

Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia's and Peru's extractive industries

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ABSTRACT

Indigenous peoples' right to prior consultation and to informed consent represents the basis of the new global model shaping state–indigenous relations. Consultation processes promise to enable indigenous people to determine their own development and are especially promoted when extraction projects with significant socio-environmental impacts are planned on indigenous lands. In this article we draw on debates on participatory development in order to analyse the first state-led consultations in Bolivia's and Peru's hydrocarbon sectors (2007–14). The analysis shows that effective participation has been limited by (1) an absence of indigenous ownership of the processes; (2) indigenous groups' difficulties defending or even articulating their own visions and demands; and (3) limited or very general outcomes. The study identifies real-life challenges, such as power asymmetries, a 'communication hurdle' and appropriate timing – as well as simplistic assumptions underlying the consultation approach – that account for the unfulfilled promises of this new model.

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Introduction

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 supported the principle that states around the world should seek the free, prior and informed consent (FPIC) of indigenous groups regarding any measure affecting them. Different interpretations of the right to prior consultation and to FPIC have since been incorporated into domestic legislations, especially in postcolonial countries in the global South.¹ Rodríguez-Garavito argued that 'FPIC's rise and impact in regulations and disputes about indigenous rights have been so profound that instead of merely constituting a legal figure, it entails a new approach to ethnic rights and multiculturalism, with its own language and rules'.² Hence it is important to scrutinise how the new global 'consultation approach' *vis-à-vis* indigenous people, which has replaced the former 'integrationist approach',³ functions in practice. The right to FPIC constitutes a stronger right to participation than the right to prior consultation, as it implies the right to give or withhold consent, not just to be consulted.

However, there is no easy way to distinguish between consultation and consent regimes, and many such domestic regulations are hybrid and contradictory.⁴ In practice, most states do not comply with these rights or implement only (often deficient) consultations.

Both former UN special rapporteurs on the rights of indigenous peoples, Rodolfo Stavenhagen and James Anaya, repeatedly emphasised that the right to prior consultation and to FPIC is of special importance in large-scale projects such as gas and oil extraction, mining or hydroelectric activities. They argued that, because of the close connections indigenous peoples have with the territories they inhabit, resource extraction that changes living environments and local ways of life tends to severely affect these groups.⁵ In this difficult context state-led consultation and consent processes should contribute to protecting all types of rights of the local populations that might be at stake. The consultation approach promises to give groups that are generally under-represented in states' political systems an influential voice in determining their own development path. A direct link between the state and local communities can thus be established in 'brown areas' – places characterised by 'low-intensity citizenship' and the 'unrule of law'.⁶ Hence, previous unilateral development models could, potentially, be overcome and a model of 'negotiated justice' established.⁷ However, the risks that flawed processes in this ambit entail are alarming. The imposition of predefined development models may have grievous consequences for indigenous self-determination, rights to land and territory, cultural integrity and even the physical survival of the affected groups.

To explore state-led consultations in resource governance in practice, we refer to the ample literature on participation in development, which provides highly useful theoretical considerations, analytical tools and concrete insights from a great variety of empirical cases. With reference to this literature, we argue that prior consultation can only protect indigenous peoples' rights when it enables effective participation.

The article presents systematic insights into prior consultation practices in Bolivia and Peru. We have selected these countries because they have recently played a leading role in the implementation of the right to prior consultation in Latin America, the region that recognises indigenous rights to the greatest extent worldwide.⁸ As the consultation approach is increasingly used in global resource governance, the cases here can also serve as examples for countries in other regions.⁹

The article draws on rich data about 40 prior consultations in Bolivia's gas sector and about the first five, recently concluded, consultations on oil blocks in the Peruvian Amazon. The data collection for this article was undertaken by the first author in Peru (15 months in total) and by the second author in Bolivia (12 months in total) during different field research stays between November 2011 and February 2015. Among these data are over 150 interviews: with staff from different state ministries and from several public and private companies; with indigenous organisations at the national, regional and local levels; with staff from several NGOs; and with over 70 members of local communities in Bolivia and Peru, among them women, elderly persons and persons with diverse socioeconomic backgrounds. Each author also conducted participatory observation in at least two prior consultation processes. The collected data also contain primary documents such as minutes, acts, official statements and correspondence from the actors involved in the consultations.¹⁰ All data were analysed with the support of the software ATLAS.ti for hermeneutic text analyses in order to assess whether the consultation processes provided opportunities for effective indigenous participation.

After a short outline of the theoretical framework, we provide an overview of prior consultation in Bolivia's and Peru's hydrocarbon sectors. We then discuss, first, the extent of the consulted indigenous groups' ownership of consultation practices; second, the groups' opportunities to substantially participate in these arenas; and, third, their influence on the actual outcomes of these processes. In the conclusion we reflect on the unfulfilled promises of state-led consultations in giving indigenous peoples a voice in the extractive industries sector.

