being responsible for managing the road network and environmental management; the municipalities focus their exclusive jurisdictions on services for citizens, along with traffic, maintenance of physical health and education infrastructure, as well as regulation,

authorization and control over the exploitation of stone materials; finally, the duties of the parish boards include encouraging community productive activities and the promotion of civic organization.

The Constitution itself establishes the National Council of Jurisdictions (Consejo Nacional de Competencias) as a technical body consisting of a representative from each level of government charged with regulating the procedure for transference of exclusive and shared jurisdictions to the decentralized autonomous governments, regulating their concurrent jurisdictions and resolving jurisdictional conflicts that may arise, in addition to developing capacities at each level of government.

The Constitution thus aims to organize the allocation of jurisdictions to affirm a logic in the process and close the door to “allocation a la carte”<sup>51</sup>. In this process, jurisdictions dealing with decisions in the oil and mining sectors have not been decentralized, remaining in the hands of the central government.

The COOTAD established a new financing structure, which defines the percentages of permanent and non-permanent revenue, such as oil revenues, that the national government must transfer to the decentralized governments, according to the parameters of population size and density, basic unmet needs, achievements in improving quality of life, fiscal efforts and fulfillment of the goals of the National Development Plan and the Territorial Organization and Development Plan of the decentralized government. It is thus clear that the management of oil revenue is predominantly centralized (99% in 2010-2012).

The significant increase in income during the super cycle led to the creation of a new public company (2011), Ecuador Estratégico, to be responsible for the planning, design, evaluation and execution of plans, programs and projects for local development and infrastructure in the zones of influence of strategic projects (oil, mining, hydroelectricity, petrochemicals, transport, etc.)<sup>52</sup>. From 2012 to 2014, the company’s investment budget was over US\$670 million, financing 1170 projects and thereby maintaining centralization in the management of revenue surpluses from extractive projects. At the same time, it generally ignored the temporality of the works and the criteria used for their prioritization.

Civic participation was also promoted and redefined by the Constitution of 2008, which created the function of transparency and social control, responsible for promoting control over the entities and bodies of the public sector, fostering civic participation, protecting the exercise and fulfillment of rights of participation, and preventing and combating corruption.

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51 Barrios, Franz. *Estudio comparado de experiencias de descentralización relevantes para el Perú en la perspectiva de escenarios políticos de mediano plazo*. Lima: PAPEP-PNUD, 2010.

52 Jarrín, Sebastián. *Reporte nacional sobre los procesos de reforma institucional durante y después del superciclo*. Quito: Grupo Faro, 2016.

The Council of Civic Participation and Social Control is the principal body for this function. It consists of seven men and women chosen by the National Electoral Council through a series of competitive merit examinations. This entity designates the General Public State Prosecutor (Procurador General del Estado), Ombudsman (Defensor del Pueblo), Attorney General (Fiscal General), Comptroller General and the members of the National Electoral Council, the Electoral Dispute Tribunal and the Council of the Judiciary. This body also contains the Superintendencies of Market Power and Control, Popular and Solidarity Economy, Information and Communication, Banks and Securities and Insurance Companies.

Subsequently, in 2010 the Law on Civic Participation and Social Control was approved, which combined direct mechanisms with civic participation (hearings, councils, empty chair, prior consultation, environmental consultation), specifically to enhance participation in functions of the State and levels of government. It establishes diverse instruments for social control, regulates the participative budget, establishes accountability, and affirms the right of access to information and transparency. This is a very detailed regulation that is still in the process of implementation.

Regarding prior consultation, in Ecuador this is supported by ratification of Convention 169 along with its incorporation into the constitutional texts of 1998 and 2008, which define the Ecuadorian State as *pluricultural* (multicultural) and multiethnic. The 2008 Constitution establishes that indigenous peoples must be consulted about plans for exploration and exploitation of nonrenewable resources found in their territories.

In the mining industry, the Mining Law (2009) affirms that the State is exclusively responsible and authorized to carry it out. However, this is not binding and if the response by those consulted is negative, the Ministry of Mines has the power to decide upon exploitation. The Hydrocarbons Law calls for implementation of consultations prior to tenders and after oil projects are carried out.

The regulation for execution of hydrocarbon consultations (2012) defines prior consultation as an instrument for participation and information that must be held before a possible adjudication of oil blocks or areas to guarantee access to information for indigenous nationalities and peoples who have settled within the areas of influence of the blocks. The regulation specifies procedures for the consultation, from certification of the topics of consultation to conclusion of the process, establishing that the entire process shall be financed by the Secretariat of Hydrocarbons.

Despite the existence of the regulation, in late 2012 a convocation was issued for the 11<sup>th</sup> Oil Round of the Southeast, for exploration and exploitation of 21 blocks (lots), in South-central Amazonia, Ecuador. This involves three provinces and affects nearly 3,000,000 ha, including the ancestral territories of seven indigenous nationalities, who immediately demonstrated against the convocation.

The basic problem that is observed, despite the political will expressed in most of the regulations summarized above, is that the right to prior consultation is a collective right and a right of participation for the indigenous communities, peoples and nationalities and Afro-Ecuadorians that



guarantees the fulfillment of other collective rights. It is not a privilege specific to these groups but rather a condition for maintaining their cultural identity and guaranteeing their right of self-determination. The currently-in-effect norms do not guarantee full exercise of this right, and on the contrary establish that it is the Ministries of Mines and Hydrocarbons that make the final decisions.

Ecuadorian environmental institutionalality was created 25 years after its extractive counterpart, indicating the complexity of the relationship between the environment and the generation of economic resources through natural resource extraction. This dichotomy has long been part of the country's history: the financing needs of the Ecuadorian State versus environmental conservation and the fulfillment of diverse environmental regulations that are being established.

That institutionalality is managed by the Ministry of the Environment, which was created by law in 1997, implying for the first time the independence of environmental regulation to guarantee a balanced environment, promoting sustainable development and recognizing fundamental natural resources. Since its creation, the Ministry has been centralizing Ecuadorian environmental institutionalality, maintaining its presence at all levels of government and with representation in every region.

The Environmental Management Law (2004) ratified its role as guide, coordinator and regulator of technical, political and administrative management of the country's environment. Its responsibilities include coordinating incorporation of the environmental component into the Territorial Organization and Development Plans at the different levels of subnational government. It is also responsible for approving EIA for strategic projects, along with environmental plans for regular investments. Additionally, it is the governing entity for management and conservation of protected natural areas and chairs the National Decentralized Environmental Management System.

Throughout the super cycle, tension between environmental matters and the decision to extract kept growing because the prices of oil and minerals, which implied greater revenue for the State, spurred increases in production, a search for new fields and enlargement of the oil frontier as the strategy. Nonetheless, the regulation for the application of social participation mechanisms established in the Environmental Management Law specifies the criteria to determine which populations have the right to protest against implementation of an extractive project.

As part of that tension, the EIA approved by the Ministry of the Environment showed a clear relationship between the number of EIA approved over the last 10 years and the increase in the prices of oil and minerals during the super cycle, thus demonstrating the growing importance of mining in the country beginning in 2012. Approval of the EIA is one of the requirements for obtaining the environmental license, which is nothing more than authorization from the Ministry for a natural or legal person to undertake a project that could cause environmental impact. Despite their limitations, the regulations establish Environmental Impact Assessments as a requirement for works, projects and activities, maintaining the right to participate in environmental management during the different phases of every activity and project prior to approval of the Social Impact Assessment.

In the context of the fall in international prices, since 2013, diverse environmental processes in Ecuador are being violated during the concession and exploitation stages in order to accelerate oil and mining exploitation. Thus, it has been decided to exploit crude oil under Yasuní National Park, once a symbol of the conservationist pretensions of Ecuadorian President Rafael Correa, which in this case succumbed to the pressure to generate additional funds following the end of the super cycle.

The same applies to the decision to abolish the Coordinating Ministry for Natural and Cultural Heritage, which was responsible for coordinating actions by the Ministry of the Environment, which since 2014 has been replaced in this endeavor by the Coordinating Ministry for Strategic Sectors, which brings together the Ministry of the Environment and the Ministries of Energy and Hydrocarbons and that of Mining, dramatically showing the response that the country is beginning to make to the dilemma that it faces.

The final message that these recent measures communicate is quite clear. It seems that the reduction in revenues due to the fall in prices is to be compensated by an increase in production volumes and in the number of projects along with decreases in environmental safeguards and requirements and in civic participation, along with the beginning of large-scale mining activities, for the first time in the country's history.

