PLUS
POLITICS

Free, prior and informed consent:
Addressing political realities to improve impact

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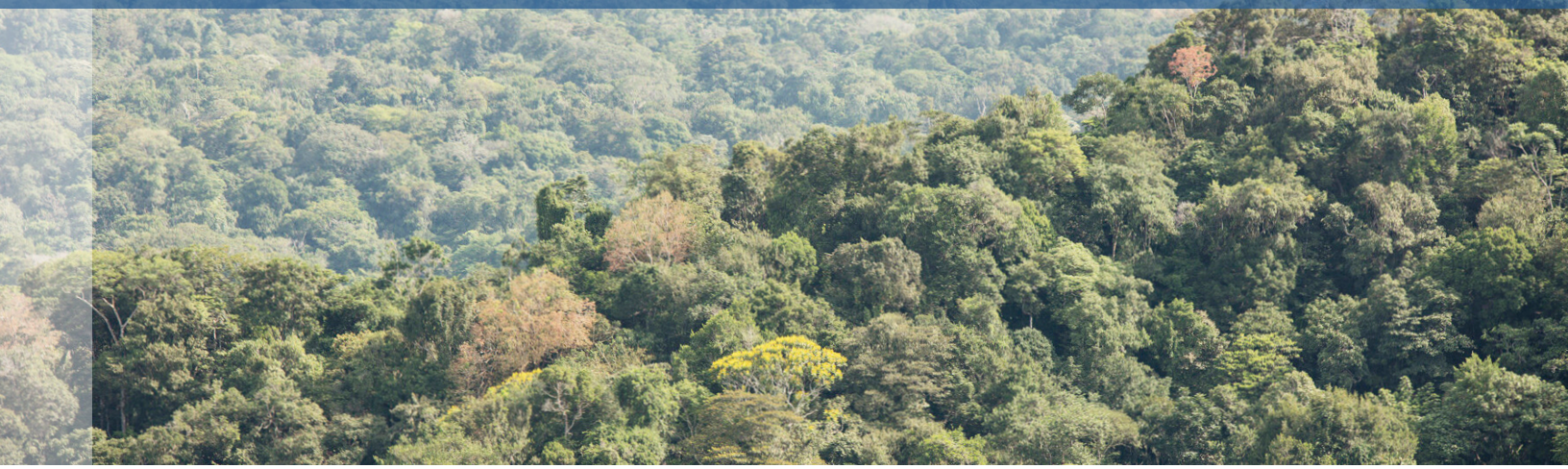

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PLUS POLITICS is a multi-part series from the Columbia Center on Sustainable Investment that aims to encourage practitioners to apply a more systematic political lens to their work on governance in the extractive industries.

Photo: "Guna Yala, Rainforest" from **If Not Us Then Who?**

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Photo: "Elderly woman outside her home, La Mosquitia" from **If Not Us Then Who?**

EXECUTIVE SUMMARY

"One of the most important lessons to emerge among international development practitioners over the past two decades is that institutions (understood here as the formal and informal "rules of the game" that shape behavior in economic, social, and political life) matter for development, and that behind institutions lie politics and power."[1]

The purpose of this analysis is to examine a specific subset of institutions—those related to the exercise of "free, prior and informed consent" and prior consultation processes in the extractive industries—and the politics and power that lie behind them, politics that often undermine the realization of indigenous peoples' rights.

International recognition of indigenous and tribal peoples' right to free, prior and informed consent (FPIC) is a result of a hard-fought struggle by indigenous rights movements that consider FPIC critical to facilitating the protection of indigenous rights and the expression of their autonomy, including in the context of oil, gas, and mining projects. In practice, while some progress has been made, the potential for FPIC as a right and a mechanism to facilitate and protect indigenous and tribal peoples' rights is far from being realized in the countries studied for this report.

Existing approaches of global actors seeking to support improved recognition of FPIC and implementation of prior consultation processes tend to focus on improving technical and normative conditions, i.e. the development of norms, standards, and guidelines and the capacity to implement these. One key piece of the puzzle that is widely recognized by actors working most closely with indigenous peoples, but less systematically integrated into how global actors support work on FPIC and prior consultation processes, relates to politics. FPIC is fundamentally about shifting power over certain decisions from one set of historically privileged actors to another set of actors, who have typically been marginalized; as such, it is unsurprising that attempts to implement the right would be highly politicized.

Explaining the gap and unpacking "political will"

By unpacking "political will" into its main underlying constituent elements—power and interests—one can map the key actors involved in decisions around FPIC and prior consultation processes related to extractives projects, and better examine how the distribution of power and interests across them shape outcomes. This gives practitioners hoping to support these processes a clearer roadmap for addressing major roadblocks and opportunities to improve both the recognition of the right to give and withhold consent, and the process and outcomes of prior consultations.

Unpacking the political context and political will means focusing on the distribution and dynamics of power and interests that help shape whether the right to FPIC is recognized as well as the outcomes of prior consultation processes, by asking questions such as:

- Who are the key actors involved?

Photo: "Babassu coconut breaker, Monte Alegre, Marahao State" from **If Not Us Then Who?**

- Who has power over what and whom?
- What are the interests and incentives driving the key players?
- How do all of these shape outcomes?

This report provides insights for global actors working to advance respect for FPIC to enable them to apply a more systematic political lens to their efforts. The report does this by 1) analyzing some of the key political challenges faced in the context of FPIC and the implementation of prior consultation processes, by drawing on research from three countries in Latin America: Brazil, Colombia, and Peru; and 2) proposing a menu of different approaches for addressing these challenges.

Key actors interests and power

Indigenous peoples and their allies

Interests. Although there is considerable variation across indigenous groups as to their interests in the outcomes of prior consultation processes, the interests of indigenous peoples and their allies in the recognition and operationalization of FPIC generally favor a process in which governments cede power to indigenous populations over key decisions related to extractives projects that would take place on indigenous lands and/or affect the rights of indigenous peoples. This includes ceding power to affected communities to freely decide, with the benefit of relevant information provided in an accessible format, whether and how the project will proceed well in advance of project approval. And, it includes recognizing the right of communities to modify consent to a project even once the project has begun.

Power. Indigenous peoples have historically had relatively little power in setting the rules of the game, i.e. in deciding how FPIC is operationalized, and how prior consultations take place. They have therefore had relatively fewer opportunities to shape relevant processes according to their interests. This is not to say that indigenous peoples and their allies have been entirely powerless. Indigenous peoples have expressed and wielded their power in multiple ways, including through protest and direct action, and by developing autonomous protocols seeking to re-shape the rules of engagement. In some cases, indigenous peoples have built power through collective action and by forming strategic alliances. In others, indigenous peoples have decided to opt out of prior consultation processes that fail to align with FPIC principles, which may also be considered expressions of power.

Host government actors

Interests. Numerous government ministries and agencies are involved in the regulation of the extractives sector and in the implementation of prior consultations, with varying interests and incentives that drive their behavior. Ministries of economy and finance, investment promotion agencies, and ministries of mines, energy, or petroleum typically prioritize attracting investment and tend to reject FPIC and favor the most watered-down versions of prior consultation processes—those which create the least opportunity for indigenous populations to slow projects down or potentially stop them altogether. On the other hand, interior or cultural ministries, or ombudsmen, may have interests that at least partially align with some notion of a prior consultation process that involves meaningful participation of indigenous peoples in decision making.

Power. Actors within government who have the most power over whether and how FPIC is recognized, as well as the most power over prior consultation processes, tend to be those with the greatest interest in a weak version of prior consultation. Proponent ministries tend to have more power and influence than other government actors over key decisions around FPIC and prior consultation processes. Actors within government who might support more robust versions of prior consultation processes tend to be those that are under-resourced and often side-lined in decision making processes. The power and influence of proponent ministries is wielded in multiple ways including by determining whether FPIC is recognized in the first place, by determining the procedural rules for prior consultation processes, and by shaping the discourse around FPIC and prior consultation processes, all of which tend to drive reality away from the original intentions that motivated the mobilization of indigenous rights movements to advocate for this decision-making right.

Private sector actors

Interests. The interests of extractives companies with regard to FPIC and prior consultation processes vary across companies based on a number of factors including size, sector, country of origin, and reputation sensitivity. There is also variation within companies, with different actors having different preferences around FPIC and prior consultation processes. At a general level, though, extractives companies have an interest in projects proceeding smoothly, on budget, and with minimal delay or disruption. These interests condition companies' broad approaches to FPIC and prior consultation processes, leading them to favor prior consultation processes that do not risk the fate of the project by putting consent on the table.

Power. While the balance of power within companies is variable and dependent on particular personalities, and the outcomes of internal negotiations, social performance specialists, whose job is to establish and maintain good relations with host communities, tend to be the least powerful players within companies and tend to have to work harder to make their voices heard. The broad interests outlined above are reflective of the interests of project managers, operations teams, and company lawyers who look for certainty with regard to timing, costs, procedures, and legal compliance. Companies can wield significant power in service of these broad interests to influence government officials whose aim it is to attract and leverage companies' financial and technical resources. In addition, the financial resources and benefits companies can make available to communities have been used to manage and pre-empt opposition.

Looking ahead: politically informed approaches to FPIC and prior consultation processes

The first step toward integrating a political lens more systematically into work on prior consultation and consent is creating mechanisms for identifying, and ideally updating, relevant information on political context. This could be done by integrating political economy analyses into project planning and on-going oversight processes. The insights from these could then be systematically applied to the design, implementation, and periodic adjustment or adaptation of particular activities or interventions intended to improve practices around FPIC and prior consultation processes.

In order to address the misalignments of power and interests that can derail the realization of FPIC, as explored in this report, practical ideas for further discussion and consideration are offered that include:

Strategies to change the status quo by changing the balance of power or changing the interest calculations of powerful actors

In order for the fundamental rights of indigenous peoples to be more fully realized and prior consultation practices improved: 1) the interests of powerful actor(s) need to better align with the interests of indigenous peoples; and/or 2) there needs to be a change in the balance of power between the state, indigenous peoples, and companies. Strategies to change the balance of power between the state and indigenous peoples could include the building of strategic coalitions horizontally across indigenous peoples and indigenous organizations, and vertically with government allies and external actors including legal empowerment organizations and technical advisors. Further work on autonomous protocols to support communities in determining the rules of engagement is another key strategy identified.

Strategies to navigate and work within the status quo

In particularly hostile political settings where the interests and power of the state and companies appear too ingrained, and the odds of success in the pursuit of the strategies outlined in the "Change" section above are low, one might consider strategies to navigate these realities as they are. Such an approach to "working with the grain," proceeds from an acceptance of the political context as is and tries to identify strategies and approaches that can nimbly and opportunistically seize openings within the political landscape for advancing incremental progress toward the overall, long-term goal or build the necessary foundations for future reforms. This could include focusing on goals that prepare the groundwork for the achievement of longer term goals, for example focusing on disrupting the underlying drivers of socio-economic inequalities, discrimination, and securing territorial rights.

Strategies to circumvent and work around the status quo

In settings where the government—the duty bearer for FPIC—is a significant obstacle, practitioners may seek alternative pathways to approximate the desired ends that indigenous peoples and their allies seek to achieve through FPIC and prior consultation processes. These could include, where appropriate, focusing on private sector-centric approaches, including engaging with investors as well as industry associations, to push for more robust standards and statements on company agency and obligations to respect indigenous communities' giving and withholding of consent.

As the empirical analyses of this report detail, unlocking the potential of FPIC will necessarily involve grappling more effectively and systematically with the political circumstances in which these processes unfold. Those wishing to do so can draw inspiration and practical direction on politically-informed approaches from the initial thinking developed in this report, on which we hope to build more detail and cases of practical application moving forward.

INTRODUCTION AND METHODOLOGY

Implementation of indigenous peoples' right to give or withhold free, prior and informed consent (FPIC) in the context of oil, gas, and mining projects has been fraught. In principle, FPIC is meant to facilitate the participation of indigenous peoples in decisions that affect them and their lands, in recognition of their right to determine what happens to them and their lands, including in the context of large development projects. International recognition of this right is a result of a hard-fought struggle by indigenous rights movements that consider FPIC as critical to facilitating the realization of indigenous territorial, cultural, and self-governance rights.[2] In practice, however, states have largely failed to operationalize the right to FPIC. Instead, many states, primarily in Latin America, have sought to facilitate a form of indigenous participation through the implementation of ***prior consultation*** processes that leave decision-making in the hands of the state.

In the context of extractives projects that present high stakes for indigenous communities, but also extractives companies and the state, the ways in which these prior consultation processes have been carried out has been the subject of criticism and concern. Some indigenous representatives have described prior consultation processes as "a mere pretext for companies to access indigenous territories, who [in the end] will enter no matter what."[3] Scholars and practitioners have also argued that the ways in which prior consultations are implemented—including how they are designed, who they include/exclude, their timing, where decision-making ultimately lies, and the monitoring and implementation of agreements—fail to meaningfully address the views and priorities of indigenous communities, and ultimately fail to protect the rights of indigenous peoples.[4]

This sort of implementation gap, which represents a significant deviation between the intentions that motivated international mobilization in support of international commitments on FPIC, and what happens in actual practice, is increasingly being recognized as an important quandary to confront in order to improve the impact of a range of governance reforms.[5] Analyses of various forms of implementation gaps tend to attribute deviations to factors that are generally clustered around "ambiguity around best practice," "capacity," and "political will." As much work is already being done on understanding and addressing the former two in the extractives sector, the current analysis takes up the last and attempts to bring more precision and clarity to the ways in which political realities shape whether and how FPIC is recognized and how prior consultations are implemented.

FPIC and Prior Consultation Processes

FPIC requires governments to cede power to indigenous and tribal peoples over key decisions that would affect their rights. Prior consultation processes, as implemented primarily in Latin America, are qualitatively different to what an FPIC process requires. At a basic level, they depart from FPIC principles by leaving decision making power in the hands of the state.

Indigenous movements, and other international and domestic actors and organizations, have been working to highlight the need for states to respect indigenous peoples' rights to FPIC,

Photo: "At home, Awas Tingni" from **If Not Us Then Who?**

often by deploying efforts to clarify norms and good practice, and by providing technical support to the key actors involved. This includes activities to promote, interpret, and litigate legal norms and standards, and advocacy aimed at advancing better practice. These activities are critical contributions to the broader struggle for the recognition of indigenous rights in the context of extractives projects. Much of the practitioner-oriented literature reflects this work and focuses on elaborating the meaning of FPIC and its relationship with the broader indigenous rights framework, analyzing legal and policy frameworks, developing guidance on good practice, and documenting deficiencies in the implementation of prior consultation processes.

This report seeks to complement these more normative and technical approaches by focusing on another crucial set of challenges that are critically important determinants: the political factors that impact how states recognize FPIC in practice, and how prior consultations are carried out in practice. There are many reasons why the right to give and withhold consent has not been widely operationalized, and the prevailing prior consultation processes have not in the vast majority of cases led to fuller realization of indigenous peoples' rights. This report explores some of the key ways in which political realities contribute to this particular and extensive implementation gap by providing a richer understanding of the ways these factors, often labeled as "political will," undermine the realization of FPIC and rights-respecting prior consultation processes in practice. All of this is done with an eye to providing practitioners working to support FPIC and prior consultation processes that better serve indigenous peoples with insights for applying a more systematic political lens to their work in order to improve their impact.

To help better grapple with this set of issues, this paper will: 1) explore a variety of ways in which the landscape of power and interests impact the right to FPIC, as well as how prior consultation processes unfold in practice; and 2) consider what this knowledge might mean for supporters and advocates hoping to see greater realization of indigenous rights through their work. In doing so, the intention is not to understate the importance of legal, technical, and practical impediments to FPIC and to better prior consultation processes, but rather to shine a focused light on political impediments. The latter, while often widely acknowledged and internalized by those working most closely with indigenous peoples, are less commonly scrutinized in practitioner-focused research and analysis, and are generally not systematically integrated into design and programming by global actors working on these issues.

This report is based on a desktop review of relevant literature and primary research consisting of over 50 confidential semi-structured interviews with civil society representatives, current and former government officials, company representatives, and academics. In addition, throughout the report we incorporate findings from a convening of indigenous representatives and civil society actors held in April 2019 and organized in collaboration with Middlesex University School of Law. Due to more widespread ratification of the Indigenous and Tribal Peoples Convention 169 (ILO 169) by Latin American countries, and the central role of the Inter-American human rights system in clarifying state obligations as they relate to FPIC, this report will focus on empirical examples from the region, drawing on in depth country analyses conducted by experts from Brazil, Colombia, and Peru to illustrate relevant examples. While this report includes findings from a convening of indigenous representatives, as well as findings from interviews with indigenous, quilombola, and other traditional peoples and communities that were particularly critical to the Brazil-focused research, this report does not purport to comprehensively represent the multitude of indigenous perspectives on FPIC or prior consultation processes; instead this report is designed to complement another project supported by the Ford Foundation that squarely focuses on understanding and capturing indigenous and tribal peoples' perspectives on FPIC and prior consultations, by providing insights gathered from another important set of actors that impact on the right to FPIC, and who lead or are involved in prior consultation processes—government and private sector actors.