Theoretical reflections

This article draws on the literature on participatory development in order to critically analyse the implementation of the right to prior consultation in Bolivia's and Peru's resource governance. The aim of our analysis is twofold: on the one hand, we wish to better understand prior consultation's potential and limitations in contributing to emancipatory transformation; on the other, we aim to enrich the existing literature on participatory development, which has not yet covered prior consultation processes.

Conceptually we understand participation as a 'voluntary process by which people, including the disadvantaged [...] influence or control the decisions that affect them'.¹¹ Our study is in line with Cornwall's, Gaventa's, Hickey and Mohan's, and Williams' normative understanding that effective participation should be a tool for empowering disadvantaged groups and thereby contribute to emancipatory transformation.¹² Therefore, when analysing participation in development, we distance ourselves from the narrow focus, which pervades mainstream development thinking and research, on participation as a technical method of project work.¹³ Instead, we share with the above-mentioned authors a rather political sense of agency; that is, we focus not only on the local level but also on wider institutional and structural contexts, and on power relations that enable or limit emancipatory participation (potentially including alternative development paths), as well as rights-based development approaches. We also share these authors' perspectives that participation should represent both a means to influence decision-making and an end in itself; that the local and the community should not be treated as self-evident and unproblematic social categories, but rather as complex social worlds; and that long-term political projects are far more promising than single sporadic events.¹⁴

The right to prior consultation and FPIC are of particular importance for indigenous peoples' participation in development. It was established in international human rights instruments, especially Convention 169 of the International Labour Organization on the rights of indigenous and tribal peoples from 1989 and the UNDRIP, and lies at the core of indigenous peoples' rights. When using the term 'prior consultation' we refer to these international standards and diverge from typologies of citizen participation that characterise 'consultation' as a tokenistic participatory exercise.¹⁵ Following international human rights, the right to prior consultation and to FPIC is not only an end (meaningful participation) but also a means for protecting all types of indigenous rights that might be at stake when measures that affect indigenous communities are implemented. In a nutshell prior consultation and FPIC should fulfil the following minimum conditions: (1) be carried out in good faith; (2) take place before adopting the planned measure; (3) provide complete and non-biased information; (4) involve the representative institutions and authorities of the affected indigenous communities; (5) be carried out in a social, linguistic and culturally adequate way; (6) aim to achieve the consent

of the consulted communities; and (7) recognise established agreements as binding.¹⁶ Such a rights-based interpretation of prior consultation and FPIC is compatible with the understandings of the above-mentioned scholars of participation in development, who assume that participation should contribute to the empowerment of disadvantaged groups and to emancipatory transformation. It implies that states must recognise plural models of development within their borders and not impose one vision over another.¹⁷ In this regard we agree with scholars of rights-based development, like Gready, who argue that imagining human rights from below re-centres the state in development policies by making it accountable and by opening up the concept of development to political reflection.¹⁸

We argue that prior consultation can only fulfil its objective to protect indigenous peoples' rights if the indigenous people consulted are able to effectively participate in the consultations. Put more concretely, our understanding of 'effective participation' draws on three criteria that have been defined based on insights from the literature on participatory development and human rights standards in prior consultation and FPIC. These three criteria are that the consulted groups must have (1) considerable ownership of consultation practices; (2) the possibility to substantially participate in these arenas; and (3) the opportunity to shape the design and the execution of planned activities. Regarding the first component, ownership, we refer to the possibility for participants to design the process – for example, the topics discussed, the way they are discussed, where and when they are discussed, and by whom they are discussed. We consider these issues important because, in line with Hickey and Mohan, 'participation as freedom is not only the right to participate effectively in a given space, but the right to define and shape that space.'¹⁹ Further, to comply with the standard contained in international human rights instruments that prior consultation should be carried out in accordance with the uses and customs of local groups and with their representative institutions, the ownership of these groups is indispensable. Second, when analysing substantial participation in consultation arenas, we follow Gaventa's insights on the importance of power relations as 'critical to understanding the extent to which new spaces for participatory governance can be used for transformative engagement, or whether they are more likely to be instruments for reinforcing domination and control'.²⁰ In addition, according to human rights principles, consultation and consent processes with indigenous people should be based on intercultural dialogue. Our third criterion for effective participation is the influence indigenous peoples have on the outcomes of consultations – that is, the design and execution of planned activities. Analysing the outcomes of consultations provides a crucial indicator of whether the indigenous people consulted have been able to influence the decisions that affect them or whether they have simply gone through an empty ritual.²¹ This criterion, again, is in line with the stipulation of international human rights standards that prior consultation and consent processes should seek to establish agreements or obtain the FPIC of the consulted groups.