### ***The case of Peru***

Following the return of democracy in the early 1980s, Peru went through a cruel internal war that caused around 70,000 deaths and thousands of disappeared persons, one of the biggest economic crises in its republican history, and the three successive authoritarian administrations of Alberto Fujimori, which began macroeconomic stabilization but by institutionalizing and privatizing the State, deregulating and liberalizing the economy, fragmenting society and engaging in cronyism, as well as fostering high levels of corruption in politics. The beginning of the super cycle of high prices coincided with the fall of the Fujimori regime and a new transition to democracy marked by a State lacking legitimacy, a precarious system of political parties without national presence, an unstructured and fragmented society, a completely open economy and a serious crisis of representation.

Decentralization is a long-standing aspiration of the Peruvian interior. After diverse frustrated attempts beginning in 1828 and 1987, the latest was the main reform undertaken by the country at the beginning of this century. The Constitutional Reform and the Bases of Decentralization Law (2002) had as their objective "comprehensive development of the country", viewing it as a means to promote development opportunities that would be more equitably distributed in the territory and nearer to people<sup>53</sup>. The Bases of Decentralization Law dealt with all of the relevant and necessary aspects to create a general regulatory framework: actions by all levels of government; the definition of exclusive autonomy and its dimension; protection of the exclusive jurisdiction

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53 Asamblea Nacional de Gobiernos Regionales (ANGR). *Los gobiernos regionales al inicio de su segunda década. 46 experiencias de éxito de la gestión pública regional*. Lima: ANGR, 2015.

of the decentralized governments; the binding nature of technical standards for public goods and services and for the national administrative systems; the definition of exclusive, shared and delegated jurisdictions; criteria for allocation and transference of jurisdiction; and the regulation of diverse civic participation mechanisms, development plans and budgets that would be participative, coordinated and respectful of the macroeconomic equilibrium in the framework of the National System of Public Investment, among others.

The problem is that the consensus achieved for both initiatives was rapidly exhausted. The diverse motivations of the main actors, which oscillated between the need to re-legitimize a worn-out State, reform it to bring it closer to the people and redistribute political power in the territories, were rapidly depleted. The subsequent development of both norms –Organic Law of Regional Governments (2002), Law of Territorial Organization and Demarcation (2002), General Law of Transparency of Acts of Government, Access to Public Information and Accountability (2002), Organic Law of Municipalities (2003), Framework Law on Participative Budgets (2003), among others– began to reveal the growing differences among the legislators, the new authorities already elected in the regions and municipalities, and the populations of the interior of the country. The disorder that was generated revealed the defects in the origin of the process: juxtaposition of organizational designs, restrictive administrative systems, an inoperative system for accreditation of capacities, accelerated transference of functions, a public budget with an inertial allocation of funds, ministries lacking coordination and autonomy, commitment to the regional level based on the old departmental constituencies, etc.

In that scenario, there were marches and counter marches until 2005, when the referendum on integration of the regions was defeated, in other words, the integration of diverse departments, a process that was rejected at the ballot box and whose success was a condition for beginning fiscal decentralization. It was then that the process of institutional changes already underway came face-to-face with the beginning of the super cycle of commodities prices and the annual increase in income and revenue captured by the State. A previous norm, the Canon or Royalties Law (2001), was a factor for additional distortion because it concentrated the funds in a limited number of regions and provincial and district municipalities, increasing territorial gaps and pre-existing inequality in the country that decentralization should have specifically corrected.

The government that came to power in 2006 aimed to relaunch decentralization through an accelerated process of transference of jurisdictions and functions, breaking with the original design that involved a plan for transference/training/certification/and accreditation, including funds. Simultaneously, by means of a decree (2007), the National Decentralization Council (which led this process; consisting of the three levels of government; with technical and budgetary autonomy and a seat on the Council of Ministers) was replaced by the Secretariat of Decentralization, a line agency of the Presidency of the Council of Ministers, dissolving the policy link between the national government and the decentralized governments<sup>54</sup>. Delayed approval of the Organic Law of the

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54 Glave, Marisa. *Tres procesos que inciden en la gobernanza de recursos naturales explotados por las industrias*

Executive Branch (2007), which had been planned for five years before that, created the Council for Intergovernmental Coordination, which was never installed. Trying to “compensate” for this deficiency, a decree (2009) established creation of intergovernmental commissions in all sectors with shared jurisdictions. Except in three cases, these were a mere formality, leaving unresolved the increasingly urgent need for coordination and linkage between the levels of government, both vertically and horizontally.

Meanwhile, the super cycle continued “supporting” this order of things. Between 2007 and 2009, despite the decrease stemming from the international financial crisis, US\$4.929 billion were transferred to the producing territories in the form of distributions of tax revenues for the exploitation of mineral hydrocarbon resources, whereas the national government captured US\$5.413 billion under the same heading. Additionally, beginning in 2007, the transferences that had been monthly became annual, further disorganizing the plans and projects of the decentralized management.

With the political relationships damaged and with the annual increase in social conflicts in the country (200 conflicts on average during this period, 52% of which were socioenvironmental<sup>55</sup>), the relationships between the decentralized governments and the national government became increasingly conflictive. In that context, beginning in 2010, recentralization of the funds of the national budget became unstoppable; the decentralized governments’ share of these funds fell from 32% in 2007 to 28% in 2010, reaching a current 24.6%. Between 2010 and 2012, the decentralized governments of the producing zones received an additional US\$7.794 billion and the national government US\$8.801 billion. Beginning that year, the public budget, by law, began to be organized by results, most of which were determined by the national government and its sectors, so that the capacity for planning and management on the part of the decentralized governments continued to weaken.

The arrival of a new government led to expectations about the possibility to reorder the process of change. Particularly when the Public Budget Law (2010) created an Intergovernmental Commission that agreed upon a set of measures to advance towards fiscal decentralization, reducing the discretion of the national government and making the transference of funds predictable. Unfortunately, the consensus was useless. Even worse, in 2012, history repeated itself with the new government. The abundance of funds in the previous years revealed the self-serving corruption that had become visible in diverse subnational spaces, particularly those that had received substantial extraordinary resources in the form of royalties. Thus, even though the subnational levels lacked both functions and jurisdictions in the field of large-scale mining and hydrocarbons, which were all concentrated at the national level, they “took advantage” of opportunities for public works sustained by the super cycle.

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*extractivas: Descentralización, participación ciudadana y gestión ambiental.* Lima: Grupo Propuesta Ciudadana, 2016.  
55 Defensoría del Pueblo. *Reporte de Conflictos Sociales n.º 59.* Lima: Defensoría del Pueblo, 2009.



In this context, the national government, in addition to re-centralizing the budget by means of diverse norms, recovered labor jurisdictions (2012), and productive (2013) and educational ones (2014 and 2015) that had been transferred to the decentralized governments, blocking the possibility for approval of the regulations and instruments that the decentralized governments needed in order to advance in territorial organization, which had been strongly opposed by entrepreneurs associated with large-scale mining and hydrocarbons. Finally, it is clear that the fall in the high prices for minerals and hydrocarbons is already affecting the decentralized governments. Decreases in their budgets over the last two years, both for the producing zones that now receive less royalties as well as the nonproducing ones that receive revenues at the discretion of the Ministry of Economy, have caused difficulties, a situation that in the near future will probably not change. In short, without a cause-effect relation, it seems clear that this process, at least in terms of funds, has become a permanent part of the super cycle and its decline.

Civic participation in recent years has gone through diverse processes of institutional change, marked by steady progress until 2008 and setbacks since then<sup>56</sup>. While it has a relatively long history that began in the 1980s and it was indiscriminately promoted by the civil society and diverse local authorities, particularly in the formulation of development plans and budget management, civic participation has acquired greater importance in the framework of the ongoing decentralization. Since enactment of the Law of the Bases of Decentralization (2002), participation has been a component of it. The Organic Laws on Regional Governments (2002) and Municipalities (2003) created the Regional and Municipal Coordination Councils, with participation by decentralized authorities (60%) and representatives of the civil society (40%), elected among the organizations registered for that purpose. The function of this consultative venue is to issue an opinion on the Agreed-upon Development Plan, the Annual Plan and the Participative in Budget.

