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## Free, Prior and Informed Consent: Addressing Political Realities to Improve Impact

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## KEY POINTS

- The right of indigenous and tribal peoples to free, prior and informed consent has yet to be realized.
- The incentives motivating government and company actors who shape FPIC outcomes tend to be at odds with the rights of indigenous and tribal peoples.
- As a result, decision-making power remains in the hands of the state.
- Though some progress has been made, greater progress requires addressing the political realities that continue to impede recognition of FPIC and meaningful implementation of prior consultation processes.
- Doing so can involve supporting activities to change, accommodate or work around political impediments.

## Free, prior and informed consent: Getting political to improve impact

Indigenous and tribal peoples' right to free, prior and informed consent (FPIC) has transformative potential. Where this right is recognized and meaningfully operationalized, FPIC can help safeguard a variety of rights specific to indigenous and tribal peoples, and while doing so, remake the power relations between peoples, governments, and, in some contexts, extractives companies. Yet, this potential is far from being realized: there is a considerable gap between FPIC in theory and what happens in practice. Our research shows that the political contexts in which FPIC and prior consultation processes unfold account for much of this gap.

Global actors who support broader recognition of FPIC and improved implementation of prior consultation processes usually focus on normative standards and best practices—and much less on directly addressing the political challenges and opportunities that shape how these processes unfold.

This brief—drawing on the larger research project on which it is based—aims to spur practitioners to apply a more systematic political lens to their work on FPIC and prior consultation processes. It previews some of the key political challenges facing effective implementation, based on research from three countries in Latin America—Brazil, Colombia, and Peru—and proposes a menu of different approaches to tackle them.



## Good intentions, thorny realities

International recognition of FPIC is a result of a hard-fought struggle by indigenous rights movements that consider it to be critical to protecting indigenous rights. FPIC is a decision-making right situated in the broader pursuit of recognition and respect for indigenous territorial, cultural, and self-governance rights.

In the context of extractives projects, FPIC requires governments to cede power to indigenous populations over key decisions related to projects that would take place on indigenous lands and/or affect indigenous rights. This includes ceding power to affected communities to freely decide, well in advance of project approval and with the benefit of relevant, accessible information, whether and how the project will proceed. And it includes recognizing the right of communities to modify consent to a project even after it has begun.

In practice, while some progress has been made, the promise of FPIC has yet to be fulfilled. Many states, primarily in Latin America, have implemented forms of indigenous participation—prior consultation processes—that in law and in practice depart from FPIC principles. These processes tend to be cursory and ultimately leave decision-making power in the hands of the state. Rather than serving as a mechanism to support the realization of indigenous and tribal peoples' rights, these prior consultation processes are described by many as administrative “box-ticking exercises.”

## Using a political lens to support FPIC

The decisions and actions of powerful actors tend to reflect the complex incentives and interests that motivate them. Political realities are frequently acknowledged through reference to the vague concept of “lack of political will,” and they generally are not systematically understood and integrated into the work of global actors who support FPIC implementation. Political realities are an important part of the explanation for why FPIC has not been widely operationalized, and therefore, understanding and addressing the local and national political context should play a key role in improving the impact of work on FPIC.

Grappling with political realities [in an actionable way](#) requires unpacking the concept of political will. This involves mapping the distribution of power and interests and then examining how these influence whether FPIC is recognized and how they shape the nature and outcomes of prior consultation processes. This means answering questions such as: Who are the key actors involved? Who has power over what? What interests and incentives drive the key players? And how do these shape outcomes? These insights are essential for practitioners to develop strategies to tackle key political obstacles, capitalize on political opportunities, and support different actors to work in more politically informed ways.

### **FPIC and prior consultation processes**

*In the context of extractive industries, the right to 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 would require. At a basic level, they depart from FPIC principles by leaving decision making power in the hands of the state.*

## Politics of FPIC in practice: key actors interests and power

There are three key sets of actors when it comes to FPIC and prior consultation processes for extractive projects in Latin America: indigenous and tribal peoples and their allies, national governments, and companies. The following summarizes the main interests of each category of stakeholder when it comes to FPIC and prior consultation processes; the sources from which different actors derive power with regard to these processes; and the distribution of power, or relative influence, within and across the three stakeholder categories.