State-led consultations on hydrocarbon activities in Bolivia and Peru

In many states of the global South resource extraction is the major source of national economic growth. In Latin America the dependence on non-renewable resource extraction has further increased since the beginning of the twenty-first century, especially in the Andean countries.²² Within the context of persisting extractivist development paths several Latin American states – especially Bolivia, Ecuador and Venezuela – have adopted post-neoliberal

models of resource governance, with an enhanced role played by the state in the economy and the increased use of revenues to finance social policies. This trend has been labelled 'neo-extractivism'.²³ Bolivia and Peru are also both implementing new policies of citizen and indigenous participation and have a significant share of indigenous people.²⁴ Importantly, Bolivia has defined itself as a plurinational state and has strong indigenous movements. However, it subordinates indigenous rights and alternative development visions to its main focus on extraction-based economic development.²⁵ In Peru indigenous peoples' original hopes that President Ollanta Humala would change previous aggressive development politics affecting their territories have been widely dashed.²⁶ In both countries' dominant public discourses extraction projects are presented as being in the 'national interest' and it has been very challenging for critics to question them.²⁷

In Bolivia state-led prior consultations have been carried out in the hydrocarbon sector since 2007, while in Peru the first processes began after the promulgation of the Law on Prior Consultation (Ley 29785, 2011) and its regulating decree (Supreme Decree 001-2012-MC, 2012). Before then only information events or company-led consultation processes, where participation was usually reduced to a mere formality, took place in both countries.²⁸

To what extent have the more recent state-led processes diverged from the previous tokenism and provided opportunities for effective participation? In both countries the recognition of the right to prior consultation in domestic legislation was the consequence of the repeated mobilisation of indigenous organisations. In Bolivia, after several marches and protests by indigenous lowland organisations, this right was inscribed into the Hydrocarbon Law (Ley 3058, 2005), its regulating decree 29033 on prior consultation in the hydrocarbon sector (2007), and the new 'plurinational' constitution of 2009. Between the time Supreme Decree 29033 was released and December 2013, 40 consultation processes were concluded; the great majority of them (30 cases) were carried out with Guaraní communities.²⁹ Only those projects classified by the Ministry of Hydrocarbons and Energy (MHE) as 'category 1' activities – meaning that they have considerable socio-environmental impacts and affect indigenous or peasant communities – were passed to consultation. However, these classifications have in many cases been questioned, and several hydrocarbon projects in indigenous territories have been granted an environmental license without consultation.³⁰ In other sectors no prior consultation has been organised in Bolivia to date. This is likely to change in the near future, as the government plans to pass a law on prior consultation soon. We can expect that the forthcoming processes will resemble those already concluded in the gas sector, which we discuss in more detail below.

In Peru the conflicts between Alan García's government and local populations defending their right to meaningful participation escalated in June 2009 in the province of Bagua; more than 30 people were killed and hundreds were wounded. A law on prior consultation was subsequently developed and promulgated by President Ollanta Humala in September 2011. By the end of 2014 five prior consultations on extraction projects have been concluded. All five processes concerned newly designated hydrocarbon blocks, four in the central Amazonian region of Ucayali (blocks 169, 195, 189, and 175) and one in the northern Amazonian region of Loreto (block 164). Shortly after the adoption of the new consultation legislation, it was announced that the first consultation would take place in Loreto's oldest oil block (1AB/192), which is the most productive block in Peru.³¹ This process has remained paralysed, however, since local indigenous federations, supported by NGOs, have called for the remediation of the severe contamination caused by over

40 years of exploitation activities before agreeing to participate in the consultation. As a result of the complications that have emerged in this process, the consulting state oil agency Perupetro has changed its focus to areas without direct experience of oil extraction in the hope of encountering less resistance.³² In general the Peruvian state was not properly prepared to implement prior consultation, as state entities lacked demographic and socio-cultural information about the vast rainforest areas of the Amazon where state structures have been almost absent. Therefore, before consultation processes began, the responsible state entity had to identify the local populations living in the project areas and their representative organisations and it had to train translators to communicate with these people in their native languages.

Indigenous ownership of consultation processes

In Bolivia and Peru consultations were initially the 'claimed spaces' of indigenous peoples, but the empirical evidence on consultation practices indicates that they have since become 'invited spaces'. Cornwall defines invited spaces as 'those into which people [...] are invited to participate by various kinds of authorities, be they government, supranational agencies or non-governmental organisations'.³³ However, the term 'invited space' implies more than indigenous representatives being invited by the state; it also means that the participants are invited into a space that has not been shaped by them. Participants in consultation processes in Bolivia and Peru alike have frequently expressed the critique that these participatory procedures have largely been imposed by the respective state.