The most important initiative was the Participative Budget Law (2003), which made these processes obligatory for all of the decentralized governments, and in its early years came to include more than 300,000 agents throughout the country. Despite difficulties with its design and operation (it is a nonbinding process and the funds involved, particularly in the regions, are small), the mechanism had innovative elements to connect it to society. The process, directed by the Ministry of Economy, has been progressively dismantled since 2008. That year, the Participative Budget Framework Law was changed, modifying the independent municipal technicians mechanism by stipulating that initiatives must have a “viable” profile in the National System of Public Investment; in 2009, the official directive limited participants to establishing priorities, depriving them of initiatives and projects; finally, in 2010, they lost the capacity to define priorities, being forced to choose among those established by the Ministry of Economy.

Along with the annual subnational budgets, the second vector is that of civic participation in extractive activities. This kind of participation has been understood as aimed at the prevention of possible conflicts between the State, the population and the companies. When reviewing

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56 Remy, María Isabel. *Participación ciudadana y gobiernos descentralizados*. Lima: Grupo Propuesta Ciudadana, 2011.

timeframes for the process of implementation in extractive projects, we find that during the concession phase –whether for communal or indigenous lands- there is no participation, only the information published in the newspaper; during the exploitation agreement in relation to payment for use of the surface of the lands, there is a “commitment among private parties” where the company, if no understanding is reached, may begin a (temporary) easement process. And while civic consultation has not been regulated in the extractive sector, it nonetheless appears in the Constitution and is convoked by the authority, having been used since 2002 (Tambogrande) in diverse scenarios of social conflict (Tía María, 2014), revealing majority opposition to a mining project and rejection of the companies and the State.

Regarding the Environmental Impact Assessment (EIA), the process is regulated by a specific norm and includes the social impact evaluation and the environmental impact declaration, incorporating the Strategic Environmental Assessment for plans, policies and programs. The decree establishes the EIA as a participative process, guaranteeing formal and informal spaces; the authority disseminates the evaluation processes with sufficient time to incorporate the observations of the affected parties; observations by the public are recorded in the plan for participation, and changes are incorporated with technical support. Despite the restrictive nature of the process, the Environmental Mining Regulation (2014), under pressure from the large companies, has shortened the timeframes for participation, limiting the deadline for observations to 15 days.

The third vector is associated with ILO Convention 169 and the prior consultation. The relevant law (2011) was adopted under the “pressure” of the conflict of Bagua (2009, with more than 30 deaths), in which diverse indigenous populations protested against a dozen legislative decrees approved in the framework of the FTA with the United States, which violated the rights of the original Amazonian populations. Subsequently, the regulation was approved (2012) and the database on the populations was submitted (2012). Since then, certain consultation processes have been carried out that cannot conceal the limitations of what was actually achieved: (i) the subjects of the consultation, because the State, based on its interpretation of who are the original peoples, has excluded peasant farming communities; (ii) the databases have not consulted the decentralized authorities or the indigenous organizations; (iii) the law permits each sector to define the norms, projects or their stages when in fact these must be consulted; and (iv) it leaves out prior consultation, which is required in cases of megaprojects, toxic tailings and population displacement.

In short, while the ups and downs of participation and decentralization are explained by their inherent limitations and by lack of interest on the part of the State, problems for participation in extractive activities are found in relation to the super cycle –clearly in rejection of the civic consultation as a mechanism that could be incorporated- because the companies do not want to lose opportunities and the State sought to protect them in relation to their investments. Also, pressures to reduce the timeframes and spaces of the EIA are more understandable given the declining prices. Regarding prior consultation, it has been and continues to be quietly opposed by the oil and mining companies, who, protecting their interests during the super cycle, applied

pressure to exclude the peasant farming communities that were located precisely in the territories where the companies regularly exploit their resources.

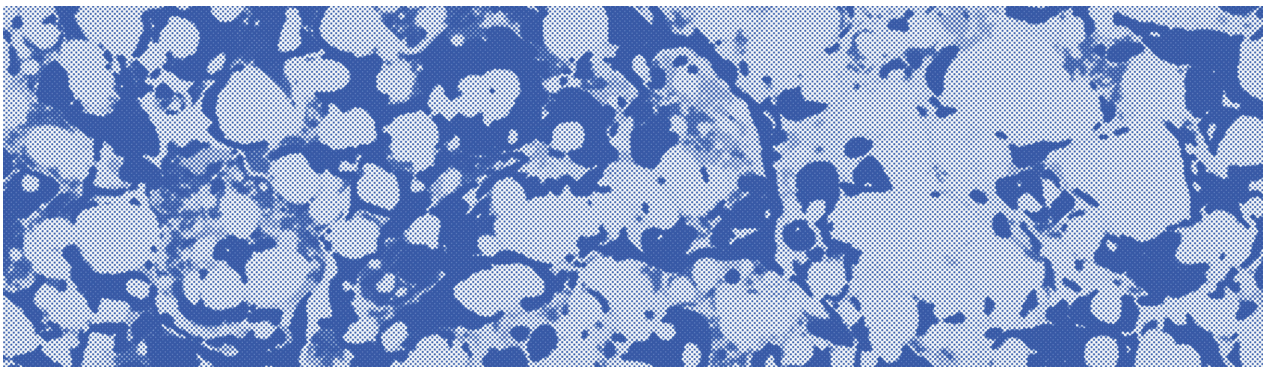
Peruvian environmental institutionality is vast and complex. Since the 1990s, diverse norms were developed and initially coordinated by the National Environmental Council. The Environmental Impact Assessment System Law (2001) establishes decentralized jurisdictions that coordinate the National Environmental Management System (2004), which is decentralized and deconcentrated and composed of five subsystems: Environmental Information, Evaluation and Monitoring, Environmental Impact Assessment, Natural Protected Areas and Water Resources. It combines diverse trans-sectorial and intergovernmental norms and instruments that are coordinated under the National Environmental Policy and the National Environmental Plan. Approval of the General Environmental Law and creation of the Ministry of the Environment (2008), in response to the demands of the Free Trade Agreement with the United States, was accompanied by the creation of the Environmental Assessment and Monitoring Body as the governing entity for this subsystem (2008), along with the National System of Protected Natural Areas. It should be pointed out that the norm was adopted following significant environmental conflicts and confrontations with mining companies (Tambogrande, Majaz and Tintaya). In 2009, the National Environmental Certification Service Law for Sustainable Investments (SENACE) was enacted, with responsibility, among other things, for approving the detailed EIA.

This institutional, which in many cases implies high levels of specialization, was increasingly seen throughout the super cycle by senior officials and entrepreneurs as an obstacle for large-scale mining and hydrocarbon investment. Forcefully opposed by the companies, beginning with the conflict of Conga (2011), it was rejected by diverse sectors. In certain cases, such as the Ministries of Energy and Mining, and that of the Economy, because it seemed to be an “obstacle” for their interests in attracting large investments, whereas in others, such as Agriculture, because of its trans-sectorial character and “ownership” of certain functions. For example, the SENACE has not finished fully taking charge of environmental certification. The same can be said of the regional governments that constantly encounter new demands on the part of the Ministry of Agriculture to advance in their interest regarding territorial organization.