### 1. Indigenous and tribal peoples and their allies: interests and power

#### Interests

These actors generally favor processes in which they are able to exercise the power to freely decide, well in advance of a project being approved as well as throughout its duration, whether or not and how the project will proceed. However, in the context of prior consultation processes that depart from FPIC principles and leave decision-making power in the hands of the state, their interests may include:

- Using prior consultation processes as opportunities to raise concerns about cultural, social, environmental, and other impacts in ways that shape outcomes and prevent or modify the way that extractives projects proceed on their territories.
- Using prior consultation processes as bargaining spaces to engage with national level state actors to seek redress for historical grievances and demand that the state fulfill its social obligations more broadly.
- Using prior consultation processes to negotiate with companies for benefits for resources derived from indigenous lands and compensation for the negative impacts of extraction.

Cutting across all the indigenous perspectives above is a shared interest in prior consultation processes that create an opportunity to advance the rights and interests of their respective peoples.

*“Indigenous and tribal peoples’ source of power is largely derived from their relationship with and proximity to resource-rich lands, and the ability to mobilize, protest, and engage in direct action”*

#### Power

**Distribution of power.** While indigenous peoples have been at the forefront of shaping norms around FPIC, they have been much less influential relative to governments and companies in determining whether FPIC is operationalized and how prior consultation processes take place. They have, therefore, had less opportunity to shape relevant processes according to their interests.

**Source of power.** Indigenous and tribal peoples’ source of power is largely derived from their relationship with and proximity to resource-rich lands, and the ability to mobilize, protest, and engage in direct action that imposes costs and creates disincentives for poor engagement practices.

## 2. National governments: interests and power

### Interests

Numerous government ministries and agencies are involved in the regulation of the extractives sector and in the implementation of prior consultation processes, with varying interests and incentives driving their behavior.

- Ministries of economy and finance, investment promotion agencies, and ministries of mines, energy, or petroleum typically prioritize attracting investment. They tend to reject FPIC as incompatible with this aim, seeing it as a source of potential costs, delays and risks to investment. As a result, they favor the most watered-down versions of prior consultation processes—those which create the least opportunity for indigenous populations to slow down projects or potentially stop them altogether.
- 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

**Distribution of power.** Governments tend to be the dominant actors when it comes to determining the nature and fate of FPIC and prior consultation processes; they are often more powerful than companies and consistently more powerful than indigenous peoples. Within government, the most influential actors tend to be those who oppose the right to give and withhold consent, and have the greatest interest in heavily circumscribing indigenous participation and influence over outcomes. These include ministries of mines, energy, or petroleum. Actors within government who support more rights respecting processes tend to be side-lined in decision making and under-resourced in performing their duties.

*“Governments tend to be the dominant actors when it comes to determining the nature and fate of FPIC and prior consultation processes; they are often more powerful than companies and consistently more powerful than indigenous peoples.”*

**Sources of power.** National governments derive their power over FPIC and prior consultation processes from a variety of sources:

- The state has ultimate authority over subsoil resources;
- The state has ultimate responsibility to protect the rights of its people;
- The government ultimately decides whether the right to give and withhold consent is recognized;
- The most powerful actors within government tend to have ultimate formal authority or informal influence over how prior consultation processes take place (e.g. procedures, timing, duration, substantive scope, criteria for participation, informational inputs, etc.);
- Relative to indigenous peoples, state actors tend to have greater access to technical expertise;
- Powerful actors within government tend to have strong alliances with the media that allows them to shape narratives about FPIC and prior consultation processes in ways that undermine indigenous peoples’ interests (e.g. by referring to these as “anti-development”).