In Bolivia, before the consultation officially begins, consulted groups can present a proposed consultation plan to the state entity responsible for carrying out prior consultation, the MHE. In practice this ministry has often limited the proposed plan considerably, mostly because of time or budget constraints. For example, in a consultation with Guaraní communities from Takovo Mora in November 2013, some participants stated: the way it is we cannot even call this a prior consultation [...]. In this process there is little participation, 10 participants per community is not enough. We do not have enough time for deliberation and we could not contract all advisors that we proposed.³⁴

With regard to these participants' criticism that they were not able to contract (i.e. engage) all the advisors they proposed, it is worth clarifying that this was not just because of budget limitations. The indigenous communities wanted to employ elderly community members as their official advisors, but the MHE determined that only people with bachelor's degrees could serve this function.³⁵ Despite such limitations regarding the consultations' duration, inclusiveness and concrete proceedings, it would be wrong to conclude that prior consultations in Bolivia have been entirely imposed by the state. In several cases consulted groups have blocked consultations until the latter have been made acceptable to them. The claim makers have in some cases achieved changes in the information distributed or the organisation of additional meetings.³⁶ Nevertheless, the state has definitely had a more decisive say in how consultations are carried out, and the state ministries have only selectively taken indigenous claims into account.³⁷

In Peru the state oil agency, Perupetro, conducts consultations. For the first five consultations it organised preparatory meetings to jointly develop a consultation plan with local communities and organisations. This step is not obligatory according to the consultation legislation, which means that it depends on the responsible state entity's willingness to carry

out such a preparatory phase. The real decision-making power of the indigenous participants in this planning phase, however, was rather limited.³⁸ For example, participants stated that in the preparatory meeting for the consultation on block 195 they had mostly just agreed to the state's proposal because they believed that even the procedure's details were already determined by the legislation.³⁹ However, later in the consultation process the participants demanded changes to the established dates and places of consultation meetings as well as to the number of participants. Because of budget and time constraints these demands were only partly accepted by Perupetro. The requested changes were mostly the result of the participants' growing knowledge about the procedure itself, and also because of the engagement of regional organisations' representatives and technical advisors in the consultation.⁴⁰ The schedules the indigenous participants had initially agreed upon for all five processes were far less than the 120-day maximum.⁴¹ After the first consultation in Ucayali concluded, the regional indigenous organisation stated in an official letter that agreeing to such short time limits was a mistake, because 'in contexts like the Amazonia those [120 days] are the minimal standards to be accepted due to the geographical (climate, distances), cultural (understanding of technicalities in another language) and social (low level of education and economic resources for travel) conditions'.⁴²

The question of who participates in consultations and thus represents the affected communities is crucial for local populations' ownership of these processes and the perception of consultations as (il)legitimate. In both countries questions regarding the representativeness and inclusiveness of the participation processes have been prevalent, although they have been more challenging in the Peruvian Amazon. There, organisational structures are weak and national and regional organisations are often not recognised as representative; they may even be unknown to many communities.⁴³ For example, during the consultation about block 169, community members questioned the presence of regional representatives and accused them of just wanting to get some benefits out of the process.⁴⁴ In the consultation about block 195, only a few of the local Kakataibo communities were invited. This practice was perceived as divisive, and many participants remarked that the Kakataibo should have been consulted as a people.⁴⁵ Similarly in some consultations in Bolivia there was debate about whether it should be representatives from the local, zonal or national level who would participate in consultations.⁴⁶ In other consultations internal divisions within indigenous organisations or communities inhibited the effective participation of some local groups.⁴⁷ Such local disputes have been related not only to struggles over political power, but also to the question of who – as a group's legitimate representative – is entitled to receive compensation payments, social investment programmes and employment opportunities.

In summary, consultations in both countries have largely been invited spaces, restricted by the time and budget constraints inherent to project-specific, short-term thinking about development. In addition, particularly in the Peruvian Amazon, the weakness of indigenous organisations and their limited knowledge of the 'rules of the game' have prevented them from taking ownership of consultation processes. This problem reveals one of the inherent challenges of the consultation approach: while it should protect the rights of the most vulnerable and marginalised groups, currently only those groups that are able to meet important preconditions for participatory governance can engage effectively in state-led consultations.

Substantial participation in consultations?

The participants' ability to participate substantially in consultation processes implies that they understand the information that is transmitted to them, that they are able to critically analyse it with regard to potential human rights implications, and that they are able to form their own opinion about the planned measures. At the same time substantial participation requires the ability to defend one's rights and interests. The opportunity of those consulted to participate substantially in prior consultations in Bolivia and Peru has clearly been limited by power asymmetries and by the intercultural inadequacy of the processes.

The determination of the topics discussed or excluded from the consultations and the way they were discussed was dominated in both countries by the consulting entities. This was problematic in two regards: first, the issues considered part of the consultations were not the aspects the participants saw as most important – such as the protection of collective land rights or communities' access to drinking water – and, second, the language used to speak about the processes and the hydrocarbon projects was technical and legalistic.