The second part of the report introduces the underlying ***conceptual framework*** for identifying and analyzing "political factors," while part three provides some background on how FPIC emerged and its intended functions in principle. Turning to how the right to FPIC and prior consultations have played out in practice, part four begins by considering the interests of key actors who are in some way involved in prior consultation processes related to extractives projects, and then moves on to an analysis of how power and interests converge to shape outcomes. Part five provides an overview of options for how donors and other global allies of indigenous peoples can operationalize more politically informed approaches to FPIC and prior consultation processes.

BEYOND POLITICAL WILL: EXPLAINING THE POLITICAL ECONOMY LENS

As noted above, much of the work of practitioners on FPIC and prior consultation processes to date has focused, on the one hand, on developing, critiquing and refining the terms and details of legal standards and frameworks and, on the other hand, on documenting deficiencies and advocating for better practice. These are enormously important factors contributing to everything from whether indigenous communities have good information and a clear understanding of the likely impacts of proposed extractives projects prior to prior consultations; to what the specific requirements should be regarding who should be consulted, when, and how; to whether and how outcomes should be implemented. It remains critical to try to get a handle on how to best align prior consultation processes with the capacity for effective implementation, and to continue to highlight the need for recognition of indigenous peoples' right to FPIC.

However, there is another crucial aspect of the story that is often well known by actors on the ground and studied by academics[6] but less systematically addressed by global actors advocating for and supporting FPIC and prior consultation processes: the ways in which political economy realities shape all aspects of FPIC recognition, prior consultation processes, and their ultimate outcomes.[7] Given that FPIC is fundamentally about shifting power over certain decisions from one set of historically privileged actors to another set of actors, who have typically been marginalized, it is unsurprising that attempts to implement the right would be highly politicized. The question is, how to understand the politics of FPIC and prior consultation processes, and apply that thinking to work meant to support these rights in practice?

While political factors are sometimes acknowledged through references to "political will," the term is too vague, fixed, or exogenous to address in any meaningful way.[8] However, by unpacking "political will" into its underlying constituent elements—power and interests—one can map the key actors involved in decisions around FPIC and prior consultation processes, and better examine how the distribution of power and interests across them shape implementation and outcomes. This gives practitioners hoping to support these processes a clearer roadmap for addressing major roadblocks and opportunities to improve both the recognition of the right to give and withhold consent, and the process and outcomes of prior consultations.

> "political economy realities shape all aspects of FPIC recognition, prior consultation processes, and their ultimate outcomes."

The movement to bring more attention to political context has in recent years been buoyed by a group of development practitioners[9] and "arose from the realization that highly technical (usually input-based) development programs often did not work very well. In particular, donors would rally around a reform process, providing technical advisers and funds, only to see the planned changes stall and disappear; this would usually be written off as a lack of "genuine political will." Over time, development actors realized that understanding why the drive for change was missing (or where it might actually exist) required a better picture of what those with power wanted

Photo: "Traditional meeting space, Talamanca, Costa Rica" from **If Not Us Then Who?**

(and did not want). It also meant finding out what factors make change possible."[10] Many of the basic insights from this work, particularly the recognition of the ways in which political realities can derail well-intentioned approaches to governance and development reforms, are more widely applicable.

Beyond formal political processes and systems, deciphering political context means thinking more broadly about the following questions:

- *Who are the key actors* that shape how the right to give and withhold consent is or is not recognized, and who are also involved in implementing prior consultation processes both in terms of de jure authority and de facto influence?

- *Who has formal or informal power* over whom and over what realm of activity?

- *What are the interests or incentives* driving their choices and behaviors, and how do these align with different interpretations of FPIC?

- *How do all of these factors shape the outcomes* we care about?

By embedding work in such understandings of particular political contexts, one can illuminate not what should happen in terms of norms and notions of best practices around FPIC and prior consultation processes, and what can happen in terms of capabilities of the actors involved, but what does and will happen when it comes to recognizing FPIC and applying and implementing prior consultation commitments in specific places at a given moment in time. Therefore, it is a critical element of the "three-legged stool" in the governance of extractive industries—which rests on a combination of conducive normative, technical, and political conditions—that needs to be tackled in hopes of improving the effectiveness and impact moving forward.

FPIC IN PRINCIPLE IN THE EXTRACTIVE INDUSTRIES

As is the case in the vast majority of countries in the world, in each of the countries studied for this research (Brazil, Colombia, and Peru) the state owns and manages subsurface minerals and petroleum on behalf of the nation.[11] The state's stewardship of sub surface resources operates in parallel, and at times in tension, with the land ownership and/or use rights that are held by communities, including indigenous peoples. Land rights are most obviously impacted by oil, gas, and mining projects on indigenous lands, but a number of other rights are also implicated, including the right to self-determination, self-governance and autonomy rights, participatory rights, cultural rights, the right to life, the right to food, and the right to water among others. Importantly, there are constraints on how the state manages subsurface rights, constraints designed and intended to protect the fundamental rights of communities who stand to be impacted by extractives projects. In this regard the internationally recognized state obligation to obtain the free, prior and informed consent of indigenous and tribal peoples who stand to be affected by a proposed project is considered by many as a critical tool for indigenous peoples to protect a spectrum of indigenous rights, and counterbalance the overwhelming power of governments and companies in the context of extractives and other development projects.[12]

In the context of oil, gas, and mining projects, free, prior and informed consent requires the state to consult with indigenous peoples, through their own representative institutions, in order to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.[13] The right is not exclusive to project-level activities, or even the extractives sector—the right is also applicable at the policy level where policies or laws that may impact on indigenous peoples are being considered.

The right to FPIC derives from indigenous peoples' right to self-determination[14] as well as a number of related rights including the right to take part in cultural life, and it is pursued as part of a broader context to realize indigenous territorial, cultural, and self-governance rights.[15] ILO 169, adopted by the International Labor Organization in 1989, recognizes indigenous and tribal peoples' social, economic, and cultural rights, including the right of indigenous peoples to decide on their own development priorities given the effect the decision has on their lives.[16] ILO 169 also emphasizes the state's duty to protect the rights of indigenous peoples, including by requiring the state to consult with indigenous peoples on relevant matters "with the objective of achieving agreement or consent to the proposed measures."[17] ILO 169 is most widely ratified by Latin American countries,[18] with more than half of the state parties to the convention coming from the region.

Following years of struggle by indigenous rights movements for more comprehensive international recognition of the rights of indigenous peoples, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly in 2007.[19] UNDRIP is recognized as the most comprehensive international instrument on the rights of indigenous peoples and recognizes the need for states to:

> "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their

Photo: "Discussions over territory" from **If Not Us Then Who?**

> free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources."[20]

Much has been written on what it means to operationalize FPIC, and conduct prior consultation processes in accordance with indigenous communities' interests in and rights to exercise their "autonomy, preside over their destinies, make decisions for themselves, and control their resources."[21] This includes:

- consulting with communities in culturally appropriate ways through community defined processes, and on issues that are jointly decided upon;
- engaging with communities in an inclusive manner that creates opportunities for all people who stand to be affected by a proposed project, both directly and indirectly (recognizing that there may be different views and perspectives within communities), to participate in decision-making including through their chosen representatives or institutions;
- consulting with communities before decisions have been made about a project so to allow meaningful participation in decision-making and influence over the process, and doing so over a period of time that is sufficient to allow communities to process and internally deliberate on information and make decisions collectively;
- engaging with communities iteratively through the life-cycle of a project so that it is an ongoing and dynamic process;
- ensuring that communities have access to relevant information in accessible formats so that they are in a position to come to a fully informed decision;
- and finally, the process should be oriented toward consensus building where the parties doing the consulting have a genuine willingness to hear and act upon the concerns and decisions of the community rather than a focus on extracting consent. There must be genuine opportunity for those being engaged to influence the outcome of the process.

Yet, the ways in which the right to FPIC has and has not been recognized, and the ways in which prior consultation processes have been implemented in Brazil, Colombia, and Peru, have diverged considerably from the international human rights law and principles on which they are based.

SOMETHING DIFFERENT IN PRACTICE

When it comes to putting FPIC and prior consultations into practice, multiple positions have proliferated over the years, influenced by the preferences of the actors who have the power and responsibility to respect and protect the right to FPIC. There has been much debate, for example, around whether and under what circumstances governments are obligated to honor indigenous peoples' decisions-making authority, including decisions to withhold consent to a project, in fulfillment of the state's duty to protect, respect, and fulfill human rights. Many governments and companies, concerned about what this could mean for their ability to develop extractives projects, prefer alternative models to FPIC—models that leave ultimate decision-making power in the hands of the government.[22] Multilateral institutions with financial interests in extractives projects have also favored this approach, developing standards and guidelines that more closely resemble a requirement to consult, with consent required only in certain circumstances.[23]

In contrast, international and regional human rights mechanisms tasked with authoritatively interpreting human rights law have clarified that where proposed activities or projects may "substantially compromise or interfere"[24] with indigenous rights, affected communities must have the opportunity to effectively participate in decision-making in relation to the proposed activities, "which requires not mere consultation but the free, prior and informed consent of the members of the community."[25] The jurisprudence of the Inter-American human rights system has been particularly instrumental in clarifying FPIC obligations.[26]

Key actors interests and power

In order to understand how political context—again, the more specific and nuanced analysis of what is commonly referred to as political will—shapes how prior consultation processes unfold, the extent to which they are consistent with principles of FPIC, and who they benefit, one has to understand who the key players are in these processes, their formal and informal roles, what their respective interests and incentives are, and how their relative power does or does not allow them to influence outcomes. The key actors involved in prior consultation processes are grouped into three categories:

i) *indigenous peoples* and their allies, which may include indigenous organizations, legal and technical advisors, and international, national, and local NGOs, among others, depending on the particular consultation in question,
ii) *host government* actors across a variety of levels and agencies, and
iii) *private sector* actors working in and with mining and oil and gas companies.

There are of course other layers of actors, including, for example, donors to indigenous groups and their allies and funders of extractives projects, but for the purposes of the current analysis the focus is on the interests and incentives of those most directly involved in project-level prior consultation processes.

Photo: "Guardians of the Forest at Rise For Climate - GCAS - 2018" from **If Not Us Then Who?**

1. Indigenous peoples & their interests

FPIC is a decision-making right intended to advance indigenous rights to self-determination. In the context of extractive industries this theoretically requires governments to cede power to indigenous populations over key decisions related to extractives projects that would take place on indigenous lands and affect the rights of indigenous peoples. This includes ceding power to affected communities to freely decide, with the benefit of relevant information provided in an accessible format, whether and how the project will proceed well in advance of project approval. And it includes recognizing the right of communities to modify consent to a project even once the project has begun.

An indigenous leader from Brazil interviewed for this research described the interests of his people:

> "Our main objective in [taking part in] a participatory free, prior and informed consultation and consent process is to increase [our] participation in decisions of great importance. … Through the decision-making process and veto power, we determine whether or not we want the project that affects an indigenous land, even with all the safeguards and mitigation measures that [the project] may have. So, it is clear that if after all the consultation process and the detailed explanation about a project… if the indigenous people think that decision will very negatively affect them, they do have the power to say "no, we do not want that for our people, for our territory." Also, they have the right to say, "yes, we are in favor of this type of project…, and we want to participate and to build safeguards together." [That] is not the same understanding of the Brazilian State or the private sector."[27]

The interests of indigenous peoples in the operationalization of the right to FPIC are clear: to exercise influence over decision-making in order to facilitate and safe-guard indigenous rights.

The interests of indigenous peoples in the outcomes of project-level prior consultation processes (that do not, under national laws or regulations in the countries studied for this report, facilitate autonomous decision-making, but rather leave decision-making power in the hands of the state), can vary considerably depending on the priorities of the particular community. Interests can and do vary, and at times conflict, within communities. Divergences in interests may relate to internal power dynamics, including those that relate to gender, age, and other factors. In addition, interests may be conditioned by the context in which prior consultation processes occur, including existing social and environmental injustices and the very absence of a rights based framework that recognizes indigenous decision-making. Thus, the interests outlined below should be read with this in mind. They are illustrative rather than determinant or exhaustive, and may overlap or arise in sequence as prior consultation processes progress.

Some indigenous peoples oppose extractive activities because of the potential for profound cultural, social, and environmental impacts, on the grounds that they threaten their cultural survival and other fundamental rights. Others may oppose extractive activities of large-scale companies to preserve community-based extractive opportunities. The potential value of prior consultation processes to indigenous peoples in these situations is that they may provide opportunities to raise these concerns in ways that shape outcomes and prevent or modify the way that extractives projects proceed on their territories.

For other indigenous peoples, prior consultation processes are understood as opportunities to engage with national-level state actors to seek redress for historical grievances and demand that the state fulfill its social obligations more broadly. These include grievances related to the lack of territorial titling, and systemic violations of the rights to health, education, and a healthy environment. For example, in discussing prior consultation in the context of an oil project in the Amazon basin, representatives from the Achuar, Kichwa, Kukama, and Quechua peoples who live in the vicinity of oil blocks 192 and 8 in Peru, expressed hope that the (then) upcoming consultation might provide an opportunity to compel the state to provide remedy for the decades of pollution, including heavy metal poisoning, that their communities have suffered as a result of oil extraction.[28] Similarly, the Mura people in Brazil have sought to raise the issues of territorial titling and the lack of critical social services in the context of a consultation concerning a potash mining project that would affect their territories.[29]

For others still, as anticipated by ILO 169,[30] communities may seek to negotiate benefits for resources derived from indigenous lands and compensation for the negative impacts of extraction. For example, scholars have noted that Guaraní communities living in areas of hydrocarbon extraction in Bolivia have been particularly successful in negotiating for compensation even before promulgation of domestic regulation on consultation processes.[31] The same is true of communities in Mexico, Peru,[32] and numerous other countries.[33] The conditions under which benefits are negotiated will vary, but in countries where the state does not in practice recognize the rights of indigenous communities to give and withhold consent, and related rights to self-determined development, the absence of opportunities to pursue other developmental pathways may qualify the extent to which negotiations around benefit sharing may be considered free and fully informed.[34]

For these latter two groups, their interests in the ***outcomes*** of

prior consultation processes lie in such processes serving less as a vehicle for opposing extractives projects altogether and more as an opportunity to improve how these projects impact their lives, and/or to serve as a bargaining space to demand that the state fulfill unmet social obligations.[35] This could be for a variety of reasons ranging from the genuine belief in the potential benefits that a project may offer to merely being resigned to the fact that the project about which the community is being consulted will go ahead irrespective of their views. Cutting across all the indigenous perspectives above is a shared interest in prior consultation processes that create an opportunity to advance the rights of their respective peoples.

2. State actors & their interests

Governments generally play an outsized role in the extractives sector given their responsibility to steward the state's sub-soil resources. The state also plays a central role in conducting consultation processes because of the state responsibility to respect and protect the rights of its people, including the right to FPIC and prior consultations. Various government ministries and agencies are involved in the regulation of the sector and in the implementation of consultations, with varying interests and incentives that drive their behavior. While governmental actors play a significant role all along the extractives value chain, including in the collection and management of revenues flowing from the sector, the promotion of extractives investments, award of contracts or licenses, and regulation and monitoring of operations stand out as critically relevant links of the value chain for FPIC and prior consultation processes. The following sections will be focused on government entities most relevant to the parts of the value chain noted above, and those most closely involved with prior consultation processes or promoting and protecting indigenous rights:[36]

- *Ministries of economy and finance and investment promotion agencies* proactively seek out and set policy for management of foreign and domestic investment and related revenue.
- *Ministries of mines, energy or petroleum* and related agencies formulate sector-wide policy, issue licenses, and in some cases also lead prior consultation processes with communities who stand to be affected by extractives projects. These entities are also referred to as project "proponents" throughout.
- *Interior or cultural ministries, or ombudsmen* are tasked with a variety of roles including coordinating prior consultations, liaising with indigenous communities, and supporting indigenous rights, or human rights more broadly.
- *The judiciary* interprets the law when extractives-related disputes arise.

The specific role of each of these will vary from one context to the next: their role may vary depending on the particular consultation in question, and much is dependent on the personal inclinations of influential individuals within these entities as well. It is nonetheless helpful to understand some of the mandates and general interests and incentives that typically seem to drive each of these key actors within government. This serves as a necessary precursor to understanding how these actors might view and seek to influence the recognition of FPIC and the implementation of prior consultations in specific ways.