### 3. Companies: interests and power

#### Interests

Generally, extractives companies have an interest in projects proceeding smoothly, on budget, and with minimal delay or disruption, leading them to favor prior consultation processes that help to establish a social license to operate, but which do not risk the fate of the project by putting consent on the table. However, depending on their size, country of origin, whether they extract oil, gas or minerals, and their reputation sensitivity, companies can have different interests and preferences when it comes to FPIC and prior consultation processes. There is further variation within companies, too:

- Social performance specialists typically have an interest in establishing and maintaining good relations with host communities.
- Project managers/operations and technical teams tend to want as much certainty as possible on timing, costs and procedures, and tend to have a greater interest in complying with legal requirements than in ensuring good practice. These actors' remuneration packages are often calibrated to incentivize them to produce and deliver projects on time and on budget in accordance with project plans. These rewards schemes generate high-stakes personal interests and strong disincentives to carve out an adequate amount of time to conduct meaningful FPIC or prior consultation processes.
- Company lawyers' interests likewise tend to focus on compliance with legal obligations imposed on them by national government regulations and tend to prioritize compliance with international standards only when required by financing.

#### Power

**Distribution of power.** While the balance of power within companies is variable and the outcome of internal negotiations, social performance specialists tend to be the least powerful players within companies and tend to have to work harder to make their voices heard. Operations and legal teams are often dominant as their inputs are considered integral to all projects. As a result,

overall, companies' actions are largely reflective of the interests of project managers, operations teams, and company lawyers.

**Sources of power.** Companies can wield significant power in service of their broad interests both directly through engagement with indigenous communities and indirectly through their influence over government officials whose aim it is to attract and leverage companies' financial and technical resources. Sources of company influence might include:

- Financial and technical resources that can be used to influence government officials.
- Financial resources that can be used to offer benefits to relevant indigenous peoples and communities, or subgroups thereof, in order to pre-empt opposition.
- Asymmetrical knowledge and information over indigenous and tribal peoples gives companies an advantage in two ways: it allows them to best understand and use consultations to their advantage and, potentially, to selectively share information that casts them and their projects in a favorable light.



Although there is obviously significant variation across contexts, in general, the actors with the most power over how processes unfold—both across stakeholder groups and within governments and companies—tend to perceive their interests as fully or partially misaligned with those of indigenous peoples. As a result, FPIC recognition and meaningful prior consultation processes are rare, and cursory consultation processes far more common. Therefore, any attempts to support indigenous peoples to put FPIC in practice or achieve gains through prior consultation processes will have to reckon with the political realities that work against these goals.

## Working politically on FPIC

What does all this mean for donors, development practitioners, international non-governmental organizations and others seeking to support indigenous peoples and their local allies?

The first crucial step is to integrate political economy analysis into their work in order to identify major obstacles and opportunities to advancing FPIC goals in a given context. When confronted with challenging political realities, the options that may be available to these actors are:

1. **Change:** transforming the power or interest dynamics that undermine the recognition of FPIC and the implementation of prior consultation processes.
2. **Navigate:** accepting political context as it is and trying to work strategically to make the most progress reasonably possible within those constraints.
3. **Circumvent:** trying to achieve desired ends by work around political obstacles.

An overview of options for working politically on FPIC in settings where the interests of powerful actors are not aligned with its robust implementation follow below:

### Pathway 1: Changing the landscape of power and interests

Various approaches might be developed to try to change the landscape of power and interests in order to improve prospects for the recognition of FPIC and meaningful prior consultation processes that better approximate the interests of indigenous and tribal peoples. These would likely boil down to increasing the relative influence of indigenous groups and/or shifting the incentives of powerful actors within government and companies. Initial ideas for pursuing these pathways, elaborated further in the full paper, are summarized in the tables below.