In Bolivia the information distributed was criticised in almost every consultation.⁴⁸ Some communities even blockaded ongoing consultations until this information was revised.⁴⁹ The critiques referred to both: the information about expected negative socio-environmental impacts, as the communities felt that the real impacts were being downplayed, and the fact that the information clashed with their own knowledge about and interpretation of local realities (for example about land ownership).⁵⁰ Moreover, because of the predominance of technical and legalistic language in the Bolivian consultations, the consulted groups would not have been able to debate with the MHE consultation team without specialist advisors. In a national Guaraní assembly in Camiri in November 2014 one community leader stated: 'For me the consultations are disappointing. They [the MHE] come with their engineers, geologists and so on and their technical discourses are overwhelming [...] Within one hour we just duck our heads, because we do not know how to discuss with them.'⁵¹ This is one of the reasons most consultation participants remained silent observers during the processes, while their leaders and advisors held dialogues with the MHE consultation team – all of whom used to be environmental and petroleum engineers without specialist skills and knowledge regarding indigenous people.⁵² The problematic nature of the delegation of negotiating power to indigenous leaders and advisors came to light particularly in those processes where these actors did not fulfil their role of representing community rights and interests satisfactorily. In such cases community members expressed their disappointment that they could not effectively make use of their right to consultation.⁵³

During the consultations in Peru Perupetro and the Vice-Ministry of Intercultural Affairs (VMI) gave PowerPoint presentations on the right to prior consultation and Peru's environmental standards for hydrocarbon projects. The participants criticised the information material for having a lot of text, as the community members living mainly from agriculture were 'not used to reading' or were illiterate.⁵⁴ Adequate translation and the cultural adequacy of the information were important for the consulted people as a sign of respect for their culture. Criticising concrete language terms and formal issues was also much easier for them than criticising technical content. Community members did not have the educational background and did not possess alternative information with which to evaluate or challenge the information distributed. In several processes the consultation participants remarked that the measure that was being consulted on was unclear to them. They did

not understand Perupetro's explanation that they were assessing the 'painting of a [hydrocarbon] block (*propuesta o dibujo del lote*) and its possible impacts on collective rights'.⁵⁵ A particular characteristic of prior consultations in Peru, imposed by the state, was that the dialogues were only held between a few designated indigenous representatives and Perupetro. In these meetings indigenous and state representatives were seated around a table and were the only ones allowed to talk. In order to discuss pending issues with their technical advisors or with other consultation participants, the indigenous representatives had to ask for breaks.⁵⁶ When they returned, the table had often already begun to discuss other topics.

Hydrocarbon projects are undoubtedly complex and highly technical, making them difficult for persons without specialised knowledge to fully understand. As a consequence, it is challenging for non-experts to formulate concerns or alternatives that might lead to substantial changes to the proposed projects. An important finding of our study is that we cannot expect prior consultation to address concerns and channel demands that the local communities might not have been able to formulate. Indeed, silence should not be automatically interpreted as a statement of approval regarding the planned project.

Cornwall provides an insightful explanation of the difficulties of speaking up and demanding substantial changes:

exercising voice in such a setting requires more than having the nerve and the skills to speak. Resisting discursive closure, reframing what counts as knowledge and articulating alternatives, especially in the face of apparently incommensurable knowledge systems, requires more than simply seeking to allow everyone to speak and asserting the need to listen.⁵⁷

The asymmetrical negotiations that have characterised consultations in Bolivia and Peru are very distant from the requirement of international human rights instruments that prior consultations should constitute intercultural dialogues. Rather, indigenous organisations have been forced to acquire the capacity to express themselves in the dominant language in order to discuss their rights and negotiate planned hydrocarbon projects. This means that they have had to rely on professional technical advisors to translate and mediate between themselves on the one side and the state and companies on the other.

Indigenous influence on consultation results

Indigenous participants' real influence on the results of the consultations has depended to a great extent on the presence of technical advisors to help them formulate and substantiate claims. Overall the possibilities for shaping the planned projects have been very limited in both countries. In Bolivia the consultations were carried out very late, when contracts with the responsible companies had already been signed and the respective project's details had already been established. For example, in the case of construction of gas ducts, the MHE has usually only carried out the consultation with the affected communities after the first sections have already been built and the machines and workers have been contracted.⁵⁸ In Peru, in contrast, prior consultation has been carried out very early in the administrative process of establishing hydrocarbon blocks. The limits of the blocks had been defined without consultation before the consultation processes began, but no concrete company or planned project has been determined. Hence, the consulted groups and individuals have been unable to formulate concrete demands related to their own needs or development visions.

The Bolivian prior consultations completed to date have concluded with final agreements signed by the MHE and the consulted groups. Some of these agreements are quite comprehensive, comprising up to 25 pages, while others are thin, containing just a few general recommendations.⁵⁹ In general the final agreements contain lists of expected socio-environmental impacts and respective mitigation measures. However, when the content of these agreements is compared with Bolivia's environmental legislation, it becomes clear that only a few mitigation measures incorporated into the agreements go beyond the existing legislation. These exceptions (for example, the requirement that the company should respect greater distances from water sources than legally established) have in several cases subsequently been neglected by the operating company.⁶⁰ In many cases the consulted groups have succeeded in incorporating the employment of indigenous socio-environmental supervisors to control the gas activities and their impacts into the final agreements; in a few cases the location of seismic lines for exploration activities has been changed; and in one case the consulted groups have succeeded in prohibiting the construction of additional access roads and stopping the company from using water from the local river.⁶¹

Our interviews in many indigenous communities in Bolivia show that there is a general discontent with the results of consultation processes – first, because of the limited opportunities the consultation participants have had to co-design the planned projects and, second, because many stipulations contained in the final consultation agreements have subsequently been disregarded.⁶² The most tangible results for local communities have come not from the consultation procedures, but rather from the compensation payments negotiated afterwards.