Finance and investment promotion agencies

A ministry of finance's primary interest in the extractives sector is to maximize the rents generated by the sector. The more money the government can generate from the sector, the more it can fund services and other government spending without borrowing. In countries with institutionally weak political parties, the large rents generated by the extractives sector are sometimes used by governing parties to make and sustain the political bargains with national and local elites that keep them in power,[37] including through the funding of re-election campaigns.[38] For these entities, therefore, the highest priorities are attracting and retaining as much investment as possible, which includes minimizing perceived obstacles to investment. When it comes to extractive investments, these entities consider the right to FPIC and prior consultation as potentially slowing or ultimately impeding the realization of extractive investment opportunities, except when prior consultations can be "wielded by governments as a counter-insurrectionary device to pacify opposition and legitimize controversial development projects."[39] As a result, this subset of government entities tend to reject FPIC and favor the most watered-down versions of prior consultation processes, those which create the least opportunity for indigenous populations to slow projects down or potentially stop them altogether, while simultaneously providing some sort of superficial release valve for diffusing tension and opposition by indigenous communities.[40] This may be especially true in the context of oil and gas projects, which tend to generate larger financial flows on a project by project basis as compared to the mining sector. While ministries of finance and their supportive agencies do not typically play a formal role in prior consultation processes, it is important to consider their interests because these entities are often among the most influential over the executive and other key decision-makers within government, likely because of their critical role in the economy.

"Various government ministries and agencies are involved in the regulation of the sector and in the implementation of consultations, with varying interests and incentives that drive their behavior."

Entities charged with overseeing or regulating extractive industries

Extractives ministries, whether focused on mining, oil, or gas, tend to share similar interests with the finance and investment actors. Their goal is to attract and advance extractives projects as quickly as possible, which often means serving the interests of extractives companies. The research shows that these ministries have acted to reject the recognition of the right to give and withhold consent to extractives projects and limit prior consultation processes because both are perceived as "obstacles" to investment in the sector. For example, a former government official described a pro-company culture within the Ministry of Energy and Mines in Peru, explaining that the ministry often emphasizes promoting and supporting mining companies and investments at the expense of meaningfully regulating the sector.[41] Thus, for these entities, the promotion and protection of the sector are much higher priorities than the promotion and protection of indigenous rights. There are mixed views within proponent ministries on whether it is even possible to reconcile the requirements of prior consultations with the goal of sustaining and increasing investment in the mining sector in Peru,[42] with consultations being described by some within key ministries as an impediment to extractives projects and a "mechanism to halt projects."[43] Despite these mixed views, the Ministry of Energy and Mines is charged with coordinating and carrying out prior consultation processes in Peru.

Unlike in Peru, the Ministry of Mines and Energy in Colombia does not lead the prior consultation process and, according to interviewees, has little if any formal involvement. But to the extent to which it has influence, its interests do not align well with FPIC or meaningful implementation of prior consultations grounded in a rights based framework.[44] The ministry nevertheless has a strong interest in the outcomes of prior consultation processes because of its mandate to promote investment in the country's oil, gas, and mining sectors. Given this mandate, the ministry's incentives revolve around increasing the volume of extractives investment in Colombia. These incentives are further reinforced by the emphasis placed on the importance of the extractives sector by successive governments: despite the different political agendas of governing parties over the past ten years, each administration has viewed the extractives sector as critical to economic growth.[45] One government interviewee explained that Colombia's Ministry of Mines and Energy has in recent years conducted minimal due diligence on the investors before granting mining licenses.[46] This interviewee referred to the ministry's actions in this regard as a "box ticking" exercise meant to reduce attempts at implementing relevant safeguards in service of significantly increasing the volume of investments in Colombia.[47] A corollary of this is that, as one government respondent explained, the promotion of the sector has been viewed by some within the ministry as a higher priority than the state's environmental and human rights obligations.[48] Indeed, prior consultations were previously considered by some in the ministry as an obstacle to extractives investment in the country, and, like in Peru, a government respondent described the requirement to consult as a "barrier" to the development of Colombia's extractives sector.[49] The same respondent attributed Colombia's low scores on investment attractiveness indices to problems arising from the requirement to consult. Views have evolved over time, however, because of the increasing recognition among some within the ministry that the marginalization of communities can come at a greater cost than inclusion, negatively impacting the ministry's ability to originate and sustain successful extractives projects. As a result, prior consultation is more recently being reframed within the ministry as a tool for benefit sharing to minimize opposition to extractives, although the idea of prior consent remains unpopular.[50]

In Brazil, the responsibility for the coordination of prior consultation processes within government is not clearly delineated. The proponent ministry, which in the case of extractives projects is the Ministry of Mines and Energy, may take part, and the Staff of the Presidency of the Republic may also play a role, along with the Ministry of Defense if the government considers there to be issues of national security at stake. These entities align in their interests: to promote investment in the extractive sector. Nevertheless, there are different views within these entities on the value of prior consultation processes and the role of consultations vis-à-vis the promotion of investment. Some oppose prior consultation outright. Others see the value in consultation processes as a way to demonstrate to companies the viability of land for their operations—to fast track a social license to operate.[51] Either way—whether opposed to prior consultations outright or hoping to instrumentalize these processes in service of investment—none of these government actors consider implementing consultations from a rights based perspective. As a government representative explained, the vision and interests of those within government that seek to promote investment are fundamentally misaligned with the interests of indigenous peoples: not only do these entities view indigenous peoples as "obstacles" to investment, but some also misunderstand indigenous peoples' distinct relationship with their territory. Because of this cultural chasm, these actors instead tend toward benefit sharing objectives and consider how to "include indigenous peoples in the market."[52]

> "This interviewee referred to the ministry's actions . . . as a 'box ticking' exercise meant to reduce attempts at implementing relevant safeguards in order to increase the volume of investments in Colombia."

Government entities charged with indigenous affairs

Alongside the two preceding categories of actors within government that prioritize the advancement of extractive investments, there are another set of government entities that are relevant to the fate of prior consultation processes in the sector. While in all three focus countries the state bears the duty to protect and respect the right of indigenous peoples to FPIC and prior consultations, the specific entities charged with directly overseeing or defending indigenous peoples vary by country. These can include entities covering culture, the interior, and indigenous issues more generally. In general, the interests of these entities at least partially align with some notion of a prior consultation process that involves meaningful participation of indigenous peoples.

In Peru, the Vice Ministry of Intercultural Affairs (VMIA) is charged with "overseeing and defending indigenous rights across the public sector,"[53] which includes sensitizing government agencies on the concept of interculturality, identifying indigenous populations, and developing guidelines for prior consultations.[54] Though it does not lead in the implementation of prior consultation processes, in theory, within the Peruvian government, VMIA's interests are most aligned with advancing an implementation of prior consultations that reflects the vision and interests of indigenous peoples. This was confirmed by government respondents, though indigenous respondents expressed doubts about whether VMIA could be considered a true ally, citing the lack of indigenous representation in the entity.[55] Similarly, the interests of Peru's Ombudsman Office, which is tasked with defending and promoting the rights of individuals and communities, also align with a rights based approach to prior consultations. However, while officials from the Ombudsman's Office have acted as observers to prior consultation processes with the objective of recommending improved practices to other government entities, it does not have a formal role in implementing consultation processes.[56]

In Colombia, the Ministry of the Interior, rather than the proponent ministry, formally assumes a coordination function with respect to prior consultation processes.[57] And while the degree of involvement by the Ministry of Interior may vary depending on the particular consultation, both private sector and government interviewees described the Ministry of the Interior's role as "minimal" or "passive"[58] and limited to determining which communities have the right to be consulted. One government interviewee described the ministry as being out of touch with the realities faced by indigenous communities, and even doubted whether many of those working on prior consultation in the ministry had ever visited a community.[59] A former government representative described that the Ministry of the Interior—driven by the desire to avoid conflict with indigenous groups in the context of Colombia's history of conflict—uses its influence to de-escalate the more hostile tendencies of other parts of government, including their preferences for militarized responses to quell extractives-related protest.[60]

The Colombian Ombudsman's Office, which forms part of the Public Ministry, is another part of the state apparatus that can potentially impact prior consultation outcomes through its efforts to support indigenous communities.[61] Its mandate is to promote the protection of human rights, and some within proponent ministries believe the Ombudsman's Office to be biased in favor of communities.[62] Given the office's protective mandate, it was reported that communities usually request the participation of the Ombudsman's Office to represent their interests in prior consultation processes.[63] Similarly, communities sometimes request the involvement of the National Institute of History and Anthropology, which is considered by communities to play a neutral role in assessing the cultural impacts of extractives projects.[64]

In Brazil, the National Indian Foundation (FUNAI) is the government entity charged with protecting indigenous rights, and the Palmares Cultural Foundation is the government entity charged with promoting and protecting the rights of quilombola communities. Both entities are responsible for mapping and demarcating indigenous and quilombola lands respectively, and in the context of large development projects, acting as a mediator among communities, companies, and other government entities. Both FUNAI and the Palmares Cultural Foundation have a role in the environmental licensing process and assess the environmental impacts of proposed projects on indigenous and quilombola lands—a process that often overlaps with prior consultation processes. As noted by the United Nations Special Rapporteur on Indigenous Peoples, Vicky Tauli-Corpuz, indigenous peoples in Brazil have, in the past, noted the "important role that FUNAI… play[s] in the protection of their rights. Governmental agencies and ministries also referred to their reliance on FUNAI to realize their own actions and programs for indigenous peoples."[65] But more recently FUNAI's role and interest in protecting indigenous rights has been questioned. The reasons for this will be explored in following sections.

The Federal Public Prosecutor's office (MPF) in Brazil is a particularly powerful institution that serves as a check on the power of the executive, and that has been instrumental in developing legal norms on the rights of indigenous, quilombola, and traditional peoples and communities through the courts.[66] MPF has been described by government and civil society respondents as "the leading player in defense of the right to consultation in the country."[67] Indeed, a government representative explained that when MPF brings a case against a government agency in defense of indigenous rights, it is a way of

reminding the state that there are public policies and laws that should be enforced and that the right to self-determination of indigenous and tribal peoples must be respected.[68]

The judiciary

Colombia's Constitutional Court, an important and powerful actor both nationally and regionally, has played an active role developing jurisprudence on FPIC and prior consultations, driven in part by the lack of national legislation on the topic.[69] The court has sought to constrain the actions of the executive through its judgements, and upheld the rights of indigenous peoples.[70] Some within proponent ministries criticize the court for not adequately considering the perceived detrimental impacts of its judgments on the economy.[71] The judiciary in Brazil and Peru has also played an important role in protecting the rights of indigenous (in the case of Peru), and indigenous, quilombola, and traditional peoples' and communities' (in the case of Brazil) to consultation.[72]

3. Private sector actors & their interests

Although there is considerable variation across extractives companies—based on size, sector (mining versus oil/gas), country of origin, reputation sensitivity, and other factors—according to our research, some common trends in interests and incentives could be identified.

Interest in obtaining a social license to operate

The notion of a "social license to operate" (SLO) is distinct from the rights based framework in which FPIC is situated. Scholars have noted that the contemporary use of the term SLO first emerged in the mining sector,[73] and is generally understood as the "broad, ongoing approval and acceptance of society for companies to conduct operations."[74] Achieving SLO has been characterized by companies' "attempts to secure the acceptance of mining activities by local communities and stakeholders, in order to build public trust in their activities and prevent social conflict."[75] The financial incentives for achieving a social license, and the reputational risks of failing to do so, largely revolve around the costs incurred as a result of social conflict arising out of poor or unsuccessful community engagement, including lost production and impacts on publicly traded companies' share prices.[76] These same incentives apply to the oil and gas sector, particularly where operations are onshore or oil and gas infrastructure is likely to impact indigenous and other communities.[77] A company representative from Mexico explained that in addition to financial incentives and reputational risks, companies are also motivated to achieve a social license to engender a sense of loyalty within the workforce where that workforce includes local community members: "The motivation for the company is to improve the quality of life of the people in the company: the people in the community are people who work for the company… people work better as a result, and express gratitude and loyalty to the company. …"[78] Company objectives in achieving SLO, therefore, are focused on establishing good relations and attaining the general approval of local communities in order to facilitate extractive activities. As such company incentives to invest in developing and maintaining SLO relate to risk mitigation.[79]

Minimizing opposition and conflict around an extractives project and creating the conditions for a loyal and motivated workforce is, of course, not the same as recognizing the right of indigenous communities to autonomously consent to or withhold consent for projects that risk undermining their rights. So, while companies are increasingly recognizing the importance of SLO as it aligns with company incentives to operate projects unencumbered by community opposition, it does not necessarily result in increased recognition of indigenous peoples' right to self-determination and FPIC. And where the expression of these rights conflicts with a company's interest in developing a project, companies may be reluctant to fully honor indigenous communities' right to self-determination.

A company respondent confirmed that some companies view legally mandated prior consultation processes as separate to social engagement, while acknowledging that there is clear overlap. The interviewee explained that legally mandated prior consultations may form part of a broader social engagement strategy, often starting before formal consultations, and continuing afterwards. From this perspective, social engagement is considered to be a more fluid and dynamic process that creates internal "intelligence" for the company that aligns with the operations team's core incentives to deliver a project on time and on budget.[80] Where a company cannot achieve social acceptance, the significant financial and reputational consequences may render a project uneconomical, and in those cases some companies have tended to be wary of proceeding without a social license.[81] It is in these situations that the objectives of FPIC and the concept of SLO are more aligned, but remain distinct: SLO is still predicated on building good relationships with the community *so as to persuade them of the benefits of a project, rather than as a process through which indigenous peoples can more fully exercise their autonomy.*

FPIC and prior consultations, as they relate to a company's broad profit incentive in pursuing projects, can be further examined through the perspectives of different types of company employees. Interviewees identified the following employee types as most relevant to project-level consultations:

- *Site level social performance experts* tasked with liaising with local communities;
- *Operations teams* including managers, and technical and financial teams; and
- *Lawyers* that oversee legal compliance.

What social performance specialists want

The interests of social specialists within extractives companies vary considerably depending on the individual and their professional background**.** One respondent explained that social specialists coming from a marketing or external affairs background will likely be driven by different motivations than those coming from a sociology or anthropology background.[82] Broadly speaking, though, the interests of social specialists center around establishing and maintaining good relations with host communities. What this requires in practice, and whether it falls closer to an interest in achieving and maintaining a social license as outlined above, or is grounded in FPIC and a rights based conception of prior consultations, will depend on the individual, and their ability to counterbalance the pressure of other parts of the team who prefer to keep consent off the table.[83]

The operations team's perspective

The operations team generally looks for certainty in the approach to FPIC and prior consultation processes with respect to the procedure to be followed, the cost, and the time consultations will take. A company respondent explained that it is much easier for social performance teams to generate internal buy-in where there are clear laws and procedures to follow, because in these contexts, operations teams view these processes as another step in the regulatory approval process.[84] The same interviewee expressed that it is particularly challenging to convince the operations team—which is motivated to keep a project on time and on budget—that FPIC and prior consultation is not only important at the permitting stage as part of regulatory approval, but that it is also an active right, and one that requires an ongoing and iterative process throughout the project's life-cycle. Similarly, it was explained that because companies respond to formal requirements and procedures, if the law requires companies to start a process before exploration begins, or to obtain the consent of indigenous communities (where companies are involved in the process), such practice is a more straight-forward "ask" of the operations team because the legal team will require the team on the ground to comply with the requirement. But where it is a principle of good practice to, for example, begin consultations early on in the project life-cycle, or to seek consent, rather than legally required by national laws and regulations or financing arrangements, it can be challenging to make the argument internally to go beyond that which is formally required.[85] Interviewees did not explicitly mention the prospect of legal risks arising out failures to comply with international law as contributing to improved practices.

Project/general manager and technical team incentives

Respondents explained that the behavior of management is heavily influenced by reward schemes;[86] managers' remuneration packages are calibrated to incentivize managers to drive production and deliver projects on time and on budget in accordance with project plans. These high stakes personal interests create strong disincentives for managers to carve out an adequate amount of time to conduct prior consultation processes or to engage in consent processes. Because of these structural disincentives, one company respondent expressed the belief that managers who recognize the longer term value in investing time and energy in consultations are usually only those who have personally experienced the harmful consequences of failing to do so, including risks to their own jobs.[87] Others have noted that technical teams have similar incentive structures: "the bonus structure of geologists depends on how many ounces of gold they find, not how well they maintain the social license."[88] One company respondent acknowledged the misalignment between current incentive scheme structures and improved social performance, and suggested developing research to inform and support companies' inclusion of key performance indicators linked to social performance.[89] Indeed, others have found that there is a perception within companies that there are few personal incentives for getting social engagement right.[90]

What the company lawyers want

Tasked with overseeing compliance with relevant laws, the legal team will want to demonstrate that the company has complied with its legal obligations in order to limit the company's legal and financial risk.[91] Interviewees explained that companies are often guided by their lawyers when it comes to FPIC and prior consultation processes. These lawyers tend to view consultation processes with a compliance mentality first and foremost, looking to domestic regulation (rather than international laws and standards, unless required by financing) to determine the nature of obligations and approach.[92] One company respondent emphasized: "legislation dictates everything."[93] Another company representative explained that while community consultations should be more of an on-going and iterative process, a company's legal team is more concerned with achieving a concrete outcome which brings some closure to the obligation.[94] From the legal team's perspective, this outcome ideally would be a written document signed by community representatives to demonstrate that consultation obligations have been adequately discharged and the process completed.[95] Company lawyers are therefore reluctant to commit to *iterative prior consultation or FPIC processes* (as distinct from ongoing social engagement) that leave open the possibility of project disruption at a later date, and open-ended legal and financial risk.