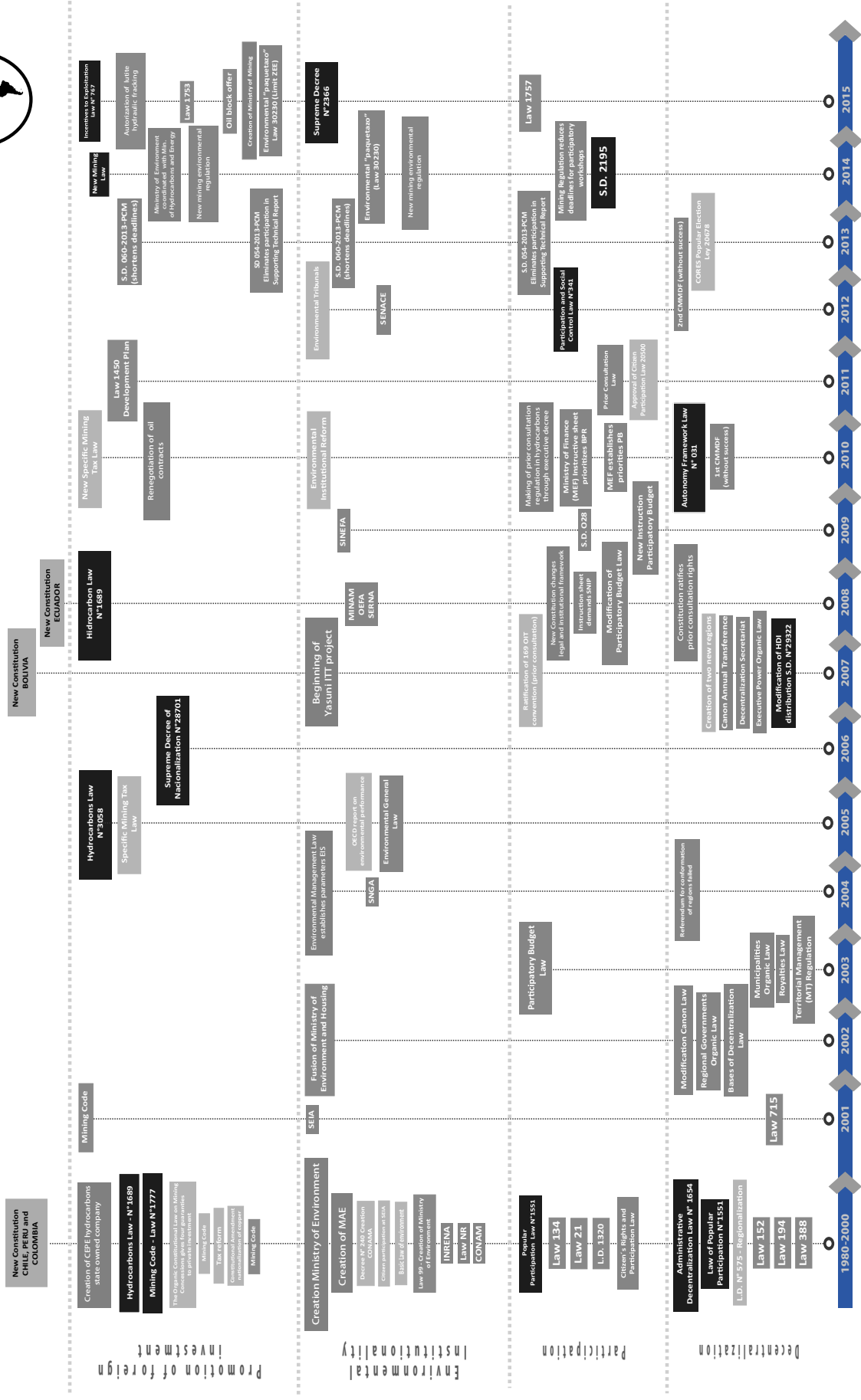
In this scenario, in recent years there has clearly been the will to undo the steps that had been taken. Thus, in 2013 and in 2014 (Law 30230), as part of “reactivating” initiatives for private investment in the context of lower international prices, measures were approved to define new time frames for approval of the EIA, ratifying the logic of sectorial certification, contrary to the centralization of jurisdictions in the SENACE and the definition of procedures based on technical criteria. Thus, the temporary emergencies of investors and of the government to capture revenue prevailed. That same Law 30230 takes jurisdictions away from the OEFA, determining that corrective measures must be taken before applying sanctions, and that the latter may only reach the punishable 50% until 2017.

Simultaneously, that law took away from the Ministry of the Environment the power to establish reserve zones and created difficulties for the conservation of key sites. Additionally, the sector

lost the function of territorial organization, which was given to the Presidency of the Council of Ministers, stipulating that exclusion of the use of lands shall not be established and environmental quality and pollution standards shall also be based on the regulatory and economic impact on industries and populations.



# TIMELINE: MODERNIZATION



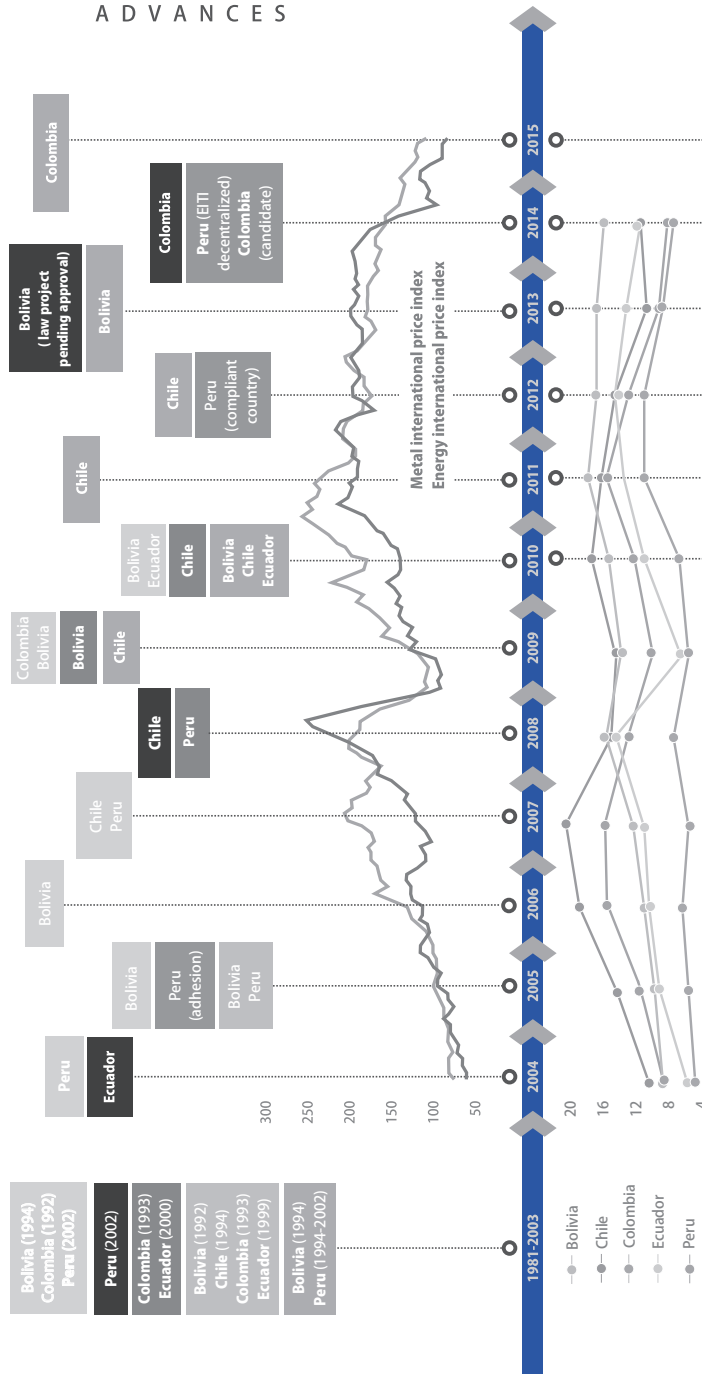
Legend: Ecuador Bolivia Chile Colombia

# INSTITUTIONALITY ADVANCES and SETBACKS during the SUPERCYCLE of EXTRACTIVE INDUSTRIES in 05 COUNTRIES

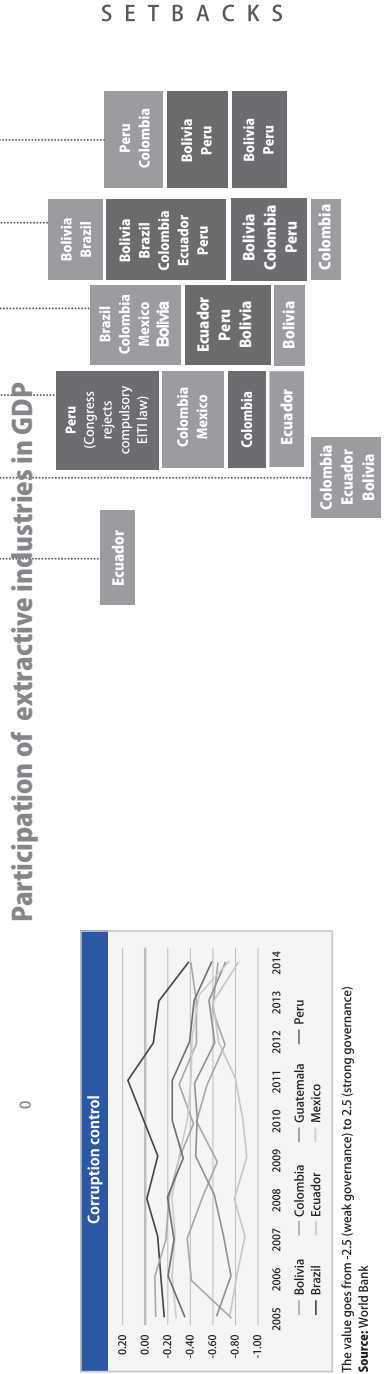
- LAW OF TRANSPARENCY AND ACCESS TO PUBLIC INFORMATION
- ENVIRONMENTAL FRAMEWORK LAW
- CITIZEN PARTICIPATION LAW
- CREATION OF ENVIRONMENT MINISTRY
- EITI INITIATIVE
- DECENTRALIZATION