In Peru consultations end with a dialogue meeting between Perupetro and the indigenous representatives, resulting in an act that contains a summary of the process and the agreements achieved. The basis for the dialogue are the minutes from internal evaluation meetings held by the indigenous peoples themselves beforehand. These 'indigenous internal agreements' are then systematised by Perupetro, which (unilaterally) separates topics to be treated in the dialogue from topics that are not part of the consultation. Topics that have been excluded include general concerns regarding education, health care, electricity, employment opportunities, and benefit sharing from extraction activities.⁶³ This lack of acknowledgement of the prime necessities of the indigenous groups has served to fuel several indigenous representatives' already existing scepticism about whether participating in the process makes any sense at all.⁶⁴

Final agreements made in the consultation processes in Peru have been quite general, especially because these processes have taken place very early, before any concrete project has been designed. In these agreements Perupetro has usually committed itself to asking the future company to take indigenous labour into account or to establish community monitoring systems for socio-environmental impacts.⁶⁵

Additionally, Perupetro and the VMI have committed to transmit certain demands that were not the subject of consultation – for instance land titling, health care and education – to the responsible entities. Other important demands from the consultation participants have not been taken into account, such as the request of the Shipibo-Conibo people in the proposed block 195 that the company respects the community 'norms of living together' (*normas de convivencia*), that the Environmental Impact Assessment be translated into their own language, and that a compensation fund be established.⁶⁶

As consultations in Peru have been carried out very early in the licensing process, before any concrete project has been designed, participants have not been able to formulate any project-specific demands. Instead, demands regarding the unsatisfied basic needs of the local communities have come to the forefront, leading to the 'overloading' of consultations with issues not directly related to the measures on which they are being consulted. It remains unclear whether the demands expressed by the consultation participants and partly included in the final consultation acts will have any tangible consequences, as no follow-up mechanisms for overseeing compliance with the acts have been established, a fact that has been harshly criticised by many indigenous representatives.⁶⁷

In the Bolivian cases analysed here, participants have also had only limited opportunities to demand substantial project changes because, when the consultations started, the project design was already finished. The consulted communities have thus concentrated on negotiating economic compensation and benefits. Rights and livelihood issues have moved into the background. This phenomenon, which has also been detected in Ecuadorian consultation processes, indicates very important deviations in practice from the original ideas of the right to prior consultation and FPIC.⁶⁸

Here, again, we can refer to findings from scholars of participation in development, who argue that participation should be a continuous process, from the initial planning phase until the execution of any project. Along the same lines Williams concludes that 'a change in temporal focus is also needed if an empowering political practice is to be created. Here it is vital that "empowerment" is not treated as a change in status created at a particular moment in time. Rather, empowerment should be seen as a relative (and reversible) process built from within longer-term political projects.'⁶⁹

Conclusion

The aim of this article has been to scrutinise how the international 'consultation approach' works in practice and whether it lives up to the great expectations tied to its rights-protection function. Based on an analysis of consultation practices in Bolivia's and Peru's hydrocarbon sectors, it has identified particular shortcomings of these processes. To date these real-life challenges and complexities have often been overlooked in international debates about the right to prior consultation and FPIC, which have largely focused on formal legal and conceptual issues.

In practice a key obstacle to effective participation in prior consultations in Bolivia and Peru has been power asymmetries between states and companies, on the one hand, and indigenous participants, on the other. Our study shows that governments have converted prior consultations from spaces claimed by indigenous activists into invited spaces dominated by the state. Accordingly, indigenous peoples' ownership of these procedures has become rather limited. In the consultations a major obstacle to local populations' substantial participation has been what could be called a 'communication hurdle'. First, in both countries consulting entities and participants have entered into consultation processes with a lack of knowledge. State representatives have known little about local indigenous populations and indigenous people have generally not possessed much prior information about hydrocarbon activities or their rights. Especially in Peru local populations have had great difficulty even understanding the concept of prior consultation and the 'rules of the game'. Second, it has been very challenging for rural indigenous participants to understand and evaluate

the highly technical details of hydrocarbon projects. It has been even more challenging for them to formulate critiques, and express their demands in public, in an ambit dominated by technical language. Ideally consultations should provide room for dialogue on culturally diverse ideas, but we have found that none of the processes analysed discussed indigenous visions. The sole presence of indigenous participants is not enough to qualify participatory processes as intercultural dialogues. In this context professional advisors have taken on crucial importance for indigenous groups and have assumed powerful roles in consultations. This is problematic, as it has resulted in the delegation of rights to individual technical specialists functioning as brokers between the state and local populations. Yet not all groups have access to such brokers and advisors do not necessarily defend the rights and interests of local populations. Thus consultations that have been designed to empower marginalised groups can actually have disempowering effects in local contexts.