All companies are not created equal

At the corporate level, a company's approach to FPIC and prior consultation processes and the incentives it responds to depend on the company's personality and objectives. An interviewee explained that some companies have a much more global perspective and company culture which translates into a more diplomatic approach to how they do business. These tend to be the large multinationals, though there is variance within the category, depending on the company culture and even nationality.[96] These companies tend to have greater capacity to develop corporate policies on FPIC and prior consultations than smaller companies and— particularly those that are publicly listed[97]—are more sensitive to reputational risks. As a result, these companies are more likely to be at the forefront of driving best practice, rather than focusing on doing the bare minimum. Companies that have shorter time horizons take a shorter term perspective to prior consultations or community engagement more generally, and an interviewee identified some junior extractive companies as falling in this category.[98] Other companies still, including smaller companies, may take a more "get it done" approach, not caring how or with whom consultations are done, as long as they are done. With these sorts of companies there is very little interest in best practice at the corporate level, which translates into poor practices at the project level.

> "Interviewees explained that companies are often guided by their lawyers when it comes to FPIC and prior consultation processes. These lawyers tend to view consultation processes with a compliance mentality first and foremost…"

There are variations between sectors, as well: business leaders from both the mining and oil and gas sectors have acknowledged that the mining companies have made more progress in integrating the concept of SLO (if not FPIC) into planning and operations in comparison to petroleum companies.[99] One explanation for this could be that mining companies are more likely to have more direct and sustained engagement with local communities than counterparts in oil and gas, particularly where oil and gas activities are offshore and do not involve land-based infrastructure.[100] This is because mining projects tend to have a larger land footprint than oil and gas projects, and because oil and gas projects tend to generate fewer jobs for local communities as compared to the mining sector. Structural differences between the sectors have also been identified as possible factors that account for differences in progress between

the sectors. For example, the fact that mining operations tend to be more locally focused and "nimble" as compared to oil and gas operations that operate in a more top-down manner may offer a partial explanation for the oil and gas sector's slower pace in internalizing the concept of SLO and progress in recognizing indigenous rights more generally.[101]

When companies want to be in charge

While the overarching incentives of both proponent ministries within government and companies with regard to FPIC and prior consultations broadly align, respondents described situations where there has been misalignment in ***approach***, especially where there has been a history of conflict between specific communities and the government.[102] In these situations, representatives from large companies have expressed a strong preference for retaining control of social engagement processes (as opposed to government led prior consultation processes that are considered part of the regulatory approval process) so the company is able to directly influence outcomes. [103]

How do power and interests converge to shape outcomes?

In theory, FPIC is a right through which to recognize and operationalize the power of indigenous communities to make decisions on issues that impact their lands and their broader rights. In practice, power asymmetries across the actors discussed above have impacted how relevant laws and regulations are written, interpreted, and implemented, often in ways that dampen the realization of the interests of indigenous peoples inherent in the right.[104] Whether the right to FPIC is recognized, and whether prior consultation processes in practice approximate the desired outcomes of indigenous peoples, is to a large extent a function of who has the formal authority and informal influence over how the rules are written and how the processes unfold, i.e. who has the power to shape these processes in ways that serve their interests. As suggested above and discussed in more detail below, the relative power of extractives companies and proponent ministries within government over indigenous groups and their allies both within and beyond government tends to result in failures to recognize indigenous rights to give and withhold consent, and prior consultation processes that do little to empower indigenous groups.

Many extractives related prior consultation processes conducted by governments (and in the case of Colombia, companies), and the actual outcomes of consultation processes, substantially diverge from what is required by international human rights law and what is sought by indigenous communities. Indeed, not one example of a "successful" prior consultation process related to extractives could be identified by local experts across the three focus countries studied.[105] The following section will explore some of the ways in which indigenous peoples exert or have built power in the context of prior consultation processes. It will also explore how the power of various government and private sector actors is deployed to shape the performance and ultimate impact of prior consultation processes, typically in ways that (at least superficially) serve the interests of these two sets of actors.[106]

How indigenous groups influence implementation

Of the three main stakeholders, indigenous communities generally wield the least power in prior consultation processes, often lacking the political influence and financial and technical capacity to shape consultation processes in ways that advance their interests. Because indigenous groups have not generally been the designers or implementers of prior consultation

processes, there have been few pathways open to them to press for their interests. As a result, consultations have overwhelmingly been carried out in ways that are generally unsatisfying to indigenous peoples regardless of their specific interests. Indeed, as noted above, in the cases examined for this project, none of the researchers was able to identify a single prior consultation process related to extractives projects that was viewed as "successful," i.e. capable of facilitating informed and autonomous decision-making. However, indigenous groups have not been completely powerless: they have been at the forefront of shaping norms, and have influenced consultation processes in multiple ways, some of which are explored below.

Power through protest

The use of informal power expressed through direct action by indigenous peoples has successfully changed the interests of powerful actors in some circumstances. The financial and reputational risks associated with protest, project stoppages, and conflict have pushed governments and companies toward increased engagement with indigenous communities and increased prioritization of establishing, at least, an SLO. Indeed community representatives reported that the threat of conflict is, at times, the only leverage communities have to generate government and company interest in engaging with community priorities, and company and government respondents report that the cost of conflict is a significant concern.[107] Direct action by communities, however, puts the life and liberty of indigenous community members at risk when met with violence meant to deter and silence opposition.[108]

Power through collective action and strategic alliances

Aside from direct action as a source of power, there are important examples of cases where indigenous peoples have pursued collective action to increase their influence over consultation processes (see box 1 below). This sort of horizontal integration can be even more impactful when coupled with strategic vertical alliances.

Box 1: Coal exploitation in the Sierra Nevada de Santa Marta: Building coalitions among different indigenous groups and establishing strategic alliances with outside actors

The Sierra Nevada de Santa Marta (the Sierra) is a mountain formation located in Northern Colombia, inhabited by four indigenous peoples: the Kogui, the Arhuaco, the Wiwa, and the Kankuamo peoples. The Línea Negra, a geographical delimitation that surrounds the Sierra contains several sacred sites of the four indigenous peoples: for them, the Sierra is central to their cultural integrity and the heart of the earth.

In 2011 a precursor to a prior consultation process began between a Brazilian company, CCX (formerly known as MPX), which sought to begin a coal mining project, and the peoples of the Sierra. It was fraught from the outset.[109] On the one hand, the project was of high interest to the company and the government. On the other hand, the peoples of the Sierra feared its implications for their spiritual, environmental, and cultural survival.[110]

A political body—the Consejo Territorial de Cabildos (CTC)—was founded to act as the representative organization of the four peoples of the Sierra before the state and other stakeholders. The objective of the CTC was to facilitate a unified approach on the basis that working together with shared criteria for action would be more effective to achieve their common goal to protect the Sierra and the survival of the peoples.[111]

The indigenous peoples benefited from the support of NGOs that provided specialized assistance and offered legal advice to the CTC.[112] This support enabled the peoples to make informed decisions by reducing informational asymmetries. Although each indigenous group had its own advisers—including first-generation indigenous lawyers who also served as "cultural translators"—and each group had its own internal discussions and disputes, the CTC was the formal representative of the four peoples throughout the process.[113]

The premise of acting and deciding according to the Law of Origin, which is the "traditional ancestral science of wisdom and knowledge,"[114] further unified the groups around the common goal of protecting the Sierra.[115] This CTC mechanism facilitated robust internal communication, and allowed the peoples of the Sierra to coalesce around a shared understanding of their goals and preferences for the design of the process. The increase in unity brought about by the CTC mechanism, coupled with shared rules of procedure, allowed the peoples of the Sierra to speak with one voice in resisting external pressures, which were great considering that the project had the support of national and local authorities, and other communities including Afro-Colombian communities and the Wayúu people.[116]

A civil society representative explained that coordinating and organizing in the context of the pre-consultation meant more than just getting on the same page; it also required there to be just one space of interaction with the state to pre-empt tactics of external actors to create division within the communities. In addition, this singular space facilitated record keeping so that commitments made during meetings were memorialized.[117] The peoples of the Sierra carefully documented meetings, and their alliances with external actors, including lawyers,

and international NGOs raised the profile and visibility of the consultation, and thus the reputational stakes for the company and the state of getting it wrong. The pre-consultation did not proceed to a formal consultation process in the end, and while the reasons for this remain unclear, some speculate that this was in part due to the fact that the consent of the peoples of the Sierra was not forthcoming, and in part due to the drop in coal prices.[118] This process highlights the potential for power-building when indigenous groups act as one coherent body with a common goal.[119] The peoples of Sierra organized in politically savvy ways by building strong networks among themselves and with outside groups in advance of the pre-consultation process. They also increased visibility of the process both internationally and through local media to avoid the process being conducted in the shadows.[120] While important lessons can be drawn from this particular case, the peoples of the Sierra still face pressures related to other mining activities.[121]

Source: Paola Molana-Ayala, *Politics of FPIC, Colombia country analysis*

Box 2. Lessons from national-level prior consultation processes

The importance of representation and the forging of strategic alliances with outside actors is also evidenced in the outcomes of national-level prior consultations with indigenous peoples on proposed policies and laws that affect them. While the confluence of interests and power that shape national-level prior consultations that are not directly related to extractive industries are distinct from the confluence of interests and power that affect extractives related prior consultations at the project level, interviewees from civil society and academia noted that in general, indigenous peoples tend to be more satisfied with the results of national-level prior consultations.[122] At the project level, where prior consultations are more local in scope, less visible, and communities have fewer allies, technical advisors, and networks, power asymmetries between more powerful actors and indigenous communities are more pronounced.[123]

> "At the national level, all of the organizations bring in their legal and technical advisors. Governments engage because they are ready to reach an agreement. There is greater transparency. Parties come to the table knowing the issues at stake, and the complexities are well understood beforehand. At the local level, you have a succession of surprises; everyday they learn something new about what is at stake."[124]

Prior consultation on climate change regulation, Peru

Indigenous representatives and government representatives who were involved in prior consultations on the Regulation of the Law on Climate Change that took place in Lima and several regions of Peru in 2019 reported that most participants in the process generally agreed that it was a constructive experience. While the subject of this prior consultation could potentially be considered lower stakes in terms of the state's economic interest as compared with extractives projects, it nevertheless provides some insights that could be useful to consider in the context of prior consultation processes related to extractive activities. Some key factors that contributed to its relative success as identified by individuals who participated in the prior consultation process include:

- Sustained participation of the Vice-Ministry of Culture. Consistent participation of the Vice-Ministry played a critical role in tempering the power imbalances inherent in negotiations between indigenous peoples and organizations and the state—in this case the Ministry of Environment;
- The participation of national indigenous organizations allowed for more robust representation of indigenous perspectives as did the creation of exclusive spaces for the participation of indigenous women, who made up over 60% of the indigenous representatives who participated in the process.[125]
- Donor funding for technical experts enabled more informed participation by indigenous representatives given the technical nature of the instruments being consulted on.

Source: Roger Merino, *Politics of FPIC, Peru country analysis*

Power through protocols

Indigenous, quilombola, and traditional peoples and communities have sought to exert power in prior consultation processes by developing autonomous protocols that determine the rules of engagement between communities and third parties. These protocols reflect customary laws and practices and have been developed in response to poor regulation and implementation of FPIC and prior consultation processes.[126] In Brazil, the Federal Public Prosecutor's office working at the local level has provided technical support to communities in their elaborations of autonomous protocols, including the Munduruku Consultation Protocol[127] and the Krenak consultation protocol.[128] And in some countries (e.g., Argentina, Brazil, Colombia[129]), state entities have legally or officially recognized certain peoples' protocols, requiring or urging government entities to adhere to the autonomous protocols in consultation processes.[130] An indigenous leader from Brazil described the potential of autonomous protocols:

> "I think that the consultation protocol serves as an instrument to give strength… to say we have the right to be consulted in this way, in this timeframe… it is not you who decides who is coming to our villages. We decide. We are the ones who are able to say who can come, and who will not be able to come, as per the consultation protocol."[131]

As identified by indigenous and tribal groups, the power of protocols lies in building unity and strengthening self-governance,[132] and counterbalancing the power of the government (and where they are involved, companies) to determine the form and function of prior consultation and consent processes.

The power of non-participation

Despite the ways in which indigenous peoples have been able to achieve some success in shaping prior consultation processes and their outcomes, in general (as will be discussed in detail in the subsequent sections) these processes have tended to favor the interests of companies and governments at the expense of indigenous groups, and have failed to include the right to give and withhold consent. In the face of such prospects, some groups have decided their only hope of shaping outcomes is by withholding their participation. In doing so, they feel they can deprive governments and companies of the appearance of legitimacy. For example, the U'wa people of northeastern Colombia have a long history of mobilizing against oil extraction in their territory: "oil, for the U'wa indigenous people, is the blood of Mother Earth. It is vital for life. And if we extract this blood, the Earth will die."[133] Considering extractives projects as antithetical to their interests, and viewing the form of the prior consultation process implemented by the state as designed to undermine their interests and rights, the U'wa "rejected the concept of prior consultations altogether."[134]

How pro-investment government entities and companies shape implementation

The notion of "political will" often boils down to this: who has the power to shape outcomes and what do they want to do with this power. While the implicit focus of this concept is on government officials, the reality of who has power to shape outcomes is more complicated, because governments are not monolithic, nor are they the only powerful actors whose interests shape outcomes.

Where power lies within governments

Proponent ministries often play a prominent role, and have significant power, through legal authority and relative influence, to decide how to implement prior consultations. They can thus exercise their official authority and power to shape the implementation and outcomes of prior consultation processes in ways that advance their respective goals and priorities, which, as noted above, tend to deviate considerably from those of indigenous groups. This results in these ministries taking actions that expressly reject FPIC and circumscribe prior consultation processes. The more sympathetic government entities that are tasked with supporting the rights of indigenous peoples seem to be highly constrained in performing this role. These entities often lack sufficient resources or capacity to effectively execute their role in advancing the position of indigenous peoples.

This relative deprivation is likely often a political calculation designed to limit the relevant entity's power and influence. The result is that these under-resourced entities end up ultimately playing a lesser role in prior consultations. For instance, in Peru, despite having authority over indigenous affairs, VMIA's power in prior consultation processes is limited. It is not only one of the most underfunded entities within government, and as such unable to participate more fully in consultations as an observer,[135] but it does not enjoy the status of a full ministry and is therefore not on equal footing with the full ministries.[136] With limited power and resources, and an inferior hierarchical status, VMIA is unable to compel proponent ministries that are driven by the belief that prior consultations will delay or obstruct their work to meaningfully implement consultations.[137] Similarly, the role of Peru's Ombudsman in prior consultation processes is limited, and its reports, that are meant to support improved consultation practices, have no binding force.[138]

Similarly in Brazil, FUNAI, which has traditionally been viewed

as an ally of indigenous peoples, has more recently come under pressure from powerful politicians and other actors within government that are aligned with a pro-extractives and investment agenda.[139] Back in 2016, the Special Rapporteur on Indigenous Peoples noted that indigenous peoples in Brazil were concerned that "the capacity and local presence of FUNAI were being debilitated to the point where the Foundation may soon no longer be able to fulfill its mandate."[140]A government respondent noted that "the mediation that FUNAI used to do between indigenous peoples, companies, and even government interests has been stifled." The respondent went on to explain that FUNAI's reduced ability to fulfill its role is the result of "internal political persecution."[141] In addition, the reported reduction in FUNAI's funding no doubt plays an important role in immobilizing the entity.[142]

In Colombia, despite bearing the responsibility for coordinating prior consultation processes, interviewees report that the Ministry of Interior is hardly involved, in large part because it lacks the funds and human resources to oversee the numerous consultation processes that take place all over the country.[143] It therefore forfeits much of its role to the private sector. Because companies are typically responsible for funding, organizing, and conducting prior consultations, the real power to shape the processes lie in the hands of companies.[144] An interviewee from the government emphasized that "everything—you must understand everything—is done by the private sector."[145] Once the consultation is complete, the company need only present proof of consultation to the government, and if this is deemed sufficient, the process ends.[146] And where companies experience delays or problems in consultation processes, government representatives reported that companies pressure the proponent ministry to intervene.[147] As noted, in Colombia, proponent ministries do not have a formal role in the prior consultation process, but given their interests in facilitating investment, any influence that is in practice exerted will likely not align with the interests of indigenous peoples.