#### Changing power

- **Support increased collective action to build strength in numbers: intra-community coalition-building.** A renewed focus on channeling resources toward indigenous communities' efforts in organizing could support improved coordination and internal governance that could amplify the influence of these actors.
- **Support mechanisms for political representation to translate collective action into political impact.** 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 recognition of FPIC.
- **Support the building of networks with allies to broaden reach and efficacy of the indigenous peoples' mobilization: inter-community coalition building.** Another way to bolster the power of indigenous peoples and their influence over FPIC and prior consultation processes is by supporting their networking with external allies, including legal empowerment groups, civil society organizations, and legal and technical advisors at different levels.
- **Focus on increased visibility and control over narratives.** One way to help counter narratives that diminish public solidarity and support for the rights of indigenous communities is by supporting alliances with sympathetic media allies.

- **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).** Political economy analyses 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 their respective entities, as well as their own influence in their realms of activity that impact on prior consultation processes and indigenous rights.
- **Support indigenous peoples in their efforts to set the rules of the game by developing autonomous protocols and advocating for official recognition of these.** The development of autonomous protocols that reflect indigenous preferences as well as their customary rules and practices for prior consultation and consent processes show promise as a means for indigenous peoples to redefine the "rules of the game" to better align with their rights and interests.

#### Changing incentives

- **Increase disincentives through litigation.** Litigation, coupled with politically informed implementation strategies, could be used to create disincentives for failures to recognize and implement FPIC.
- **Increase 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 sham prior consultation processes and practices that undermine the rights and interests of indigenous peoples.
- **Engage 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 company incentives with the goal of improved social engagement and could have the knock-on effect of improving the quality of prior consultation processes where companies play a prominent role.

## Pathway 2: Navigating political realities

In some instances, when the prospects of changing key aspects of political context in the short- to medium-term seem highly unlikely, FPIC advocates and supporters might consider a more pragmatic approach to advancing their cause however and whenever possible within the existing political realities. This may entail adjusting strategies, timelines and understandings of incremental goals.

- **Opt out when opting in might do more harm than good.** Some indigenous groups have felt their best option would be to withdraw from prior consultation processes, feeling they have more to lose by participating in consultations that legitimize extractives projects for governments and companies but without providing indigenous peoples with any real opportunities to shape outcomes than they would by not participating at all.
- **Prepare the groundwork for a longer term fight.** This approach might require lengthening timelines for improving outcomes and focusing on identifying steps that can be taken opportunistically in the interim to incrementally build toward that greater goal down the line, including work aimed at disrupting underlying drivers of inequality and discrimination and improving recognition of territorial rights.
- **Seek the lowest common denominator (meeting the powerful at their interests).** To the extent that communities feel they have an interest in strategically using prior consultation processes as a bargaining space to address historical grievances with the state and/or to induce the provision of adequate compensation and benefits from companies, donors may consider supporting the work of legal empowerment or other civil society organizations to accompany communities in the negotiation of equitable agreements, with resources dedicated to a sustained focus on monitoring the implementation of these agreements.

## Pathway 3: Circumventing political impediments by leveraging the private sector

Finally, another option for dealing with challenging political contexts might be to try to develop alternative pathways to achieving the same ends. Simply put, this means thinking about whether there are other ways—beyond the current government-centric models—to achieve similar outcomes.

- **Other roads to consent: improving private sector standards.** Even in situations where powerful actors within government oppose indigenous and tribal peoples' right to give and withhold consent, companies still have agency to decide not to proceed with a project in the absence of consent. Focusing on advocacy to strengthen industry association standards to reflect and emphasize the fundamental responsibility of companies to respect the decisions of indigenous and tribal peoples, including in cases where consent is not given, may be options to consider.
- **Other roads to doing no harm and improved benefit: directly negotiating with companies and their investors.** 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 to develop meaningful steps for companies and investors to anticipate and reduce harm to indigenous peoples and their lands and to improve the direct benefits to these groups, while appealing to companies' interests in securing a social license.

## Conclusion

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.

# Building politically informed approaches to FPIC

## Change: 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 consultation processes (e.g. sympathetic government agencies)
- Support indigenous peoples in their efforts to set the rules of the game.

## Change: interests

- 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.

## Navigate

- 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).

## Circumvent

- Other roads to consent: leverage the private sector.
- Other roads to doing no harm and improved benefit: directly engage EI companies and their investors.

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