We have also shown that the timing of consultations during the licensing processes of hydrocarbon projects has substantially limited indigenous peoples' influence on the results. In Peru prior consultations have been carried out at a stage when no project has yet been defined. The consultation results have thus had a very general character, and consultations have primarily been used to express long-standing grievances towards the state. For the groups consulted, health care and education have been urgent demands, and the question of whether their participation has been influential will largely depend on whether the state uses the consultations as an impulse to address such claims. In Bolivia consultations have been carried out after project details have been established by the companies and changes to the already-designed projects have often been rejected. Therefore, indigenous participants have concentrated on negotiating the categorisation of impacts with regard to the amount of compensation paid. As a result, prior consultations have tended to be reduced to a bargaining tool for achieving a share of the pie from extraction revenues rather than for securing the rights and livelihoods of local populations.

An important reason the consultation approach has not fulfilled its promises is that it requires preconditions that are usually not in place. At the national level the governments of Bolivia and Peru are not actually willing to engage in intercultural dialogue and truly change how state decision-making takes place. This would require them to revise dominant development ideas and to grant local communities a decisive say in extraction activities. Therefore, in the ambit of strategic political and economic importance, the disincentives to participatory governance are particularly great. At the local level the ideas underlying the consultation approach – for example, that consultations be carried out through representative indigenous institutions and according to their own norms and procedures – do not necessarily fit with the reality, where the question of who represents whom and according to which norms and procedures is often unclear or contested. When we analyse consultation practices in concrete local contexts, we find that important basic assumptions of the consultation approach are too simplistic.

The 'overloading' of consultations with problems and expectations that are not directly related to the specific extraction activities at stake suggests that, in addition to project-specific participation, other channels for continuous and broad indigenous–state communication should be enhanced. Project-specific consultation processes cannot stand alone as an isolated mechanism to channel all the demands of socio-politically and economically marginalised indigenous populations. In future the usefulness of prior consultations will largely depend on the degree to which other indigenous rights – such as the right to land

and territory, to autonomy or to participate in the state's powers – can simultaneously be enhanced, as well as the degree to which dominant development models are challenged.

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Notes

1. See Szablowski, "Operationalizing Free, Prior, and Informed Consent"; and Due Process of Law Foundation, *El derecho a la consulta previa*.
2. Rodríguez-Garavito, "Ethnicity.gov," 268.
3. Ibid.
4. Szablowski, "Operationalizing Consent."
5. Stavenhagen, cited in Inter-American Court of Human Rights, *Case of the Saramaka People*; and Anaya, *Report to Human Rights Council*.
6. O'Donnell, "On the State, Democratization and some Conceptual Problems."
7. Szablowski, "Operationalizing Free, Prior, and Informed Consent," 112.
8. Of the 15 Latin American countries that have ratified ILO C169, none has complied with its obligation to carry out prior consultation or FPIC processes – with the exception of Bolivia, Colombia and Peru. However, as the violent armed conflict in Colombia significantly shapes and complicates prior consultations, we have decided to focus on Bolivia and Peru.
9. Voss and Greenspan, *Community Consent Index*; and Rodríguez Garavito et al., *La consulta previa a pueblos indígenas*.
10. For example, consultation reports from MHE, "Informes finales."
11. Saxena, "What is meant by People's Participation?," 31.
12. See Cornwall, *The Participation Reader*; Cornwall and Brock, "What do Buzzwords Do?"; Cornwall, "Spaces for Transformation?"; Gaventa, "Towards Participatory Governance"; Gaventa, "Finding the Spaces for Change"; Gaventa, *Power and Powerlessness*; Hickey and Mohan, *Participation*; Williams, "Evaluating Participatory Development"; and Williams, "Towards a Repoliticization of Participatory Development."