Where power lies within companies

While it will differ from company to company and consultation to consultation, the interests of the operations team and legal team tend to most significantly affect how prior consultation processes play out in company led processes. This can result in a process that resembles more a compliance procedure than a genuine dialogue process.[148] Of course social performance experts are central, but they tend to wield less power than their colleagues, which may be due to the fact that "financially… [they are] regarded within the corporation as cost centers rather than profit centers."[149] Their ability to call the shots in prior consultation processes is dependent on their ability to convince more powerful actors within companies of the value of FPIC and/or prior consultation processes. One social performance expert noted that the hardest part of the job is internal negotiation rather than external interaction with communities:

> "we fight about these things internally. It is not easy at all. Now things are better because FPIC is part of the company's procedures, but it is still not easy."[150]

Even where companies do not lead the process, the private sector can still significantly impact the behavior of proponent ministries. For example, in Peru it has been reported that the private sector, and particularly mining companies, have significant power over the political system.[151] A former government representative reported that Sociedad Nacional e Mineria Petrolio y Energy—an extractives industry association—has "incredible influence" and access to the country's leadership, and the Ministry of Energy and Mines in particular. The same respondent noted that close relationships between many industry actors and the policymakers who regulate the sector are a product of the groups mixing in the same elite circles.[152] Similarly, in Brazil, the government's clear alignment with the agribusiness sector has the broader effect of influencing government action on indigenous, quilombola, and traditional peoples' and communities' rights more generally, which has a knock-on effect for realization of their rights in the context of the extractives sector.[153] For example, the fact that the Parliamentary Front of Agriculture (FPA), a particularly strong agribusiness lobby group[154] that aligns with the mining sector, opposes consultations and FPIC is likely to impact on the government's stance on FPIC and prior consultations more broadly.

In addition, government interviewees noted the impact of the "revolving door" between government and the private sector in many countries in the region. This was the case in the pre-consultation process between CCX and the peoples of the Sierra in Northern Colombia, where the company employee who was tasked with leading the consultation process was formerly employed by the government; this type of situation was described by interviewees as a particularly common occurrence in Peru.[155] The prevalence of former government officials going on to take up jobs in mining and petroleum companies further deepens companies' networks within the government.[156] With key government agencies thus captured by private sector interests,[157] even where companies do not have a formal role in the prior consultation process, their interests are well represented.

How power is deployed to set the rules of the game

"FPIC gets in the way of the government's economic strategy–that is–indigenous peoples get in the way."

- Indigenous representative[158]

One of the most important ways that power and interests can be expressed in governance is by shaping the so-called "rules of the game," i.e. determining how an issue is defined, how it will be addressed in practice, by whom, when, and the ultimate weight different voices will be given in determining ultimate outcomes. Almost across the board, governments dominate these policy-defining moments, unsurprisingly given that they touch on main functions of the state. Indeed, researchers have noted that participatory processes that are meant to deepen indigenous participation in shaping the rules that affect them and their lands may act as a means for the state to achieve its aims in defusing tensions related to extractive industries,[159] while at the same time reinforcing existing power dynamics by prescribing the form of participation in ways that contain and control participation and influence:[160] "opening just enough political space to discourage frontal opposition, but too little to allow for substantive change from within."[161] This is a view that was shared by a community representative, who expressed that in practice prior consultation processes have created a vertical relationship between the state and communities that eliminates opportunities for the parties to engage as equals, with the state at the top, and communities at the bottom.[162]

Setting the rules of the game – the how

The shaping of regulation by powerful actors has had the effect of prioritizing the interests of those powerful actors in determining the "***how***" of FPIC and community consultations. The circumstances surrounding the development of Peru's prior consultation law is an example of how powerful actors shape laws to serve their interests.[163] The process of developing the law, and in particular the accompanying regulation, was criticized by indigenous representatives as reinforcing power asymmetries between powerful state actors and indigenous groups involved in the process. The final law omitted the right to consent, and indigenous groups complained of imbalances between representation of the state and indigenous representatives on the commission to formulate the prior consultation regulation, as well as exclusion through other means including the type of language used during the process and the locations chosen to convene.[164] This led to the adoption of implementing regulation that failed to address many of the issues that indigenous representatives viewed as fundamental to the protection of their rights.[165] One specific critique of Peru's prior consultation law raised by indigenous organizations is how much power it leaves in the hands of proponent ministries to determine the "how."[166] Instead of consultation processes being community-driven and designed, as indigenous peoples and pro-indigenous activists have called for in line with the requirement to consult in accordance with indigenous peoples' own processes and practices, consultations have been conducted in exclusionary and culturally inappropriate ways.

In Colombia, multiple administrative regulations including Presidential Decrees establish the rules on the implementation of prior consultation that restrict the scope of the right. Experts, including the ILO supervisory bodies, consider that these regulations, none of which were drafted and promulgated in consultation with indigenous peoples, lack sufficient protection for the rights of indigenous peoples.[167] Instead, they reflect the interests of the powerful actors behind their drafting.

Perhaps the most stark manifestation of how the fact that the rules of the game are being shaped by powerful interests impacts outcomes is that in the countries studied, the right to FPIC—the right to give and withhold consent—is left out of national laws and regulations.[168] Indigenous representatives have described the participatory mechanisms that are reflected—prior consultation processes—as an administrative process with a predetermined outcome.[169] One community respondent expressed that the most problematic part of consultations is the part of the process where decisions are made, because the government controls how interests of indigenous peoples are taken into account, and ultimately it is the government that makes the final decision.[170] Indeed, this outcome underlies the concerns of indigenous peoples in Mexico who consider any new general law on prior consultation would further facilitate the granting of concessions on their lands.[171] And this reality is reflected in a new bill proposed by the Federal Government in Brazil that would open up indigenous, quilombola, and traditional peoples' and communities' lands to extractives activities and expressly exclude rights to give and withhold consent.[172]

Like powerful actors within government, many companies do not commit to respect communities' giving or withholding of consent. This is driven by some companies' concerns that the standard of consent may potentially impair their ability to begin or continue extractive activities. One company interviewee acknowledged: "Most people are doing FPIConsultation not FPIConsent. I think that that is kind of the unspoken; that is ok if that is what makes it work."[173] Companies have pointed to domestic legislation and regulations to reinforce this approach,[174] which some argue private sector actors have had a role in influencing.[175]

This view is reflected in industry association statements and guidance documents. For example, the International Petroleum Industry Environmental Conservation Association's (IPIECA) guidance document on indigenous peoples and the oil and gas sector does not take an affirmative position in support of FPIC, but instead notes that many governments and companies prefer to engage in free, prior, and informed consultation processes.[176] And while the International Council of Mining and Metals' Indigenous peoples and Mining Position Statement acknowledges in its overview that the outcome of FPIC should be that indigenous peoples "can give or withhold their consent to a project," it goes on to explain that because most countries do not have legislation that confers on indigenous peoples "the right to veto," FPIC should be regarded as a "principle to be respected to the greatest degree possible in development planning and implementation."[177] And where consent is not forthcoming, and the relevant government decides that a project can proceed, ICMM's position statement does not explicitly require members to respect the decision of indigenous communities in these circumstances, but rather defers to the discretion of ICMM members to "determine whether they ought to remain involved with a project."[178] This suggests that the outcome described in the overview (that indigenous peoples can "give or withhold their consent to a project") is aspirational rather than required.

In places where comprehensive laws do not exist, other actors have played a role in shaping standards. For example, in Guatemala[179] and Colombia, where a general prior consultation law does not exist, the Constitutional Courts have found space to weigh in and interpret the law in this area. In Colombia the Court has concluded that none of the administrative regulations promulgated by the executive to regulate consultation comply with international human rights standards including standards in relation to FPIC.[180] It seems that in the past Colombia's Constitutional Court has interpreted international law largely free of the incentives that motivate actors within proponent ministries, and free of the influence of the private sector, which has resulted in interpretations that more fully recognize and protect indigenous rights in line with the jurisprudence of the Inter-American system.[181] In Brazil, where the legislative framework on prior consultation and consent is lacking, indigenous communities have sought to fill the gap by autonomously determining the rules for engagement as discussed in an earlier section.

Setting the rules of the game – the who

ILO 169 establishes state obligations to consult with indigenous and tribal peoples.[182] Domestically, this has been interpreted in various ways. In Peru, for example, the prior consultation law recognizes the right of consultation for indigenous peoples.[183] In Colombia, indigenous, Afro-Colombian, and Roma groups are recognized.[184] And in Brazil, where no consultation legislation exists, experts have asserted that ILO 169 requires indigenous, quilombola, and other traditional peoples and communities to be consulted.[185] While a single definition of "indigenous" or "tribal" does not exist, international law has recognized self-identification as the pivotal criterion.[186]

Driven by the motivation to limit the number of projects that require consultation, proponent ministries have actively tried to influence determinations of who is considered indigenous so as to narrow the groups who fall within the definition.[187] A former government respondent explained that in the early days of the implementation of the prior consultation law in Peru, there was significant opposition from those within the Ministry of Energy and Mines during the government led process of determining which groups could be considered indigenous. Some argued that Peru did not have an indigenous population, preferring the view that "we are all mixed, we are all the same."[188] Others expressed the view that only those in the Amazonian regions could be considered indigenous because they have had less contact with "civilized" parts of the country.[189] While it was VMIA's proper role to advise on indigenous issues, and create a reference database of indigenous populations, the Ministry of Energy and Mines sought to exert its influence in ways that would restrict the application of the prior consultation law so as to limit the impact of the law on extractives projects. Because the Ministry of Energy and Mines was not bound by law to collaborate with VMIA, a former government interviewee explained that the Ministry of Energy and Mines took steps to make its own determinations, excluding certain groups from prior consultations because, in the Ministry of Energy and Mines' estimations, they did not meet certain criteria.[190]

In other instances, the Ministry of Energy and Mines would rely on VMIA's database to reduce the number of communities to whom the requirement to consult would apply. For example, in the case of a copper mining project that would affect the Cañaris farming community (a subgroup of the Quechua people) in the central Andes, the Ministry of Energy and Mines pointed to the exclusion of this group from VMIA's database as evidence that the requirement to consult did not apply, against the recommendation of the Ombudsman's Office. Protest by the Cañaris people later resulted in the Quechua people being registered in the database.[191] This exclusionary approach, which has been driven primarily by the preferences of the Ministry of Energy and Mines, was confirmed by community representatives who remain concerned about the state-centered approach to defining "indigenous." For example, one indigenous representative noted that although the database created by VMIA has improved over time, it remains exclusionary, undermines indigenous identity, and restricts the application of the right to consultation.[192]

In Brazil, there are multiple dimensions to actions taken by the state to deny indigenous peoples' rights to self-determination, including their rights to FPIC and consultations. Because the state officially recognizes indigenous peoples' territorial rights through demarcation and titling,[193] failure to demarcate and title indigenous lands by the government has been one method to i) legitimize mining operations on indigenous lands (which is prohibited by the Constitution in the absence of approval from Congress, which, at the date of writing, has not been given) that are yet to be demarcated and titled; and ii) deny the existence of indigenous communities' legitimate territorial rights, and thus limit those communities' rights to prior consultation. For example, in a case concerning a potash mining project that would take place on the land of the Mura people, the mining company, Potássio do Brasil, argued that because the land was not demarcated, it could not properly be considered indigenous land, and thus consultation was unnecessary.[194]

In 2019, in a move that would potentially further restrict the ability of indigenous groups to claim the right to consultation and consent in Brazil, the government transferred the job of demarcating indigenous lands to the Ministry of Agriculture. This change in control was called for by Brazil's farm lobby, Sistema CNA, which interviewees described as one of the leading opponents to FPIC and consultation in Brazil.[195] Though the job of mapping indigenous lands has since been transferred back to FUNAI following protest by indigenous organizations, Brazil's current president has continuously affirmed that his government will not demarcate any indigenous or quilombola land,[196] while also threatening to open up indigenous lands to mining.[197]

Setting the rules of the game – the what, the when (and the how long)

One of the key elements of FPIC and prior consultations is the requirement that consultations take place sufficiently prior to any state authorization of a project proposed on indigenous territories, and sufficiently prior to any commitment or activity by a company on indigenous territories.[198] In practice, consultations often occur when key commitments to projects have already been made and financial costs have been incurred. In Peru, proponent ministries have the discretion to decide when in an investment process consultations will occur. In the context of the petroleum sector, the requirement to consult is engaged prior to the grant of a concession, so the topic of consultation—the what—is the decision to grant the concession. But in the mining sector the requirement to consult is engaged only after the decision to grant a concession has been taken.[199] In Colombia, prior consultations typically occur after exploration, so the topic of consultation is exploitation; this sequencing has been described as a key driver of conflict between communities, companies, and the government.[200] It further weakens the position of communities in consultations because by the end of exploration, both the company and the proponent ministry have an even greater financial interest in the project, and are therefore eager to "close a deal," and to exert their power to do so.[201] One former government representative explained that proponent ministries in Colombia have come under significant pressure from companies that, after exploration, have faced opposition in consultation processes. In these cases companies have called on proponent ministries to intervene in favor of the project or to reimburse the company for expenses incurred for exploration activities.[202]

A government respondent explained that they believed it to be in the government's and companies' interests to initiate consultations after exploration because the time and financial investment involved in undertaking consultations is too significant to incur before knowing if commercially exploitable resources exist.[203] Another government respondent concurred, and explained that companies benefit from making deals with communities during exploration or in the context of other processes that occur in advance of the official prior consultation process; this sequencing allows companies the time to engage with communities and agree on benefit sharing arrangements before the official consultation process, so that when communities later learn of the prior consultation process, they are either already heavily invested in the project, or have signed away much of their bargaining power.[204] This was the case in the Aurora mining project in Peru where the company had begun engaging with the community in advance of the formal consultation process through the environmental impact assessment process, and secured the community's approval for the start of operations in exchange for urgently needed benefits including jobs and support for agriculture.[205] A government respondent confirmed that similar sequencing challenges arise in Mexico because conversations around compensation for land use occur in advance of consultations, resulting in key decisions being made before consultations have even begun.[206] In multiple countries there have been discussions to move the consultation process earlier to occur before concessions are issued, but there has been strong push back by both the government and the private sector. In Peru, for example, mining associations argue that such a move will impact investment in the country—an argument that influential government actors are sensitive to.[207]

There has also been resistance to prior consultations in proponent ministries because of the time it takes to conduct meaningful consultation processes. While indigenous communities call for processes that allow for deeper participation by building in sufficient time and flexibility, including for intra-community deliberation, this is perceived to be at odds with the financial incentives of both the governments and companies.[208] Governments' concerns around the length of prior consultation processes are heightened where there are numerous consultations in the pipeline and little government

capacity to oversee them, and exacerbated when they come under significant pressure from the private sector, which may call on proponent ministries to intervene when the process stalls or stretches over a lengthy period of time that does not align with project timelines. As a result, powerful government actors and companies look for ways to simplify and accelerate prior consultations,[209] including by creating administrative rules that limit the length of consultation processes.[210]

How power is deployed to weaken, deter, or demobilize actual or potential opposition

Powerful actors shape narratives that undermine support for indigenous peoples

Public solidarity with indigenous rights, when present, has proved instrumental in increasing the power and influence of movements. Following the Bagua tragedy in Peru,[211] for example, there was widespread support for protests and strikes called by indigenous groups, and as a result, indigenous organizations were able to build broader alliances with new actors including trade unions, political opposition, and international and national public interest organizations.[212] This increased the influence and capacity of indigenous organizations to demand recognition of their rights, which later resulted in the promulgation of the prior consultation law.

For investment-promoting government actors, such alliances are seen as contrary to their interests. In many instances, these actors have sought to undermine the ability of indigenous groups to mobilize a broader group of allies in support of their rights by strategically reshaping the discourse. By characterizing indigenous groups who oppose extractive activities on their territory as "anti-development," "leftists," or "Marxists,"[213] governments pit these groups against the general population that is presumably "for" development. Such narratives are propagated at the highest levels. For example, the former vice-president of Colombia has argued that communities seek to blackmail companies in their exercise of their right to prior consultation.[214] And in Brazil, a Congressional Investigative Commission has openly encouraged the government to denounce ILO 169, and described the UN Declaration on the Rights of Indigenous Peoples as a grave threat to Brazil's sovereignty.[215] This discourse is effective in isolating indigenous communities from potential allies that could translate into increased political influence and power.