- RULES THAT ENCOURAGE EXTRACTIVE INDUSTRIES
- RELAXATION OF ENVIRONMENTAL CONTROL
- RELAXATION OF CONSULTATION PROCESSES
- EITI SETBACKS
- DECENTRALIZATION SETBACKS

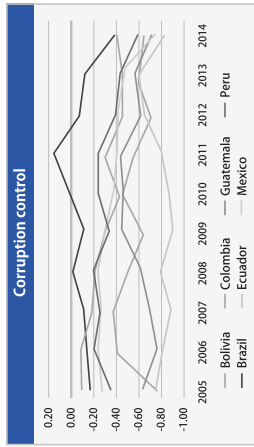
## ADVANCES



## SETBACKS



Participation of extractive industries in GDP



The value goes from -2.5 (weak governance) to 2.5 (strong governance)  
Source: World Bank

## 4.

# COMPARATIVE ANALYSIS OF THE COUNTRIES

The five countries analyzed arrived at the start of the super cycle of hydrocarbon and mineral prices in different situations, depending on their own itineraries for political, social and economic evolution. Chile, Colombia and Bolivia began the 1990s with democratizing reforms: Chile returned to democracy in 1990, in Colombia the “green” Constitution of 1991 was approved and in Bolivia the Popular Participation Law was enacted in 1994, which recognizes the Grass-roots Territorial Organizations (OTB from the Spanish acronym) and permits the creation of indigenous municipalities.

From then on, whereas in Chile and Colombia large-scale processes were begun to modernize State institutionality, in Chile through a strongly centralized model and in Colombia in a clearly decentralizing process, the main approach taken in Bolivia was to promote a decided process of decentralization, internationally recognized for the innovation of its initial reforms.

In contrast, in Peru, following hyperinflation during the second half of the 1980s, the economy was stabilized and the country was mostly pacified, and in 1992 an authoritarian and corrupt government was installed that remained in power until the end of the decade. In Ecuador, a period of great political instability began in 1996 that led to approval of the Constitution of 1998. However, this was unable to stabilize the situation, and in a scenario of falling international prices for oil, the country ended the decade in a serious economic crisis that led to the dollarization of its economy. This in turn prolonged a very serious political crisis that lasted until in 2006 – the year in which Rafael Correa was elected President of the Republic- there were ten successive heads of State.

Colombia also ended the decade with an economic crisis that affected its aggregated public finances, but was able to surmount it relatively quickly, introducing, among other things, an adjustment in the pace of its decentralization. Bolivia entered the new century with a grave political and governance crisis that also led to there being three presidents in less than five years, a situation which came to an end with the election in 2005 of Evo Morales as President of the Republic.

Meanwhile in Peru, after the uncovering of the level of corruption in which the country had been immersed in the 1990s, the authoritarian government that had dominated the decade abruptly collapsed and was followed by a short period of transition. Between 2000 and 2001, the country recovered its democratic alternation, maintaining its open economic model and macroeconomic stability jealously preserved during the 1990s. Meanwhile, during that entire period, Chile maintained its democracy after recovering it in 1990 without major setbacks or notable reforms, under the cloak of the Constitution inherited from the military dictatorship that had governed until that same year.

## 4.1 State Decentralization

The five countries studied come from long-standing traditions of cronyism coexisting with municipal institutions inherited from the Spaniards, having lived most of their history under designated authorities and with jurisdictions limited to urban ornamentation and typically local public services. Paradoxically, the country that best expresses that historical model is Chile, the most centralist of the five, with municipal authorities chosen beginning in the late 19<sup>th</sup> century and until 1973. Ecuador also has a long-standing tradition of authorities elected at the subnational level, although with frequent interruptions.

During the period analyzed, the five countries have made efforts to decentralize their States with different intensities and have been able to establish reforms of unequal relevance. The first recent initiatives for decentralization in the subregion took place in the 1980s in Peru and Colombia. The most durable and consistent was undoubtedly that of Colombia: in 1983 the process of strengthening its municipalities began; 1986 marked the beginning of the democratic election of mayors and promulgation of the Departmental Regimen Code; in 1991 the new Constitution approved the election of departmental governors as authorities at the intermediate level of government, the first of which was held in 1992; and 1994 saw issuance of the Municipal Regimen Code. Although over the years certain adjustments had to be introduced, mainly to avoid imbalances in subnational public finances that would endanger the stability of the national finances, Colombia is currently the most clearly decentralized among the unitary Andean States.

In Peru in 1980, even earlier than in Colombia, after 12 years of interruption during the military dictatorship, the democratic election of municipal authorities was recovered, which has been maintained uninterruptedly until now, and with promulgation in 1983 of the new Organic Municipalities Law. The election of regional authorities began in 1989, based on regions defined in the regionalization plan approved in 1984. However, this experience was quickly truncated in 1992, which also saw the dissolution of the Congress of the Republic.

10 years later, with the recovery of democracy and by means of a constitutional reform, regionalization was restarted in 2002, but this time based on the pre-existing departments, with modernization of the Organic Municipal Law the following year. Despite progress made over the years, everyone in Peru now recognizes that the decentralization process has been unable to transform the centralist matrix of the Peruvian State.

After these early cases, and already in the 1990s, Bolivia very decidedly, even audaciously, began its own decentralization process, which, after an uneven development, has currently also led to a clear centralist reflux. As previously stated, the first step came in the form of the innovative and recognized Popular Participation Law of 1994, which extended the municipal regimen to the entire national territory, enabled the formation of indigenous municipalities and expressly fostered civic participation at the local level.





In 1996 an administrative decentralization process began aimed at the departmental level, which led to increased pressures for greater autonomy, principally by the departments of eastern Bolivia, culminating in a serious political and governance crisis that was only resolved with the national election and the election of departmental prefects in 2005. Through the use of referendums in 2006 and 2009, all of the departments opted for a regimen of autonomy. As a result, in 2010, the Framework Law for Autonomies and Decentralization was approved –overturning the Popular Participation Law- which theoretically opens up possibilities for greater autonomy for the departmental prefectures as well as for the municipalities. This however is subject to a requirement for access: prior approval of a statute for each department and an Organic Charter for each municipality, a requirement that until now neither the departments nor the municipalities have been able to fulfill, corresponding to the recentralizing trend shown by the current national government.

In Ecuador, despite uninterrupted elections of authorities since 1992 at the sectional level (corresponding to its provinces<sup>57</sup>) as well as the municipal level, its decentralization process is the most belated and most limited in its scopes until now. In the framework of the new Constitution of 2008, in 2010 the so-called Organic Code of Organization of the Territory, Autonomy and Decentralization (COOTAD) was approved, which, although it clearly defines the jurisdictions that correspond to each level of organization of the Ecuadorian State, it must be said that the level of decentralization that it signifies is quite conservative.

Chile, as previously stated, is the most centralized of the five States analyzed. Expressing its singularity, in 1974, the year following the beginning of the military dictatorship, a regionalization was approved through the grouping together of the provinces existing at that time<sup>58</sup>. However, these territorial entities –which came into effect beginning in 1976– were governed by an intendent designated by the Presidency of the Republic and by counselors indirectly chosen by the counselors of the municipalities (communes) of each region. Only in 2013, under democracy, was the direct election of regional counselors approved. From then on, and given the needs for greater political space by those new elected authorities, there has been increasing demand for decentralization in Chile, particularly from the more peripheral regions (see the cases of Magallanes, Aysén and Tocopilla). In that context, President Bachelet in 2014 designated a presidential commission to formulate recommendations on the matter, in which the direct election of regional intendents beginning in 2017 is currently in full public discussion.

### ***Decentralization of public funds***

Except for the very centralized case of Chile, in the other countries, a relevant portion of public revenues from the extractive industries helped to finance greater decentralization of public expenditure, although not specifically through fiscal decentralization but rather through budgetary transference systems from the national level to the territorial entities.

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57 The political-administrative organization of Ecuador did not incorporate the level of department.

58 The political-administrative organization of Chile did not incorporate the level of department.

In that sense, it is evident that in all of the countries analyzed, there has been notable resistance by their national governments to effective fiscal decentralization processes, with the exception of taxes on equity traditionally corresponding to the municipalities and certain selective taxes paid to the departmental governors' offices in Colombia, so that the country's greater decentralization of fiscal funds has thus been made principally through systems for transference of revenues collected at the national levels.