13. See Cooke and Kothari, *Participation*; and Enns et al., "Indigenous Voices."
14. Hickey and Mohan, *Participation*. See also Parfitt, "The Ambiguity of Participation."
15. An example of such a narrow definition of consultation can be found in Pretty: 'Participation by consultation: People participate by being consulted or by answering questions. External agents define problems and information gathering processes, and so control analysis. Such a consultative process does not concede any share in decision making, and professionals are under no obligation to take on board people's views.' Pretty, "Participatory Learning for Sustainable Agriculture," 1252. See also Arnstein, "A Ladder of Citizen Participation," 4–9.
16. Rodríguez Garavito et al., *La consulta previa a pueblos indígenas*; and Due Process of Law Foundation, *El derecho a la consulta previa*.
17. See Stavenhagen, "Ethnodevelopment"; and Escobar, *Encountering Development*.
18. Gready, "Rights-based Approaches to Development."
19. Hickey and Mohan, *Participation*, 27.
20. Gaventa, "Towards Participatory Governance," 34. See also Hickey and Mohan, *Participation*; and Williams, "Evaluating Participatory Development."
21. See Arnstein, "A Ladder of Citizen Participation," 4.
22. Burchardt and Dietz, "(Neo)-extractivism."
23. Ibid. See also Veltmeyer and Petras, *The New Extractivism*.
24. The two Andean countries have the largest estimated indigenous populations in South America, with over six million (62.2%) in Bolivia and over seven million (24%) in Peru. ECLAC, *Guaranteeing Indigenous People's Rights*, 37.
25. See Humphreys Bebbington, "Consultation, Compensation and Conflict"; and Schilling-Vacaflor, "Rethinking the Link."
26. Lust, "Peru," 193.
27. See Veltmeyer and Petras, *The New Extractivism*.
28. Schilling-Vacaflor and Flemmer, "Conflict Transformation through Prior Consultation?"
29. MHE, "Informes finales."
30. Interviews with staff from the national APG office for natural resources and the environment, Camiri, October 2013 to December 2014; and interview with former employee of the MHE, Santa Cruz, February 2012. All interviews cited in this article were conducted and translated by the authors. The names of interviewees have been withheld by mutual agreement.
31. O'Diana et al., *Análisis de la aplicación de la consulta previa*.
32. Perupetro is responsible for demarcating new hydrocarbon blocks and finding an operating company.
33. Cornwall, "Spaces for Transformation?," 35.
34. Field notes, Takovo Mora, November 11, 2013.
35. Interviews with over 20 members of local communities, traditional authorities and advisers from Takovo Mora, October 2013 to November 2014.
36. See MHE, "Informes finales"; Bascopé Sanjines, *Lecciones aprendidas sobre consulta previa*; and Haarstad and Campero, *La participación en el sector de hidrocarburos en Bolivia*.
37. Interviews with Guaraní representatives and members of Guaraní communities, September 2013 to November 2014; and MHE, "Informes finales."
38. The consultation plans proposed by Perupetro were developed according to a model from the methodological guidebook of the VMI and already contained dates, places and numbers of participants of future meetings.
39. Interview, FENACOCA, Lima, April 2014.
40. Interviews with indigenous leaders in Aguaytia, Pucallpa, Atalaya and Satipo in the Amazon regions of Ucayali and Junín in March 2014, December 2014 and January 2015.
41. The regulating decree of Peru's consultation law states that the phases of publication, internal evaluation and intercultural dialogue can take up to 120 days. The five prior consultations concluded were conducted in a minimum of 56 days (block 169) and a maximum of 97 days (block 175).
42. ORAU, "Carta N° 012-2014-ORAU."
43. See Chirif, "Auge y caídas de las Organizaciones Indígenas."

44. Interview, Diana Mori, CONAP-U, Yarinacocha, December 2013.
45. Field notes, Aguaytia, March 14, 2014.
46. Interviews with staff from the national office of the Assembly of Bolivia's Guaraní People (APG) for natural resources and environment, Camiri, October to December 2013.
47. MHE, "Informes finales."
48. Ibid.
49. See Haarstad and Campero, *La participación en el sector de hidrocarburos en Bolivia*; and MHE, "Informes finales."
50. Interviews with Guaraní representatives and members of Guaraní communities, September 2013 to November 2014.
51. Field Notes, Camiri, November 25, 2014.
52. Interviews with staff from the MHE, La Paz, December 2013.
53. See Giné and Villarroel, *TOTAL E&P Bolivia y sus impactos*; and Schilling-Vacaflor, *Las actividades de gas natural*.
54. Interviews, Santa Martha, March 2014.
55. The measure consulted is the Supreme Decree, which will approve the signing of the contract between Perupetro and the winning company.
56. ORAU, "Carta N° 012-2014-ORAU."
57. Cornwall, "Spaces for Transformation?" 84.
58. Field notes, Takovo Mora, October and November 2013; and interview with staff from YPFB Transporte, Santa Cruz, November 2014.
59. MHE, "Informes finales."
60. Schilling-Vacaflor, "Rethinking the Link."
61. MHE, "Informes finales"; interviews with staff from the Bolivian Environmental Ministry, the Ministry of Hydrocarbons and Energy and with many representatives and members of Guaraní communities, September 2013 to January 2015.
62. Interviews with representatives and members of Guaraní communities, September 2013 to January 2015.
63. Authors' analysis of final state–indigenous agreements and documents from indigenous internal evaluation meetings from prior consultations about future hydrocarbon blocks 169, 195, 164, 189 and 175.
64. Interview, Kakataibo leader, Puerto Sungaro, February 2014.
65. Authors' analysis of final state–indigenous agreements and documents from indigenous internal evaluation meetings from prior consultations about future hydrocarbon blocks 169, 195, 164, 189 and 175.
66. Ibid.
67. Interviews with indigenous leaders in Aguaytia, Pucallpa, Atalaya and Satipo in the Amazon regions of Ucayali and Junín in March 2014, December 2014 and January 2015.
68. See Falletti and Riofrancos, "New Participatory Institutions."
69. Williams, "Towards a Repoliticization of Participatory Development," 241.

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