The media plays a fundamental role in shaping the narrative around extractives and indigenous and tribal peoples' rights, and in countries like Brazil, Colombia, and Peru, the largest media groups tend to be closely linked to political elites. In Peru, the voices and views of those within the government seeking to promote investment in extractives are powerful in the conservative media.[216] Such coverage strongly influences the national discourse on extractives and indigenous rights, pitting the rights of indigenous peoples against broader economic interests. While FPIC and prior consultations have been characterized as a barrier to economic development by powerful actors, one interviewee explained that resistance to FPIC and prior consultation is also an issue of cultural and structural racism driven by the belief that indigenous peoples "do not deserve to be heard or afforded special treatment."[217] Interviewees reported that misinformation publicized by the media in Colombia has the effect of delegitimizing the actions and decisions of indigenous communities, and putting their rights at risk.[218] Instead of reporting on the risks communities face and their related claims for improved quality of life, access to water and other basic goods, the media has at times supported the narrative of indigenous peoples as "anti-development," characterizing community blockades or action as attempts to harm the country's economy. As a result, indigenous communities are further isolated in their cause.[219] Community respondents from Peru echoed this concern.[220]

Divide and rule within communities

> "The state has many strategies to try and make us fight amongst ourselves, and with other communities."
>
> - Indigenous representative[221]

Governments and companies can undermine the likelihood of indigenous peoples finding power in numbers, by using divisive tactics to fragment or exacerbate existing fragmentation of the interests of community members and peoples. Scholars and indigenous representatives have noted that these strategies are used as a governing technique by powerful actors to achieve their own ends by weakening the ability of indigenous communities to "defend their claims, to organize collective action, and ultimately to uphold their rights."[222] These strategies also aim to streamline prior consultation processes in service of the interests of powerful actors to expedite the development of extractives projects. Divisive strategies include negotiating with community leaders behind closed doors to the exclusion of the wider community, or seeking to circumvent formal prior consultation processes and engage in unofficial talks with influential community members, in advance of the formal process. Co-opting leaders or other influential community members with the strategic distribution of benefits or bribery in order to "reward pro extraction attitudes" as well as to penalize opposition is another divisive tactic that has reportedly been used.[223] For example, Maya communities in Belize have argued that companies have given jobs and money to those who support their activities, while restricting

access to jobs to those who do not.[224] And in Bolivia, scholars have found that in consultations with the Guarani people, proponent ministries and companies negotiated with individual leaders and created "arenas of exclusive participation," instead of conducting consultations through the Guarani people's traditionally inclusive assemblies.[225] Similarly, in the context of consultations for a hydro-electric dam in Brazil, the Special Rapporteur on the Rights of Indigenous Peoples reported that the Munduruku people in Brazil had been allegedly approached by a consulting firm employed by the consortium of companies who sought to build and operate the dam and offered compensation in order to "abandon their opposition to the project and debilitate indigenous collective decision-making in relation to the project."[226] Another similar strategy described by one government respondent is the use of covert intelligence gathering to understand a community's views on a project in order to stymie movements to oppose projects from within.[227]

Companies may also seek to take a piecemeal strategy to prior consultations in order to build incremental support for the project in order to increase pressure on communities who are consulted further down the line.[228] For example, in the case of the proposed CCX coal project in northern Colombia that involved a pre-consultation process with the Kogui, Arhuaco, Wiwa, and Kankuamo peoples, the company first secured the backing of local authorities of the relevant departments and municipalities to reinforce the national level support the project enjoyed, and obtained the support of communities who were more accepting of the project, before moving on to consult with the Kogui, Arhuaco, Wiwa, and Kankuamo peoples, who were opposed to the project. By building momentum in this way, the company sought to exert pressure on the remaining communities to acquiesce with the project's plans.[229]

Inducing cooperation with the promise of benefit sharing

Another way to demobilize the support for recognition of FPIC and effective implementation of consultations is by inducing cooperation with the promise of benefits to be distributed to the collective through the life-cycle of the project. As noted earlier in this report, where companies have had early access to communities through environmental impact assessment processes or otherwise, they have been able to negotiate benefit sharing arrangements in advance of formal consultation processes, which eliminates the concept of consultations occurring prior to important decision-making related to the project, and results in the community having effectively signed away much of their bargaining power before consultation processes even begin.[230] A company respondent acknowledged that because extraction is generally inconsistent with the values of many indigenous communities, companies seek acceptance of a project through the negotiation of benefit-sharing arrangements.[231] This has proved, in some cases, to be a particularly successful way of inducing community acceptance of extractives projects due to the socio-economic vulnerability of indigenous communities. Indeed, a respondent explained that companies have previously taken the view that "we must pay for consent."[232] And while some companies attempt to keep the benefit sharing and prior consultation processes distinct, this is not always the case nor in the companies' interests to do so.[233]

In some cases, the stark societal inequality that indigenous communities experience calls into question whether consent can in fact be considered to be freely given where, in the context of profound material deprivation, it is induced by the promise of development benefits that should otherwise be provided for by the state.[234] Moreover, where the right to FPIC is not recognized and consent is off the table, and communities recognize or believe that a particular project is a fait accompli, communities may instead enter into agreements with companies that are considered by company and outside actors as means for cultivating (and evidencing) social acceptance of a project. Indigenous organizations and experts have pointed to examples of this in practice where First Nation communities in Canada entered into impact benefit agreements on the belief they could not object to the project.[235] The Assembly of First Nations described such agreements as "a way to make the best of a bad situation by securing some benefit from an unwanted project that [indigenous communities] do not feel able to prevent."[236]

Controlling the flow of information

One of the ways companies pursue social license for a project is through controlling information about a project. They do this by often presenting a one-sided and positive picture of the benefits associated with a project, with limited information on the anticipated negative impacts. For example, experts describe the inter-cultural dialogue phase of prior consultation processes in Peru as being used by government officials to persuade communities of the benefits of a project rather than presenting opportunities to discuss the risks and potential impacts too.[237] At times companies actively restrict access to information or present it in ways that are inaccessible to communities. This behavior is enabled by an absence of independently verifiable information on project impacts, a lack of demand and/or capacity to interpret scientific or technical information that is made available, and few pathways to accountability even if information is made available and is well-understood. Company respondents expressed that it is a difficult task to persuade their colleagues within the company to provide clear and full information to communities in an accessible format because it goes squarely against the company's interest in generating community buy-in to a project where providing the full picture may risk the community rejecting a project.[238]

WHAT CAN BE DONE DIFFERENTLY MOVING FORWARD?
OPERATIONALIZING A POLITICALLY INFORMED APPROACH

The above analysis has drawn on illustrative examples and empirical evidence to demonstrate the importance of political factors in shaping the ways in which the right to give and withhold consent is recognized and prior consultation processes unfold. By identifying specific pathways and mechanisms through which aspects of political context have often impeded the realization of rights and the outcomes being sought by indigenous peoples and their allies through work on FPIC and prior consultation processes, the hope is to complement knowledge of some of the more technical and normative challenges that also have emerged and are actively being addressed by practitioners through technocratic and normative solutions. The question that remains is what does all this mean for actors—donors, development practitioners, INGOs and others—who seek to support indigenous peoples (working with their local allies/advocates) in pursuing their right to meaningful participation in decisions that affect their lands and livelihoods, including those affected by extractives projects? How can these actors more squarely address the ways in which political realities shape the efficacy and impact of their work on the ground?

There is no "silver bullet." "Solutions" to political challenges are as numerous, varied, and context-specific as those challenges themselves, which some suggest is why practitioners have largely side-stepped the unpacking and addressing of political factors to date even while widely acknowledging the importance of "political will." Nonetheless, there is an opportunity to do better. There are various principles and resources to enable different actors to integrate a more systematic political lens into their work, including their work in support of prior consultation and consent. What follows is an overview of some of the building blocks to more politically-informed approaches to supporting FPIC and prior consultation processes, including examples to help clarify how one might address in practice the sorts of political challenges and opportunities identified in the preceding section.

Mainstreaming tools and systems for analyzing political realities

At a general level, approaches to working in more politically-informed ways involve: a) understanding key elements of how political context can shape the design, implementation, and impact of particular activities or interventions, and b) devising plans to address these.[239] The former tend to rely on integrating political economy analyses (PEAs) of some sort into project planning and on-going oversight processes in order to understand and anticipate how key dimensions of these specific contextual factors can shape the landscape of opportunities for and impediments to progress on various goals or in addressing specific problems.[240] Thus, the first step toward integrating a political lens more systematically in work on prior consultation and consent is creating mechanisms for identifying, and ideally updating, relevant information on political context.

"the first step toward integrating a political lens more systematically in work on prior consultation and consent is creating mechanisms for identifying, and ideally updating, relevant information on political context."

Photo: "Meeting to discuss mapping" from **If Not Us Then Who?**

The analyses in the preceding section illustrate some of the ways in which various elements of political context can impact implementation and outcomes at a general level across various settings. They also show that there can be important variation from one context—whether regional, national, or project-level—to the next, as well as variation in political circumstances and dynamics over time. Capturing the key elements of political economy pertaining to a particular issue in a particular context can provide the basis for strategizing how to best position work in pursuit of both long-term impact and shorter-term gains. These insights can help illuminate the prospects for impact of specific "best practices," laws, or policy commitments in a given context by identifying roadblocks and pathways to effective implementation and enforcement.

PEAs can run the gamut from formal and systematic evaluations by trained political economists to more informal and light-touch assessments undertaken by those who know the ins and outs of a specific industry or region or issue particularly well. They tend to start with a basic mapping of key stakeholders, their power/influence and interests with regard to the issue in question, and (mis)alignments of these with intended goals of those intervening in the space, all of which can then be used to understand allies and opponents to particular reforms. PEAs can also help anticipate moments of opportunity on the horizon (e.g., relevant policy debates, IFI negotiations, etc.), (mis) alignments of interests across key actors and with other policy priorities, or any other political economy factors that might make for more or less auspicious circumstances for the pursuit of specific outcomes and goals. There are numerous resources outlining different approaches to producing and using PEA, depending on the needs and goals of the actor in question.[241]

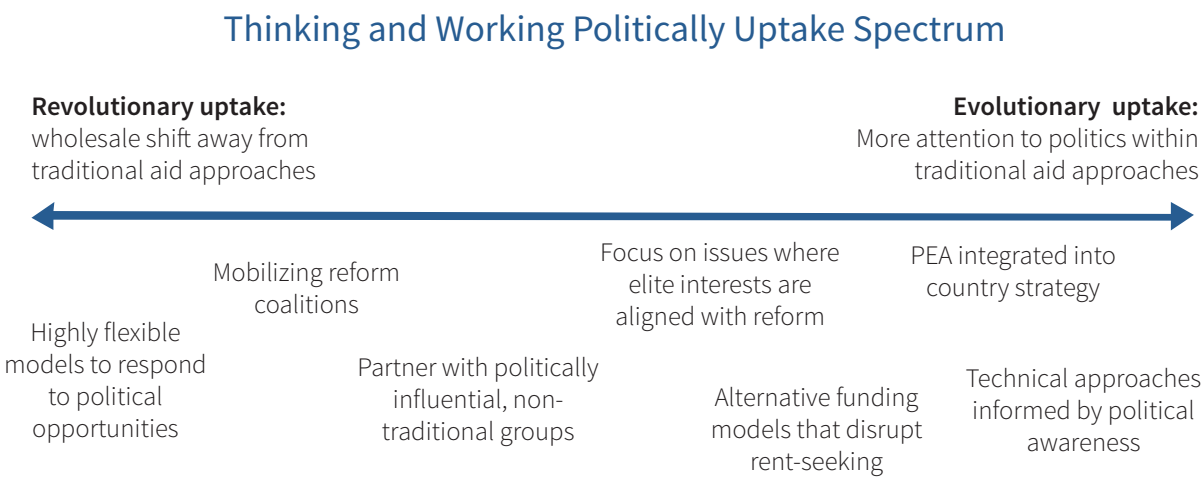
Then what? Responding to political realities

Just as there is not a single approach to doing PEA, there is no single prescription for what to do once the lay of the political land becomes clearer. There are a wide range of ways to "work politically," i.e. to address political conditions, and no specific template for doing so. Again, this will depend a lot on the priorities and resources of a particular actor working in this space and can range from "evolutionary" (layering political considerations into existing approaches and programming) to more "revolutionary" in the below figure.[242]

Therefore, the purpose here is to provide an overview of various types of approaches to responding to major political economy opportunities and obstacles in order to try to bring about greater progress towards indigenous peoples' goals for consultation processes. When possible, we provide illustrative examples of how such approaches might be applied to some of the challenges and opportunities raised in section IV.

Options for confronting political roadblocks

In terms of approaches to responding to political roadblocks that often impede desired outcomes and impacts, it can be useful to consider how different approaches position themselves in response to the political landscape. The typology CCSI has developed for doing so is as follows:



TWP Uptake Spectrum (Parks 2014)

1. *Attempting to change the political status quo.* These types of approaches, drawing on PEAs, actively seek to change some aspect of the political status quo in order to improve the prospects for progress toward desired outcomes. This may include, for instance, efforts to change specific (im) balances of power or (mis)alignments of incentives in order to create more auspicious political circumstances for addressing a particular problem or advancing a particular goal. A risk inherent in this approach, particularly for outsiders, is unintended or unanticipated consequences from "meddling" in politics, particularly in support of one community or issue, or accusations of such meddling being used to delegitimize the agendas and groups being supported.

2. *Navigating the political status quo.* Sometimes described as "working with the grain,"[243] this type of approach boils down to accepting the distribution of power and interests as they are for the short/medium term and trying to get the biggest "wins" possible within these constraints. PEAs serve as background contextual assessments to inform the strategy, targeting, and design of advocacy, technical interventions, and other activities meant to improve a particular area of governance but without prioritizing changing political conditions. Trying to make the most of what is available can translate into seeking out and working with those actors whose interests and power are best positioned to carry a particular agenda or incremental reform forward, acting opportunistically on any political openings that present themselves, or adjusting down short-term expectations when political circumstances are particularly inauspicious.

3. *Circumventing the political status quo.* In addition to trying to live with or change the distribution of power and interests that comprise a problematic status quo, in some cases there may be an option to try to circumvent political roadblocks by seeking alternative pathways to approximate the desired outcomes. These are attempts to sidestep political obstacles by replicating governance outcomes (i.e. particular "public goods") through non-traditional modalities.

Working politically on FPIC and prior consultation[261]

Many of the factors discussed above that skew prior consultation processes away from the realization of indigenous peoples' rights come down to power imbalances and interest misalignments between indigenous peoples and their allies on the one hand, and powerful governmental and corporate actors on the other. The latter public and private sector actors can use their influence, and the financial and political resources underlying this, to shape how processes unfold—the very rules of the game and surrounding conditions—all in ways that advance their interests. These political and economic elites can also influence the interests and power of indigenous peoples in ways that further undermine these groups' position and potential gains. So, what can be done in light of such realities?

Change: Trying to move power and interests to improve FPIC recognition and improve prior consultation processes

In order for the fundamental rights of indigenous peoples to be more fully realized and prior consultation practices improved: 1) the interests of powerful actor(s) need to better align with the interests of indigenous peoples; and/or 2) there needs to be a change in the balance of power between the state, indigenous peoples, and companies; one that reduces current extreme asymmetries and puts the different sides onto more equal footing. (While the categories of incentives and power are dealt with separately below, there is significant feedback and overlap between the two). What follows is a sample of preliminary ideas of possible ways to encourage such realignments of power and interests in order to improve the prospects of FPIC implementation and improved prior consultation processes. The potential value and viability of each idea will vary by setting and actor who might take it up, and some are already in use.

Changing the current balance of power

Support increased collective action to build strength in numbers: intra-community coalition-building

Individuals and sub-groups within a group of people often have different priorities and perspectives. These differences can be legitimate or induced or exacerbated by outside forces. Where different indigenous communities have come together and are internally organized and unified around a common goal, they have generally fared better in influencing the process and outcomes of prior consultations, and/or secured more equitable terms upon which companies are permitted to operate in indigenous territories. Therefore, a renewed focus on channeling resources toward efforts to support indigenous communities in coordinating internally and bolstering internal governance could help amplify the influence of these actors. This would also hopefully be one way to counteract the advantages governments and companies seek when exercising their power through strategies to divide indigenous communities and thereby dilute their influence (discussed in section IV). This type of support would need to be carefully calibrated to avoid meddling with or entrenching intra-community power dynamics or fragmentation, which may be exacerbated by concentrating

resources in the hands of a few. It would likely also need to include a mediation function. Executing such a strategy would require a politically informed understanding of intra-community dynamics, buttressed by carefully considered transparency measures.

Support mechanisms for political representation to translate collective action into political impact

Even when unified, the presence of strong and unified political representation can be decisive in determining influence and the extent to which indigenous participation will be effective in shaping prior consultation processes and advancing the outcomes indigenous peoples seek. Therefore, in order to help realize the benefits of coordination across indigenous groups discussed above, supporters could also support access to strong representation of, and coordination among, indigenous organizations. As noted in section IV, with the exception of some high profile cases, project-level consultations are generally less visible than consultations at the national level. Supporting the creation of national-level dialogue spaces that focus on extractives, where national-level indigenous organizations can directly engage with the executive on extractives-related matters, and which connect to and support project-level processes, may help to increase visibility that can translate into political impact. Political organization by indigenous peoples is not new, and national-level dialogue spaces are not unprecedented. Indigenous organizations at local, national, and regional levels exist, and the Mesa Permanente de Concertación con los Pueblos Indígenas in Colombia, is an example of where major national indigenous organizations have secured a space for high-level representation to directly engage with the central government on national laws. The emphasis here is on supporting unified political representation. Again, such an undertaking would raise its own political challenges. The desirability of such an approach would necessarily be context-specific, and depend on, among other things, power dynamics within and across indigenous organizations, and the level of unity or fragmentation in the agendas of indigenous organizations.

Support the building of networks with allies to broaden reach and efficacy of the indigenous peoples' mobilization: inter-stakeholder coalition building

Another way to bolster the power of indigenous peoples and their influence over prior consultation processes is by supporting their networking with external allies, including civil society organizations and legal and technical advisors at different levels. This includes strengthening links between national and regional organizations and local-level civil society organizations, as well as the communities they support. This would help overcome some of the informational and technical asymmetries that are exploited by more powerful actors to skew outcomes in their own favor, including efforts to withhold information on project impacts or to control the way information is presented on a project. In countries where a large number of consultation processes are ongoing at any one time, donors may consider facilitating broader networks that connect indigenous communities and organizations with legal empowerment organizations and other technical advisors, in support of project-level prior consultations.