In the cases of Colombia, since the decentralizing reform of the 1980s, Bolivia, through the Popular Participation Law of 1994, and very recently Ecuador, in the COOTAD approved in 2010, national laws have been used to establish rules for the decentralized governments to share the current revenues of their respective States, which in Colombia are associated with very strict conditions for their use.

In Peru and Chile, the main instruments determined by national law for the municipalities to share the current revenues of the State are limited to their respective municipal compensation funds

Regarding extraordinary public funds –deriving from the income from extractive industries–, almost all of the countries of the group have approved specific laws: Colombia approved its first royalties law in 1994; in Peru, the general law of the canon<sup>59</sup> (royalties) was approved in 2001 and the royalties law in 2004; in Bolivia, in 2005 the Direct Hydrocarbons Tax (IDH) was created, which mainly benefits municipalities, and in 2007 a royalties law was also approved; and finally, Ecuador, the COOTAD also approved a distribution rule for extraordinary revenues mainly from hydrocarbons exploitation.

In that sense, it is clear that the super cycle of exportable raw materials prices of these countries facilitated the financing and impetus for their decentralization processes, as well as their main antipoverty programs. Nonetheless, the social indicators, particularly in the raw materials producing zones, which are mostly rural or natural zones inhabited by historically excluded populations, frequently indigenous peoples or Afro-descendants, show no improvements, at least in proportion to the additional funds transferred to the subnational governments of those areas or invested in national programs in the fight against poverty.

In the current context of lower prices for mineral hydrocarbon exports, the national governments tend to centralize the funds and, therefore, weaken decentralization processes. Thus, coincidentally in 2011, measures were adopted in diverse countries that signified a clear trend towards the recentralization of public funds: in Bolivia, the Tax Classification and Creation Law of 2011 and, since 2010, the national government has opposed the definition of the Fiscal Pact included in the Framework Law on Autonomies and Decentralization; in Colombia, a profound reform was implemented in the system of royalties, which has implied a clear recentralization of those funds;

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59 In most cases, represented by a predetermined share of the constituencies that produce the income tax paid by industries that exploit natural resources in their constituency.

in Ecuador, a public company has been created –Ecuador Estratégico– to invest from the national level the extraordinary revenues from the extractive industries.

Finally, in Peru, although no express measure has been implemented for the re-centralization of funds, the fall in the royalties or canon has made clear that the share of the decentralized governments in the total distribution of public funds continues to be approximately the same as in 2003, before recreation of the regional governments, and as in Bolivia, the Executive Branch refuses to discuss effective fiscal decentralization, even though the Congress in 2010 and 2012 designated commissions for that specific purpose.

Furthermore, in a future scenario, which in all cases will involve lower tax revenues, all of the countries analyzed, except for Chile because of its limited level of decentralization, will face problems in dealing with the dynamics and expectations for subnational public expenditure encouraged by decentralization.

## **4.2 Environmental institutionalality**

In the 1990s, there was a first generation of measures to build environmental institutionalality in the countries analyzed. Focusing only on enacting general laws and the creation of a national governing body, Colombia and Chile clearly stand out in the group for their early progress.

In 1993 in Colombia, the General Environmental Law was enacted, which was used to create the Ministry of the Environment, the National Environmental System and the Regional Environmental Corporations; although it must be pointed out that in 2003, the sectors of environment, housing and sanitation were combined into one single ministry, resulting in considerable weakening of the environmental sector, until 2011 when an independent Ministry of the Environment was reconstituted, although clearly lacking power and funds during its early stage.

In Chile, although a Ministry of the Environment was not initially created, in 1990 the National Commission of the Environment (CONAMA) was constituted and in 1994 a Law on the Bases of the Environment was approved, although creation of the respective Ministry, to replace the above-mentioned Commission, had to wait until 2010, and with much reduced powers. Thus, the Ministry of the Environment must approve its policies in the framework of a Commission of Ministers for Sustainability chaired by the respective minister, and consisting of 12 ministers from productive sectors.

Peru is following a path similar to that of Chile, although taking more time to do so. It also created a National Commission of the Environment (CONAM) in the 1990s, but only in 2004 and 2005 did it promulgate respectively a Framework Law of the National Environmental Management System and the General Law of the Environment, delaying creation of the Ministry of the Environment until 2008.

Similarly, in Bolivia the Environmental Law was promulgated in 1992, although the respective Ministry was not created until 2009. And in Ecuador the reverse occurred: although its Ministry

of the Environment was established in 1998, just five years after the early case of Colombia, its Environmental Management Law was approved only in 2004, when the other countries –except for Peru– had already approved theirs.

Despite those basic advances, processes to implement systems for impact evaluation and/or environmental certifications have generally been a lot slower. In Chile, its Environmental Impacts Assessment System (SEIA) was legally created in 1994, but the Superintendence of the Environment and the Environmental Assessment Service were not created until 2010, and the environmental tribunals in 2012. In Peru, its SEIA was established in 2001 and regulated in 2008, and the National Certification Service was created in 2012, although it had been implemented for four years without yet being able to effectively operate. In Colombia, the National Environmental Licenses Authority was constituted in 2011, and in Bolivia, although the Environmental Monitoring Committees had been created in 2005, its SEIA has yet to be implemented.

Thus, although in general the countries have made progress in creating their institutionality for environmental management, these processes advance slowly, mainly when they involve impact assessment and the issuance of licenses for large natural resource exploitation projects with private or public investment. This is apparently due to opposition from other very influential forces in the national governments through their units responsible for promoting those investments.

Furthermore, in a context of lower prices for mineral and hydrocarbons exportations, such as what is happening now, the States try to encourage increased production to compensate for the decrease in prices, which means that they focus on eliminating barriers for investment, including environmental regulations such as civic consultations about extractive investments.

Thus, in 2014 Colombia decided that only the national mining authority can exclude a particular site from mineral resource exploitation, and, the following year, by means of the so-called “Christmas Decree”, an attempt was made to limit the power of municipalities to question extractive investment because of its environmental, social or economic impacts at the local level, in addition to implementing a regimen of rapid licenses called “express” for natural resource exploitation projects. That same year in Chile saw creation of the Investment Streamlining Committee to promote an agenda of projects that favors large-scale private investment.

Equally, in Peru there was the promulgation of the so-called “large environmental package” (Law 30230), which dismantled a series of requirements –understood as barriers– for the authorization of private investment projects for natural resource exploitation, and the powers of the Ministry of the Environment were limited, which, as a result of this Law, must approve its policies through the Presidency of the Council of Ministers. In a similar manner, in Ecuador in 2013, the Ministry of the Environment became attached to the Ministry for Coordination of Strategic Sectors. Finally, in Bolivia, by means of a decree, in 2015 hydrocarbon exploration was authorized in natural heritage conservation areas.



## *Distribution and Exercise of Related Jurisdictions*

In the five countries analyzed:

- Constitutionally, the ownership of natural resources corresponds to the State or the Nation, not the owners of the surface land, whether they are individual or collective.
- As a result, because in all these cases the countries are unitary States, jurisdictions associated with the promotion and management of hydrocarbons and large-scale mining concessions and exploitation belong exclusively to the national governments.

Nonetheless:

- In Colombia, local governments have the power to approve territorial organization plans, whereas in Ecuador they can approve territorial organization and development plans. In Peru, that jurisdiction is assigned to the regional level. However, in 2013 It was modified through the imposition of additional studies prior to the possibility of approval for a regional territorial organization plan, and in 2014 its reason for being, namely to regulate large-scale uses of land intrinsic to territorial organization, was deactivated by law.
- In Bolivia, local governments have jurisdiction to monitor compliance with environmental norms. In Colombia, to monitor the practices and impacts of the extractive industries at the local level, not only in environmental terms but also at the social and economic levels, the municipal authorities since 1986 have the prerogative to convoke municipal popular consultations.

In their rush to promote investment in extractive industries, the national governments have tried to ignore or dismantle jurisdictions previously granted to their subnational governments, which have tried to use those jurisdictions to oppose projects that their authorities and populations view as affecting their rights in the territorial communities.

Despite the historical asymmetry of power between national governments and their territorial entities, in some countries the processes of decentralization and creation of environmental institutionality, in particular, and modernization of their States, in general, seem to be effective means for balancing the powers in the state apparatus for protection of civic rights.