Focus on increased visibility and control over narratives

One of the ways governments and companies shape conversations around FPIC and prior consultation processes is by controlling the narrative around specific consultations in ways that diminish public solidarity with and support for the rights of indigenous communities. One way to help counter this and to build wider support for the indigenous cause is through focus on supporting the creation of alliances with sympathetic media allies, and through the involvement of international allies in shaping and publicizing narratives around project-level consultations. At a macro level, this could include supporting the development of independent media in countries where the major media houses are captured by state interests, or engaging in more micro-level targeted efforts to train and update sympathetic media outlets or individual reporters on how to report on indigenous issues and prior consultation processes.[244] Increasing the visibility of individual processes may raise the financial and reputational stakes for companies and governments (i.e. change their incentive calculations while hopefully increasing the power indigenous groups through more widespread support).

Once allies have been lined up to help craft and disseminate indigenous perspectives more effectively, one of their targets for these reframing efforts could be changing the anti-development narrative that surrounds FPIC and prior consultations more broadly and in ways that increase solidarity with and support for the cause of indigenous peoples. As discussed above, our research shows that messaging around the exercise of indigenous rights in the context of extractives projects is unhelpfully reductive, and often brands communities who oppose projects as "anti-development." This narrative equates extractives with improved development outcomes, and characterizes the exercise of indigenous peoples' autonomy as denying the broader citizenry opportunities for development.

Support the building of indigenous power through strategic support to other actors who might have influence over prior consultation processes

Government entities with interests that broadly align with the interests of indigenous peoples are often sidelined in many consultation processes due to a combination of a lack of

resources, and/or a lack of formal or informal influence over consultation processes. Supporting these entities to increase their involvement in shaping consultation processes (and representation of indigenous peoples within these entities) is an important first step. This could include providing resources to support the increased involvement of independent observers, public advocates, and relevant ministries that are sympathetic to a rights based approach to consultations and consent. However, increasing the resources available to these entities will not necessarily translate into their increased influence. This is where PEAs could be commissioned to identify reformers within and outside of government (including in traditionally pro-extractives ministries) who may be able to use their positions to increase the influence of these entities, as well as their own influence in their realms of activity that impact on prior consultation processes and indigenous rights. Inspiration could be taken from the World Bank's International Corruption Hunters Alliance, a global platform that supports anti-corruption reformers within governments and "offers members representing more than 100 countries an opportunity to jointly analyze national and global developments and to exchange information critical to the success of their work."[245]

Support indigenous peoples in their efforts to set the rules of the game

This would mean supporting indigenous peoples to lead on different aspects of setting the rules and procedures for prior consultation and consent processes. Law-making is a political process, and many prior consultation laws and regulations from the Latin American region have ultimately reflected and furthered the interests of already-powerful actors. In this context, the development of autonomous protocols that reflect indigenous preferences as well as their customary rules and practices for consultation and consent processes (as discussed in section IV) show promise as a means for indigenous peoples to redefine the "rules of the game" to better align with their interests. Our research suggests that companies respond to regulation. Without it, the role of social performance experts within companies in justifying the implementation of iterative consultation and, importantly, consent processes, may be further complicated. Thus, in contexts where companies play a role in consultation and consent processes, one way to try to socialize compliance with autonomous protocols might be through advocating for this to be a requirement included in IFI and broader financing standards, to increase incentives for corporate compliance. Another way to advance this agenda might be to couple support for the creation of those protocols with support for politically informed advocacy to push for legal recognition of community protocols, making adherence to them a legal requirement. This is not unprecedented. There are examples of judicial recognition of protocols in Brazil;[246] and, in Argentina, the National Ombudsman recognized the protocol of the communities of Salinas Grandes and Laguna de Guayatayoc in Northern Argentina.[247]

Changing incentives

Even when power asymmetries are impervious to rebalancing, there may be opportunities to try to shift the interests and incentives that animate actors' choices and behavior, at least to disincentivize particularly poor prior consultation practices.

Increasing disincentives through litigation

Litigation, coupled with other advocacy and direct action strategies, has increased the financial and reputational costs of non-compliance with FPIC and consultation rights for governments and for companies.[248] The appropriateness of a domestic litigation strategy depends on the particular country context. In countries where the judiciary operates relatively independently and free of political influence, litigation strategies have served to advance the development of legal norms. In other countries, where the executive undermines the judiciary, and/or there is rampant corruption, domestic litigation strategies may be less appropriate. In these cases, turning to regional and international human rights mechanisms, creating alliances with litigators or NGOs in the home state of a particular company, or turning to international grievance mechanisms may be more strategic. Decisions of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights (IACtHR), for example, have had a profound impact on shaping and further elaborating the definition of FPIC. However, in a study on the impacts of indigenous land rights-related strategic litigation, experts found that even where judgments found in favor of indigenous communities, "implementation of judgements in favor of indigenous communities was uniformly poor."[249] This general sentiment was confirmed by an indigenous representative involved in an emblematic IACtHR case, where the judgment remains unimplemented.[250] The failure to implement domestic or international judgments may be explained by the fact that the responsibility to implement lies with those that have little interest or incentive to do so. Further strategies that focus on litigation as a means to improve practice in specific prior consultation processes (as distinct to the strategic purpose of developing norms—which remains of profound importance in its own right) may consider coupling litigation efforts with well-funded and politically informed implementation strategies; PEAs could support the identification of allies for implementation.

Increasing disincentives through direct action

This approach mobilizes people and attention—e.g., by using direct action, strategic framing, virtual mobilization over social media, and other techniques—against prior consultation processes and practices that undermine the interests of

indigenous peoples. This kind of pressure on governments and companies from below is intended to change incentives of those currently holding power, i.e. create disincentives for side-lining the interests of indigenous peoples. As noted in the preceding section on power, increasing the profile of indigenous issues, framing them in such a way to broaden sympathies, and helping catalyze strategic coalitions can enable more extensive political mobilization and impact by changing the (dis)incentive calculations of companies and government agencies who would oppose them. Direct action has its risks, and has resulted in violent and deadly confrontations.[251]

Engaging directly with companies that respect human rights to call for a change to internal incentive schemes that better account for social performance

This could be critical to better aligning internal incentives with the goal of improved social engagement and could have the knock-on effect of improving the quality of prior consultation processes in which companies play a prominent role. To implement such an approach, more research would need to be done to understand who the key actors are within companies who determine internal incentive schemes, the incentives they are most likely to respond to (e.g., shareholder pressure?), and how these would be secured (e.g., through shareholder advocacy?). While this approach may still fall short of facilitating the expression of indigenous autonomy (i.e. FPIC) when the determinations of indigenous communities are at odds with a company's goals in developing a project, better alignment of internal incentives could go some way in improving how companies engage with indigenous communities from the outset, and through the life-cycle of the project.

Navigate: Pragmatic opportunism in pursuit of progress wherever possible

In particularly hostile political settings, which represent the most challenging circumstances—i.e. where the interests and power of the state and companies are too ingrained, and the odds of success in the pursuit of the strategies outlined in the "Change" section above are low—one might consider strategies to navigate these realities. This means thinking about how to identify and maximize plausible "wins" within these highly constrained scenarios which are seen as fairly fixed in the near term. The approaches that follow are illustrative and not necessarily recommended.

Opting out when opting in might do more harm than good

When the pro-investment parts of governments and extractives companies have so much influence over the implementation of prior consultation processes, fundamental reform of these processes in the short to medium term can seem insurmountable. Indeed, from this starting point, some indigenous groups have actually felt their best option would be to withdraw from prior consultation processes. Their rationale for doing so typically has been that they have more to lose by participating in sham consultations that legitimize extractives projects for governments and companies without providing indigenous peoples with any real opportunities to shape outcomes than they would by not participating at all. Believing there is no hope of improving the process by overcoming underlying power asymmetries that work against them, they walk away rather than being exploited for others' interests.

Preparing the groundwork for a longer term fight and acting opportunistically on openings

Accepting the status quo and "working with the grain" does not have to mean giving up on trying to support consultation processes that better reflect and advance the interests and priorities of indigenous peoples. Even when power and interest dynamics significantly stack the odds against improving recognition of FPIC or the performance of prior consultation processes for indigenous peoples in the short term, there are alternatives beyond inaction or fundamental compromise. However, these might entail lengthening timelines for improving outcomes and focusing on identifying small steps that can be taken opportunistically in the interim to incrementally build toward that greater goal down the line. This means keeping effective FPIC recognition and implementation as a long-term goal while turning more immediate attention to trying to identify small steps, whenever and however possible, that could build momentum in the right direction over time. These small steps

could target some of the structural factors that limit the power of indigenous and tribal communities more broadly. This may include working to disrupt underlying drivers of socio-economic inequality and discrimination. Another critical focus could be improving the recognition of the territorial rights of indigenous, quilombola, and traditional peoples and communities, which, as noted above with regard to Brazil, is effectively a prerequisite for consultation processes.

Seeking the lowest common denominator (meeting the powerful at their interests)

Another approach to navigating highly challenging political realities, derived from a view of current political realities as fixed and hostile to indigenous people's rights and goals, focuses on acquiescing to and capitalizing on the interests of powerful actors. Throughout the interviews and workshops carried out for this project, government and company representatives made it clear that as long as indigenous peoples pursue their right to consent (and therefore the right to withhold consent), powerful actors would seek to minimize the potential impact of prior consultation and consent processes on extractives activities. A representative from a prominent financial institution explained that their approach is to try to support prior consultation processes that "take consent off the table," in the hopes that by doing so they can align these processes better with the interests of governments and companies in seeing extractives projects proceed unthreatened and then use the opportunity to push for more benefits from these projects to be passed on to indigenous populations. The rationale is, if companies and governments do not have to fear projects being thwarted altogether, they might be willing to support more meaningful "consultations" on mitigating harm or improving benefit sharing. It is a tradeoff between the pursuit of larger goals that are likely to be actively thwarted and lesser (incremental) goals that are more likely to yield at least *some* wins, which might be appealing to some indigenous communities. It is important to note that this approach is necessarily local in nature and—if desirable to an indigenous community—could be considered where communities do not oppose a particular extractives project on principle.

To the extent that communities feel they have an interest in strategically using consultations as a way to address historical grievances with the state and/or to induce the provision of adequate compensation and benefits, donors may consider supporting them to negotiate equitable agreements, with a focus on implementation. The last point matters greatly because, oftentimes, agreements reached in the context of consultation processes are not honored by the state (or companies if relevant), and do not result in the resolution of historical grievances or the alleviation of structural inequities.[252] Therefore, in addition to supporting the negotiation of better agreements, and advocating for the inclusion of critical enforcement mechanisms linked to the licensing process (e.g., stipulating at the licensing stage, that a material breach of the terms of a prior consultation or benefit sharing agreement amounts to a breach of the license terms),[253] resources could be dedicated to a sustained focus on monitoring the implementation of these agreements. This could involve advocating for oversight by an impartial third party and/or drawing in more sympathetic parts of the government, including for example, the Ombudsman's Office in Colombia and VMIA in Peru. Such entities would likely require increased funding to carry out these activities. Donors could also consider supporting community-based data collection and monitoring efforts to the extent that communities have an interest in this.[254]

It is clear that efforts focused on benefit sharing alone will not support the central purpose of FPIC and may indeed undermine the exercise of the right at a later point in a project. They could, however, be paired with strategies to augment the power of indigenous communities explored in the "Change" section above, or, if pursued in the context of politically hostile settings, they could be pursued as interim measures in support of longer-term goals. Indeed, scholars have cautioned against a focus on benefit sharing at the expense of sustained support for social movements and vice versa, because focusing on one without the other risks leaving indigenous groups with representation but "resource starved," thus lacking any real power to influence; or, if resources are attained through projects delivered by companies or other development pathways, but indigenous peoples remain without sufficient representation, this will serve to "reinforce the symbolic order."[255] More generally, small-scale piecemeal projects are unlikely to respond to needs for well-coordinated and sustainable local development.

Circumvent: Advancing FPIC and prior consultation outcomes and objectives through other means?

Perhaps the most significant departures from existing work in support of prior consultations and FPIC would come from thinking about alternative pathways to approximate the desired ends that indigenous peoples and their allies seek to achieve through consultation processes. Simply put, it means thinking about whether there are other ways—beyond the current models—of achieving the outcomes of: 1) facilitating the decision-making authority of indigenous peoples when their lands or livelihoods are implicated; and 2) if projects do proceed, minimizing such projects' harm and ensuring that indigenous communities adequately benefit from them.

Other roads to consent: improving private sector standards

Of the goals that indigenous peoples typically seek through consultation and consent processes, the opportunity to give or withhold consent is at once the most important to many and also the hardest to imagine advancing successfully through other means. Because formal authority over the disposition of subsoil minerals and the implementation of international commitments typically lies with sovereign states, the role of the national government in determining whether and how indigenous peoples will be recognized and whether and how they will have a voice in extractives-related decisions is not easily replicable through other pathways. Unlike development outcomes, e.g., creating jobs or providing healthcare, political recognition and authority cannot legitimately be conferred by the private sector or other actors outside the formal state. However, even when powerful actors within government oppose the right to give and withhold consent, companies have agency to decide whether or not to proceed with a project in the absence of consent. As noted in section IV, if unable to secure the social license for a project, some companies have been wary to proceed due to the financial and reputational risks. The agency of companies to decide is reflected in ICMM's Indigenous Peoples and Mining Position Statement.[256] However, in accordance with this report's analysis, it is insufficient to rely on the good will of powerful actors involved in consultation and consent processes to align with the right to give and withhold consent in the absence of incentives to do so. A more robust ICMM Indigenous Peoples Mining Statement that sets the bar higher, bringing industry standards into alignment with the requirement to respect the decisions made by indigenous peoples in cases where consent is not forthcoming, in recognition of their right to FPIC, may provide a compelling incentive for companies to respect indigenous peoples' right to give and withhold consent. Such a position statement could potentially be transformative.

Other tools that may be considered as options to improve FPIC implementation and prior consultation processes include independently verified certification standards that create incentives for companies to ensure that government-led prior consultations align with international requirements, or, if companies lead the process, for their own processes to align with international standards. In order for standards like the Initiative for Responsible Mining Alliance (IRMA) to incentivize better practice, there would presumably need to be relatively widespread uptake at least among the more progressive extractives companies, and some kind of cost (reputational or otherwise) attached to non-participation.

Finally, another strategy that has gained ground particularly with respect to human rights concerns and climate considerations is increased investor engagement. There are clear incentives for increased investor action: it is estimated, for example, that mobilization around the Dakota Access Pipeline cost the companies involved and their partners US$ 7.5 billion.[257] With these financial incentives for action there are potential opportunities to work with investors, using issue linkages that capitalize on and align with other investor interests and areas of recognized risk, to improve standards around respect for indigenous rights.

Other roads to doing no harm and improved benefit

For those indigenous peoples who, in exercise of their right to self-determination, are willing to consent to extractives projects, FPIC might not be the only pathway to trying to minimize the harm of extractives projects. Indigenous peoples, wielding the threat of opposition or disruption, or increased power (through strategies discussed in the "Change" section, above) might circumvent their governments and negotiate with extractives companies and/or their investors directly. These direct negotiations might focus on developing meaningful steps by companies and investors to anticipate and reduce harm to indigenous peoples and their lands, and to improve the direct benefits to these groups, while advancing companies' interests in securing social license. Again, there is precedent for this, e.g., building on the Devonshire Initiative's Beyond Zero Harm Framework,[258] currently being piloted in Ghana, Burkina Faso, and Guinea.[259] In essence, this approach would be pursuing some of the same ends from the "Navigate" section but instead of focusing on the state as a key player in terms of the delivery of specific outcomes desired by indigenous peoples, the focus would be on private sector actors. The same provisos outlined at the end of the "Navigate" section apply here—and with even greater emphasis—because of the ways in which powerful actors, and in particular companies, have in the past used the promise of benefits in advance of or during consultation processes to induce the acquiescence of indigenous peoples in ways that erode their rights to self-determination.

Pathway 1: Changing the landscape of power and interests

Changing power

- Support increased collective action to build strength in numbers: intra-community coalition-building.
- Support mechanisms for political representation to translate collective action into political impact.
- Support the building of networks with allies to broaden reach and efficacy of the indigenous peoples' mobilization: inter-community coalition building.
- Focus on increased visibility and control over narratives.
- Support the building of indigenous power through strategic support to other actors who might have influence over prior consultation processes (e.g. sympathetic government actors within relevant agencies)
- Support indigenous peoples in their efforts to set the rules of the game by developing autonomous protocols and advocating for official recognition of these.

Changing incentives

- Increase disincentives through litigation.
- Increase disincentives through direct action.
- Engage with companies that respect human rights to call for a change to internal incentive schemes that better account for social performance.