Thus in Colombia, the Council of State suspended a decree that sought to prevent municipalities from opposing mining through the exercise of their territorial organization jurisdiction, and in the same sense, the Constitutional Court has issued a ruling rejecting the so-called "Christmas Decree" and ordering the national Executive Branch to reach agreement with the municipalities to determine whether or not a particular extractive investment can be made in their constituency.

In Chile, the establishment of sanctions by regulatory bodies for infractions of the regulatory limits for pollution has led to the cancellation of certain large-scale private investment projects.

### 4.3 Participation and civic consultations

In general, processes for modernization and/or decentralization in the countries analyzed have also corresponded to progress in the introduction of mechanisms for democratization in the relationships between the State and society. As proof of that, the first of these countries to undertake this path was once again Colombia. Since its municipal reform of 1986, it has included the municipal popular consultation as a mechanism for the expression of civic will in relation to projects that imply substantial impacts on local life or economies. In 1991 the Constitution recognized civic participation as a right, and in 1994 a law on the rights of civic participation was approved.

That same year in Bolivia, the Popular Participation Law was approved and in Peru the Law on the Rights of Civic Participation and Control, part of which was suspended by the authoritarian government of that decade and whose full validity was restored during the 2001 democratic transition. This marks the beginning of a wave of explicit promotion of civic participation and transparency in public management by the Peruvian State in the context of the decentralization relaunched in the country in 2002. One of its main milestones is promulgation of the Framework Participative Budget Law in 2003, with explicit support from the Ministry of Economy and Finance, which viewed it as a means to ensure that decentralized public expenditure will respond to civic priorities.

The most belated cases are those of Ecuador and Chile. In Ecuador, the Constitution of 2008 expressly recognizes a function of transparency and social control, and in 2010 a civic participation law was approved. And finally, the most limited case in this field is undoubtedly that of Chile: the incorporation of a regulatory mechanism for civic participation within its Environmental Impact Assessment System (SEIA) came about only in 1994, and in 2011 a law focused on civic participation and associations related to public management was approved.

However, at the end of the 2000s, civic participation mechanisms showed signs of weakening in the countries where they had been most thoroughly developed. Between 2008 and 2010, participative budget processes in Peru were considerably undermined and the decentralized authorities learned to formally comply with their obligations for accountability.

In Colombia, the profusion of regulatory mechanisms for civic participation and social control means that some have lost part of their meaning or been captured by certain interest groups, which promote the need to modernize legislation in the field, with approval in 2015 of a Statutory Law on Democratic Participation.

Finally, in 2013 a Law on Social Control and Participation was approved in Bolivia, in view of the fact that the Popular Participation Law had been repealed in 2010 by the Framework Law for Autonomies and Decentralization.

It must be clarified that some of the progress in consideration of civic voices in decision-making about large-scale investments in extractive industries has not come through currently-in-effect



mechanisms in the laws and regulations but rather due to the capacity for mobilization and pressure by social actors (cases of Bagua and Conga versus prior consultation, in Peru) or rather, the use of certain regulated mechanisms against others (cases of popular consultations in municipalities such as Ibagué, in Colombia).

Nonetheless, in a scenario of decreased prices for mineral and hydrocarbons exports, as is presently the case, the States try to promote increased production to compensate for lower prices, so that they focus on reducing barriers to investment, including civic consultations about extractive investments.

### ***Prior consultation for extractive projects***

Regarding prior consultations with original or indigenous peoples, Colombia and Bolivia were the first of the countries analyzed to incorporate them into their regulatory frameworks. Colombia approved prior consultations in 1990 and the following year Bolivia ratified ILO Convention 169.

However, despite those initial commitments, processes for effective implementation are extremely prolonged: in Colombia, eight years later, in 1998, the procedures and conditions for undertaking prior consultation processes were finally defined; and in Bolivia, only beginning with the Law of 2005, nearly 15 years later, was their implementation regulated for the hydrocarbon sector under the direction of the respective Ministry; in 2009 the new Constitution explicitly recognized prior consultation but only in 2014 was it regulated for the mining sector.

Several years after the first commitments to prior consultation in the subregion, such as in Bolivia, the Constitution of Ecuador of 1998 also explicitly recognized it, but replicating certain delays for its effective implementation. Only in 2012, again nearly 15 years later, was it regulated for the hydrocarbons sector, specifying that such consultations are nonbinding and remain pending in the field of mining.

Finally, the most belated cases in this field are those of Chile and Peru. Chile ratified ILO Convention 169 only in 2007, postponing its entering into force until 2009. In Peru, ratification by the Congress came only in 2010, for it to be initially observed by the Executive Branch and finally promulgated in 2011 and regulated in 2012. In 2013, the definition of indigenous peoples was restricted, limiting it to the Amazonian communities and leaving out the Andean ones.

Now then, recognition and incorporation of the prior consultation in the laws and regulations of these countries does not necessarily mean that in all cases it has immediate and effective application. Only in Colombia was it reported that beginning in 2004, there were 240 processes in the hydrocarbon sector, 15 in mining, and in 2012, three such cases in energy. In Ecuador, it was not until 2013 and 2014 that a process for prior consultation began in relation to convocation of the so-called Southeastern Round of hydrocarbon concessions, which led to strong protests and social discontent regarding the process. In Peru, some preliminary experiences have also been attempted

in Amazonia, with considerable distrust by the population, its representative associations and the civil society organizations that support them.

#### **4.4 Typology of cases in the Andean region**

##### ***Colombia and Peru***

Beginning in the 1990s, processes for economic modernization and modernization of the State arrived in Colombia, and for economic stabilization and liberalization in Peru. At the beginning of the 2000s, aggressive neoliberal-style policies were adopted to promote private investment and open markets, taking advantage of the super cycle. In Peru, this was accompanied by democratic recovery and low-density decentralization, and in Colombia, it was shaped by the greater strength and efficacy of its institutions despite challenges stemming from the subsistence of armed groups in large parts of the country.

At the end of the super cycle, both States clearly adopted the “race to the bottom”, dismantling barriers to private investment and increasingly affecting the diverse reforms, with greater tension in Colombia because of its stronger tradition and institutional strengths (e.g. the rulings of its Constitutional Court).

##### ***Bolivia and Ecuador***

Processes of crisis and political instability arrived in the 1990s in Ecuador and in the early 2000s in Bolivia.

In the middle of the 2000s, “progressive” or “leftist” governments came to power with constituent processes and the approval of new Constitutions (Ecuador in 2008 and Bolivia in 2009).

These were strongly centralized State managements of natural resources and their revenues. In Bolivia, they faced tensions stemming from demands by the departments (e.g. implementation of the regimen of departmental economies) and in Ecuador belated reforms in the development of its institutions and in the use of revenues (e.g. Empresa Pública Ecuador Estratégico).

##### ***Chile***

This is clearly the exception in the group: a strong centralized State with a long-standing tradition of dependence on revenues obtained from copper exports, with a significant role for the main state company in copper exploitation (although beginning in the 1990s, with a considerable increase in participation by the private sector.)

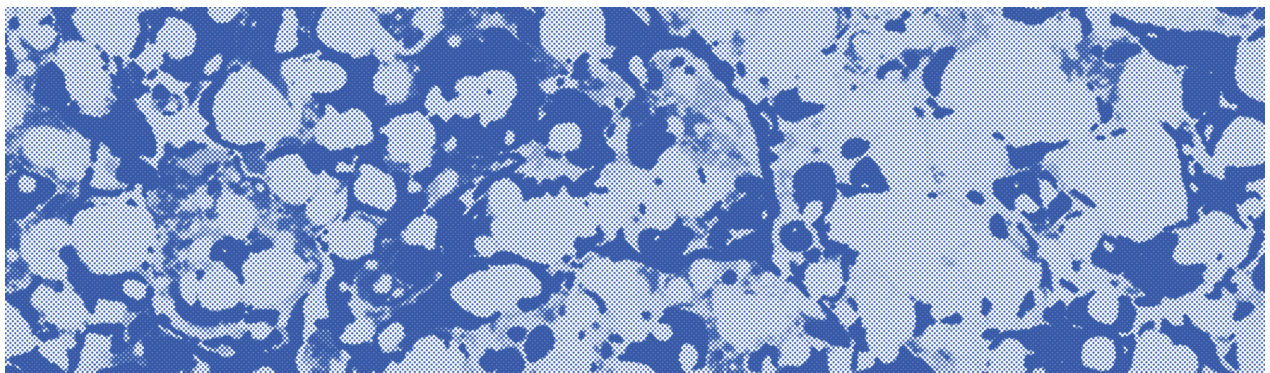
In Chile, institutional reforms tend to be processed over long time periods, so that few such reforms associated with the super cycle have been introduced, even when growing demands are made by





the regions for more funds and autonomy, without there being clarity about the future impact they will have on the national agenda.

The diverse responses by the countries, both to the super cycle of export prices for minerals and hydrocarbons as well as its recent involution, show the importance of general development and strength of its institutions to guarantee a better equilibrium between the diverse forces and interests involved, and, therefore, increased debate and transparency regarding public decisions dealing with the protection of civic rights, sustainability of resources and the natural heritage of the countries.



# 5.

## CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Conclusions

During the 20<sup>th</sup> and 21<sup>st</sup> centuries, there have been four (4) large cycles of high demand and high prices for the natural resources that exist in Latin America. Three of these cycles have been determined by increased demands for minerals and energy and one of them by policy decisions on the part of the oil-producing countries.

In each cycle, specific subcycles can be identified involving public policies for concessions and contracts, investments, production, exports and revenue capture. The timeframes and relationships between these subcycles are specific to each country. When we speak of the super cycle that is now coming to an end, we refer to the period of high demand and high prices that signified a particularly high cycle of public revenue capture.

During each cycle, the countries of the region that have a wealth of natural resources demanded by international markets have implemented policies to exploit demand and benefit from those prices. In all such cases, these policies have had impacts of greater or lesser intensity on the current institutional frameworks and ongoing institutional reforms in each country at each historic moment.

The relationships between policies to promote extractive investments and institutional reforms in each country are complex and involve the specific endogenous dynamics of each country and the international dynamics of which all of these countries are a part.

Policies to promote extractive investments are basically the same in all of the countries and the international trends of which they are a part are also common to all of them. Therefore, what explains the impact of the cycles and responses to them, in terms of policies to promote investments, are the specific historical circumstances in which each country implements and takes part in the international dynamics.

The way in which this specific interaction occurs in each country is determined by their prior history and the social, institutional and political conditions in which each country arrives at the cycle of investment promotion policies. The history during the super cycle of each of the five countries analyzed has quite different starting points, which to a great extent determine their different behaviors and outcomes during the cycle.

In general, during the super cycle, the high private profit margins and those of public revenues generated the margin of tolerance that the political and business elites have had for the processes for decentralization, participation, strengthening of environmental institutionality and tightening of fiscal conditions. The condition seems to have been the maintenance of high rates of earnings and revenue capture, so as not to undermine investment in extractive industries and so that macroeconomic balances would not be affected.

The progress and setbacks in the fields of decentralization, participation and civic consultation as well as the building of environmental institutionality also come in response to the capacity for resistance and pressure by diverse social actors (e.g. Bagua and Conga and prior consultation in Peru; Magallanes, Aysén and Tocopilla and decentralization in Chile; the case of Ibagué and consultation in Colombia, etc.). It is clear that, both for the interests of the economic and political elites and the pressures resulting from international dynamics, social conflicts have had an impact on the direction and depth of institutional changes.

The impact of policies for the promotion of investments in extractive activities on ongoing institutional reform processes is mediated by the action of other levels of the State that may have a greater or lesser degree of autonomy in relation to the political and economic elites that promote those policies.

- In Colombia, the Constitutional Court has questioned several public policies for not having been consulted with the indigenous peoples.
- In Peru, in the midst of marches and counter marches, the Ombudsman's Office (Defensoría del Pueblo) and the Ministry of Culture have until now, and without any guarantees, been able to ensure that indigenous consultations are also to be undertaken regarding mining projects in the Andean zones, contrary to the opinion of mining entrepreneurs and the Presidency of the Republic itself.
- In Chile, the fines and new standards imposed by the environmental authorities have paralyzed energy and mining megaprojects.

As a result of this complex interaction of endogenous and international dynamics, the impacts that policies for the promotion of investments in extractive activities have had on institutional reforms have not had the same intensity or degree of discretion in all of the countries.

- For example, within decentralization processes in Colombia, Peru and Bolivia, the abundance of revenues permitted a variable level of decentralization of fiscal funds, while maintaining rigid centralization in the negotiation of large-scale investments with the large companies of the sector.
- For example, in Chile a process of strengthening environmental institutionality has been maintained even at the end of the super cycle, whereas in the rest of the countries, policy is instead aimed at weakening that process.

- For example, in Peru there have been advances and setbacks in terms of participation in relation to extractive activities (hearings on the EIA, right to free and informed prior consultation.)

Regarding this point, it should be pointed out that at the end of the super cycle, and with it the end of private super profits and super captures of extractive revenue, this tolerance appears to have ended. Currently, a direct relationship can be observed between the end of the super cycle and public policies that in all of the countries seek to partially reverse what had been achieved or even sustained during the commodities boom in terms of decentralization, participation and environmental management. That is what we have called the “race to the bottom”.

We understand this “race to the bottom” as the existence of policies in all of these countries whose common characteristic is to weaken decentralization, civic participation, environmental management and tax pressures in order to continue to attract investments to the extractive sector in the new scenario of decreased demand and lower prices.

At this point, we do not know if the fall in demand and of prices for commodities has hit bottom or if the “race to the bottom” among the countries analyzed has already ended. Nor do we know if those policies will effectively change the terms under which extractive activities are carried out nor whether they will have the desired impact: to continue to attract extractive investments and capture the revenues they generate. It turns out that while the perceptions and intentions of the business elites that demand these policies are clear, the responses by the political elites and different sectors of the State may not be clear, even to the point of being in contradiction with those of the entrepreneurial elites and being contradictory in and of themselves. Only time will tell what the real impacts are.

## 5.2 Recommendations

The recommendations that we present are based on a territorial perspective of good governance of extractive industries. For good governance from a territorial perspective, we understand that decisions about extractive industries need to be made with informed participation by all public actors (national sectors and intermediate and local governments) with responsibility over the territories and populations impacted by those decisions, along with participation by those same populations.

The recommendations that we present will have to be implemented in a difficult scenario for the region, because “Latin America and the Caribbean will have to go through that productive transformation in an adverse international, regional and national context. Slower worldwide growth and the threat of a new international financial crisis could strongly affect the region at a time when regional integration is weak, the fiscal space needed in order to respond with anti-cyclical policies has been significantly reduced or does not exist and, in many countries, has decreased the prestige of political institutions and governments”<sup>60</sup>.

<sup>60</sup> Alicia Bárcenas, Alicia. *Horizontes 2030. La igualdad en el centro del desarrollo sostenible*. Santiago

- Promote productive diversifications and fiscal reforms to lessen demand on the sale of commodities in terms of growth, expectations and financing the public budget, which requires recovering and strengthening the capacities of the State to carry out strategic planning and promote specific policies for economic development.
- Promote institutional reforms in the management of extractive revenues so that it will not take away competitiveness from other productive sectors (investment funds), to compensate for external fluctuations (savings and stabilization fund), to support diversification (funds for science and technology), to sustain pension systems (pension funds) or to directly benefit vulnerable/needier sectors (social funds).
- Review policy measures from a cost-benefit perspective that are being implemented in the framework of the so-called "race to the bottom" in our countries, including the weakening of ongoing institutional reforms and external indebtedness as a source of financing to replace extractive revenue.
- Take advantage of the end of the super cycle to consolidate the three institutional reform processes analyzed and in that way generate an institutional framework for unwinding of the extractive industries, with participation by the subnational governments, the citizenry and strong environmental authorities in decisions associated with the sector.
- Define mechanisms for participation by the subnational governments in the management of the territory, granting of concessions, negotiation of contracts, approval of the EIA and the respective monitoring.
- Consolidate mechanisms for civic participation in the definition of public policies associated with the extractive industries. In that framework, consolidate exercise of the right of consultation of the indigenous peoples, respecting the international standards promoted by the ILO and United Nations.
- Improve standards and strengthen the autonomy of sectorial environmental authorities in the management of the territory and the environment.
- Take the reforms of environmental and social standards of the OECD as the benchmark for strengthening global integration processes.
- Promote a process of regional integration of high environmental, social and fiscal standards, presenting a demanding platform from the region for common negotiation with international investors interested in our natural resources.

- As the starting point, use the agreements already used by the Union of South American Nations (UNASUR) and the Community of Latin American States and of the Caribbean (CELAC), with assistance from the ECLAC (CEPAL).
- Use initial experiences from other regions of the world as a benchmark, such as those of Africa Mining Vision, which were promoted on that continent by the United Nations<sup>61</sup>.

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61 See: <http://www.africaminingvision.org/>

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