Pathway 2: Navigating Political Realities

- Opt out when opting in might do more harm than good.
- Prepare the groundwork for a longer term fight.
- Seek the lowest common denominator (meeting the powerful at their interests).

Pathway 3: Circumventing Political Impediments by Leveraging the Private Sector

- Other roads to consent: improving private sector standards.
- Other roads to doing no harm and improved benefit: directly negotiating with companies and their investors.

CONCLUSION

Indigenous and tribal peoples' right to free, prior and informed consent has transformative potential: potential to safeguard a variety of rights specific to indigenous and tribal peoples and potential to transform the power relations between peoples, governments, and extractives companies. Yet, this potential is far from being realized in the countries studied for this report. This gap between intention and reality is no coincidence.

The most powerful entities within governments, when it comes to the fate of these issues, are those with the mandates to attract and develop the extractives sectors. It is these entities that are calling the shots on whether and how the state recognizes FPIC. They, in turn, appear to be driven in part by what they perceive to be the interests and preferences of extractives investors (which in the extreme version can resemble a capture dynamic). Within extractives companies, the most influential actors seem to be those whose interests are not well-aligned with the spirit of FPIC, further stacking the odds against recognition and operationalization of FPIC. Fears of projects being delayed, costs increasing or deals collapsing generate disincentives, which are not adequately counterbalanced by incentives for compliance from legal requirements or perceived benefits. As a result, prior consultation processes are being implemented in place of recognizing FPIC and operationalizing FPIC processes. Even these prior consultation processes are carried out in ways that diminish the potential for meaningful indigenous participation in decision-making, clearly skewed toward advancing the interests of powerful actors in government and the private sector. To the extent to which there are some occasional benefits being realized by those being consulted, these consultations tend to typically reflect male perspectives and lead to gendered outcomes.[260] Thus, multiple layers of political realities converge to significantly limit the breadth and depth of efforts to advance FPIC and prior consultation processes.

There is growing recognition in the broader development fields focusing on governance that politics matters. This report, and the project in which it is situated, was conceived to shed light on the ways that political realities impact the governance of extractive industries in order to offer practical insights, strategies, and tangible guidance for practitioners focused on addressing implementation gaps, which can be explained in no small part by political realities. This project highlights the importance of politics in the context of FPIC specifically, but some lessons drawn from the research are equally applicable to the field of extractives governance more broadly.

Lessons for FPIC and prior consultation processes

Political economy analyses as a starting point

To embed work on FPIC implementation in the realities of local social, political, and economic contexts, a starting point would be to undertake some sort of assessment, in the case of our analysis, a political economy analysis of some sort. The purpose would be to develop a clearer roadmap for addressing major roadblocks and opportunities to improve both the recognition of the right to give and withhold consent, and the process and

Photo: "Landscape, La Mosquitia" from **If Not Us Then Who?**

outcomes of prior consultations. Because political context is fluid, assessments would need to be updated periodically, and strategies and windows of opportunity assessed in light of updates. Locally situated actors working to support improved FPIC implementation are embedded in the political contexts of their countries and regions, and may explicitly or implicitly carry out some version of a political economy analysis to inform their work. This may be done systematically, on an ad hoc basis, or intuitively. Local actors who do not already have systems for integrating such analyses into their work may benefit from developing internal processes to systematize the application of such analyses. Not every organization—local or global—will have the resources and capacity to generate in-depth political economy analyses on a periodic basis. In these situations, light-touch political economy analyses, a facility for providing such analyses, or informal mechanisms to share knowledge and analyses between a trusted group of like-minded organizations and individuals may be options to consider and develop further.

Acting on the findings of such an assessment

Once the major incentives, interests, and power dynamics driving outcomes in a specific situation or context are well understood—down to the interests and power of not only institutions but also key individuals—consideration would need to be given to the question of how to deal with these in order to maximize progress toward advancing meaningful recognition of FPIC and the implementation of prior consultation processes. Answers to this question would likely be multiple, varied, and multi-layered and usefully addressed by coalitions of coordinated actors. This report sets out a typology to organize strategies and approaches to address political realities, and invites practitioners to consider the questions:

- What would it take to change the interests of powerful actors currently impeding the realization of the right to FPIC, or to change the balance of power? Who is positioned to bring this about and what interest do they have in doing so?

- What should be done if, in a particular context, the incentives and power dynamics opposing reform seem immovable at a particular moment? How might practitioners navigate such inauspicious political realities and try to opportunistically get the most out of a bad situation? Could this include adjusting timelines and focusing on incremental wins in the short-term that could lay the groundwork for more transformative goals around improved recognition of indigenous rights in the longer-term, wins that may later create openings for and ultimately contribute "Change" strategies? Of course, in considering the implementation of these strategies, the political factors impacting each programmatic goal would need to be accounted for in the program's design.

- Are there alternative pathways to realizing the goals of FPIC? Is it possible to actively work around political roadblocks, i.e. try to achieve the same ends through alternative pathways relying on other powerful actors? In the case of extractives-related prior consultation processes, could this mean trying to mobilize the power of companies and investors and, particularly in the case of the mining sector, their interest in SLO to achieve recognition of the right to FPIC when key government actors seem unlikely to be swayed? What would it take to bring this about?

Specific moments or political circumstances might call for different approaches and/or sequencing of interventions and strategies. Responding to these dynamic situations may well benefit from funding and programming models that are flexible and adaptive in approach and timeline, even while maintaining more fixed commitments to the short, medium and particularly long-term goals being pursued. By building processes and internal capacity to regularly conduct and respond to political circumstances and shifts on the ground, global and local actors will be better positioned to systematize the identification of potential windows of opportunity as well as obstacles to their work; to develop politically informed strategies for various political scenarios; and to seize opportunities to make shifts in programming that respond to or counter changing political contexts.

Lessons for extractives governance more broadly

"Everyone knows politics matter"

"Everyone knows politics matter" but few systematically integrate political insights into program and project design and planning. Local actors in particular are acutely aware of the ways in which political realities shape the prospects of success in a given reform area and can be quite savvy and opportunistic in navigating those political realities. However, this is not always the case with global actors who have traditionally approached governance and development reforms from more normative and technocratic approaches and top-down notions of good practice, along the way creating incentives for local actors to follow suit. Both global and local actors could benefit from integrating a political lens more firmly alongside or within their normative and technocratic approaches early on and factor political considerations into assessments of what might be considered "good practice" or a feasible pathway to reform in a specific context. Context-specific theories of change that factor in politics will likely yield more impactful programs and projects than those that do not.

Global actors need to devote equal attention to form and function

One of the points highlighted by this research, but applicable far beyond this paper, is that good development practice and the promotion of good governance need to focus as much on planning for and supporting implementation as they do on identifying good practices and getting those formally adopted. This starts with asking: what would it take for a particular reform or intervention to have its intended effect and what are the factors that determine this? While there is some effort to tackle these issues when it comes to addressing technical capacity to implement, more attention needs to be paid to addressing political conditions that will be needed to ensure reforms are operationalized more or less as intended. Such considerations would ideally be anticipated and integrated into program and project design from the early stages of any intervention in order to strategize the best approach for achieving a desired goal in a particular context.

We need a better understanding of how change happens

So far, much work on good governance—of extractives and beyond—has focused on identifying laws, policies, and practices that ***should*** improve governance and development outcomes and on trying to get these adopted. But the significant implementation gaps that have emerged across a range of sectors and geographies suggest that expected changes are not following suit as hoped. Transparency is not automatically triggering accountability, technical assistance does not guarantee advice will be taken, putting a law on the books does not mean it will be put in practice and enforced. Therefore, more work needs to be done to understand what actually precipitates real change, e.g. when have governments or companies got the closest to implementing good FPIC practices and what precipitated that? Along the way, this would likely entail considering who would need to do what in order for a particular reform to truly take root and what would it take for them to not only be able to do this but want to do so.

As work on the governance of extractive industries and FPIC continues, there is an opportunity to learn from and build on the normative and technocratic strides that have been made to date and unlock more of their potential impact. Unpacking "political will" and more systematically operationalizing insights on political context will be crucial to that and within reach if we devote adequate attention to doing so.

ENDNOTES

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Photo: "Scarlet Macaw Protection Project, Mabita, La Mosquitia" from **If Not Us Then Who?**

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244 *The politics and practice of FPIC: Understanding power dynamics and imagining innovations for investment-related decision-making.* (April 25, 2019). One civil society representative respondent from Brazil explained that even where there are sympathetic media allies, they don't always understand the issues and struggle with identifying a compelling "hook."

245 As customary rules are not static, thought would have to be given as to how/whether a regulatory requirement or legal recognition of sorts would allow for protocols to remain iterative. See: World Bank, I*nternational Corruption Hunters Alliance* (ICHA), (October 25, 2018), https://www.worldbank.org/en/about/unit/integrity-vice-presidency/brief/International-Corruption-Hunters-Alliance.

246 Monteiro Joca, P., "Politics of FPIC, Brazil country analysis" (unpublished report, 2020); Associação Comunitária Indígena Guarani (ACIGUA) "Protocolo de Consulta Prévia Da Tekoa Itaxi Mirim Guarani Mbya" (2018); Instituto Kabu, Rede Xingu +, Giovanni Bello, and Bepmoiti Kayapó (2019) *Protocolo Kayapó-Menkragnoti*. Pará. https://www.youtube.com/watch?v=WcWoAJ7rjaY. Judicial decisions (e.g. TRF-1, Tribunal Regional Federal da 1a Região. 2017. "Ministério Público Federal versus Empresa Mineradora Belo Sun.") and administrative decisions have also recognized the enforceability of autonomous protocols, especially the Indigenous consultation and consent protocols. FUNAI has recently supported the elaboration of consultation protocols by the Indigenous peoples of Oiapoque, and Xingu, as well as the Juruna, Guarani Mbya, Waimiri Atroari, Kayapó-Menkragnoti, and Yanomami and Ye'kwana consultation protocols; Povo Juruna da Terra Indígena Paquiçamba, *Protocolo de Consulta Juruna*

(Yudjá) Da Terra Indígena Paquiçamba Da Volta Grande Do Rio Xingu. Brasil (2017); Povo Waimiri Atroari. *Ie'xime Arynatypy Nypykwatypy Waimiri Atroari Behe Taka Protocolo de Consulta Aos Povos Waimiri Atroari.* Roraima: Rede de Cooperação Amazônica (2018); Povos do Território Indígena do Xingu, Protocolo de Consulta Dos Povos Do Território Indígena Do Xingu. Brasil (2016); Povos Indígenas do Oiapoque, *Protocolo de Consulta Dos Povos Indígenas Do Oiapoque.* Oiapoque: CCPIO, RCA, Iepé (2019); Povos Yanomami e Ye'kwana. 2019. *Protocolo de Consulta Dos Povos Yanomami e Ye'kwana.* Terra Indígena Yanomami (2019). Coordenação Geral de Licenciamento Ambiental CGLIC "Funai No Licenciamento Ambiental." https://www2.camara.leg.br/atividade-legislativa/comissoes/grupos-de-trabalho/56a-legislatura/licenciamento-ambiental/documentos/audiencias-publicas/26-06-19-rodrigo-bulhoes (December 7, 2019). FUNAI has expressed the importance of considering the Indigenous consultation protocols in consultation processes.

247 Marchegiani, P., "Argentinian National Ombudsman Issues Resolution Recognizing Kachi Yupi Community Protocol," *Natural Justice,* (May 26, 2016), https://naturaljustice.org/argentinian-national-ombudsman-issues-resolution-recognizing-kachi-yupi-community-protocol/.

248 Davis, R., Franks, D., *Costs of Company-Community Conflict in the Extractive Sector.* (Harvard Kennedy School, 2014), https://www.csrm.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf; Fredericks, C. F., Meany, M., Pelosi, N., Finn, K. R., *Social Cost and Material Loss: The Dakota Access Pipeline.* (First peoples Worldwide, University of Colorado Boulder, 2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf; Adamson, R., "Investing in Indigenous Communities," *Green America,* https://www.greenamerica.org/green-living/investing-indigenous-communities.

249 Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights.* (2017), https://www.justiceinitiative.org/publications/strategic-litigation-impacts-indigenous-peoples-land-rights. This study focused on 3 countries: Paraguay, Malaysia, and Kenya. Despite this finding, there are many positives that flow from litigation even where judgments remain unimplemented. For e.g. the report found "The positive rulings put potent political tools into the hands of the indigenous communities that they probably could not have wielded had they not brought suit. For example, some indigenous communities were able to return to their historic lands in Paraguay following unlawful eviction, because the positive ruling emboldened them to simply move back. And the fact of a win in court prompted positive feelings of empowerment, rights awareness, and self-advocacy (non-material impacts). Sometimes, a win inspired other communities to file, generating more broad-based pressure on the courts to address systemic rights violations."

250 Indigenous representative intervention, *The politics and practice of FPIC: Understanding power dynamics and imagining innovations for investment-related decision-making* (Roundtable, New York, April 25, 2019).

251 "Peru: Five years on from Bagua violence and still no justice for victims." *Amnesty International.* June 5, 2014, https://www.amnesty.org/en/latest/news/2014/06/peru-five-years-bagua-violence-and-still-no-justice-victims/.

252 Merino, R., "Politics of FPIC, Peru country analysis" (unpublished report, 2019); Schilling-Vacaflor, A., *Contestations over Indigenous Participation in Bolivia's Extractive Industry: Ideology, Practices, and Legal Norms.* (German Institute of Global and Area Studies (GIGA), 2014), https://www.jstor.org/stable/resrep07527. "The consultation agreement includes provisions about appropriate behavior on the part of company staff, measures for preventing and repairing damage, the principle that indigenous socio environmental supervisors will oversee the companies' activities, and the objective that local labor forces shall be given preference for employment. Despite the fact that such agreements should be binding, their implementation has been deficient. This is because the corporations and their subcontracted partners often disregard such agreements, the Environment Ministry monitors gas activities only sporadically, and the indigenous supervisors are paid by the extraction companies themselves—which leads to their co-optation and their fear that they will lose their job if they are too critical."

253 Columbia Center on Sustainable Investment. *Mechanisms for Consultation on and Free, Prior and Informed Consent in the Negotiation of Investment Contracts,* (2017), 18, http://ccsi.columbia.edu/files/2017/05/Szoke-Burke-and-Cordes-FPIC-and-ISCs.pdf .

254 Columbia Center on Sustainable Investment, NAMATI, *Community-Investor Negotiation Guide 2: Negotiating Contracts with Investors.* (2018), 57–60, http://ccsi.columbia.edu/files/2018/09/51-namati_ccsi-guide-2-full-online-lr-compressed.pdf p. 57-60.

255 Hale, C. R., "Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala," *Journal of Latin American Studies 34*(3), (2002): 485–524.

256 ICMM International Council on Mining and Metals, *Indigenous Peoples and Mining Position Statement*, Commitment 6. https://www.icmm.com/position-statements/indigenous-peoples.

257 First Peoples World Wide, University of Colorado Boulder, *Social Cost and Material Loss: The Dakota Access Pipeline.* (2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf.; *Relationships 101: Oil And Gas Looks For A Social License To Operate* http://insideenergy.org/2014/12/05/relationships-101-oil-and-gas-look-for-

a-social-license-to-operate/.

258 The BZH Author's Working Group, *Beyond Zero Harm Framework: A Participatory Process for Measuring Community Well-Being:* (Devonshire Initiative, 2016), https://cfccdb0b-d93c-4fbf-bafe-f028554593ff.filesusr.com/ugd/420f7e_ad2b0c15a0cb4267aae5c54ca75b26ce.pdf.

259 World University Services of Canada's (WUSC), West Africa Governance and Economic Sustainability in Extractive Areas (WAGES), and African Center for Economic Transformation, "Beyond Zero Harm Research Project & Participatory Local Development in Extractive Areas Study in Ghana, Burkina Faso and Guinea," *AidStream*, Febuary 1, 2018, https://aidstream.org/who-is-using/US-EIN-11-3803281/22301.

260 ONAMIAP and OXFAM, *¡Sin mujeres indígenas, no!.* (OXFAM, 2019), https://peru.oxfam.org/latest/policy-paper/%C2%A1sin-mujeres-ind%C3%ADgenas-no. While internal community dynamics are not the focus of this research, there are clear differences in the experiences, interests, and power of women to participate in consultation processes that warrants further examination.

261 When considering how to operationalize politically informed approaches to FPIC, we have tried to be mindful of how ideas adopted in the context of international development are and are not appropriate for the human rights field. In the field of development, a politically informed approach may require adaptive approaches that adjust an intervention to the given political context, or may even require the recalibration of the *goal* of an intervention in light of political realities. Unlike development policies that practitioners may discard in favor of more politically feasible methods, FPIC is a safeguard for the fundamental rights of indigenous peoples, and thus any politically informed interventions to support the right must be designed in ways that do not retreat from the purpose of FPIC. Yet, there is still much to learn from the political economy literature arising out of the development field. It provides an additional lens through which to evaluate existing strategies and develop new strategies designed to support meaningful implementation of FPIC that are responsive to and situated in the relevant political context.

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