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**Democratizing Resource Governance through  
Prior Consultations?  
Lessons from Bolivia's Hydrocarbon Sector**

Almut Schilling-Vacaflor

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# **Democratizing Resource Governance through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector**

## **Abstract**

With the recent expansion of extractive industries in Latin America, contestations with the affected communities have increased in number and intensity. Therein, the indigenous right to prior consultation and to free, prior and informed consent has played a crucial role. Based on the empirical study of several consultation processes in Bolivia's hydrocarbon sector since 2007 and referring to deliberative theories as well as human rights norms, this article explores the enabling and constraining factors in the democratization of resource governance through these procedures. While the specificities of consultations in plurinational Bolivia are taken into account, the study also draws general conclusions for similar processes in other resource-reliant countries.

Keywords: resource governance, human rights, indigenous peoples, prior consultation, deliberative democracy, Bolivia, Latin America

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# Democratizing Resource Governance through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector

Almut Schilling-Vacaflor

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## 1 Introduction

The global commodity price boom (2004–2009) has so far been crucial for the further expansion of mining and hydrocarbon activities in Latin America at the beginning of the twenty-first century.<sup>1</sup> Though, this trend has not gone uncontested. Socio-environmental conflicts around extractive industries have flourished, particularly between affected communities, states and corporations. Referring to international human rights (HR) law, these communities have frequently challenged state-led development visions and contrasted them with their

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own visions of self-determined development. The explosion of new plural legal norms on prior consultations at international and national levels in the past two decades (see Morris et al. 2009)<sup>2</sup> has been closely associated with increasing contestations about this procedure in the juridical and political field all over Latin America (e.g. Fulmer, Snodgrass and Neff 2008; Rodríguez-Garavito 2010; DPLF 2010, 2011).

The citizen participation of local communities in resource governance has been a growing worldwide trend particularly since the 1990s (see Zillman, Lucas and Pring 2002). In the Latin American region, this trend has been embedded in a general development of enhancing participatory and deliberative forms of democracy (Selee and Peruzzotti 2009), intertwined with the strengthening of HR in national legislations in the same period. International HR instruments by date only contain specific, legally binding standards for the right to consultation of indigenous peoples. Therefore, the great majority of indigenous and peasant communities affected by resource extraction in Latin America – a region where 15 out of 18 states ratified ILO Convention 169 on Indigenous and Tribal Peoples from 1991 (hereafter ILO C169) – refer to the indigenous right to prior consultation. In some cases this claim has even gone alongside identity shifts of the respective communities.<sup>3</sup> Currently, the reference to their right to prior consultation and to free, prior and informed consent (FPIC, see below) is the single most important tool that local communities possess to legally resist extractive projects in their habitats; to demand a decision-making role in measures that affect them; to reduce possible social and environmental damage; and to improve their bargaining position on compensation payments and benefit-sharing. Prior consultations provide formal arenas in which representatives of the state, local populations and the extractive companies directly meet and discuss issues at stake, allowing “for contacts between radically different conceptions of development, nature, and human flourishing” (Rodríguez-Garavito 2010: 273).

Nevertheless, many case studies on prior consultations in Latin America reveal that these procedures have not been carried out at all or were dreadfully deficient, measured by HR standards (see DPLF 2010, 2011). Against this backdrop, I have chosen in this article to analyze the consultations in contemporary Bolivia because there is an exceptionally large number of potentially enabling factors for implementing meaningful consultations and rich empirical data there. Among the assumed enabling factors are a progressive legal framework, a president who self-identifies as indigenous, and a government that emerged with the support of strong indigenous-peasant organizations and that claims to aim to protect Pachamama (mother earth) and to develop a post-neoliberal economic model of *vivir bien* (good living)

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2 Alongside the right to prior consultation in international HR law, the obligation to consult communities affected by planned resource exploration, exploitation or transportation projects was adopted as a standard by international organizations like the World Bank (e.g. its Operational Directive 4.20) and the Inter-American Development Bank, as part of the corporate social responsibility policies of many extractive corporations worldwide and has been included in the national legislations of many resource-exporting states.

3 See Wright and Martí on Peru (2011).

(see Postero 2007; McNeish 2008; Gustafson 2009; Schilling-Vacaflor 2011). Since Bolivia's Supreme Decree (SD) 29033, which regulates prior consultations in the hydrocarbon sector, was released in 2007 and widely celebrated as an example of "good practice," more than 20 consultations have been carried out, many of them lasting several months and resulting in signed agreements.

In this article I will first present the interrelations between prior consultations, democratization and human rights protection. Thereby, I will link and contrast deliberative theories with human rights norms on meaningful consultations. Subsequently, the article will analyze some recent prior consultation cases from Bolivia in more detail. Referring to deliberative theories and HR norms alike, it will discuss relevant enabling and constraining factors for implementing meaningful consultations. The insights of this article are embedded in the concrete socio-political context of contemporary Bolivia, but I will also draw some general conclusions that are relevant for similar processes in other countries' resource governance.

## **2 Democratization and Prior Consultations in Resource-Reliant States**

As Sen pointed out, the question of whether citizens have a voice in the construction of their own development is critically important, not only for their empowerment, but also for a country's quality of democracy (Sen 2004: 56). McNeish makes a direct link between prior consultations and democratization when he defines these participatory procedures as an indispensable step toward "creating democratic agreement on resource governance" (McNeish 2010a: 22). For resource-reliant states, this link is of particular importance as it implies that deliberative processes in the framework of prior consultations could help block frequent causal relations between resource dependency and the deterioration of democracy (Ross 2001; Basedau 2010; Acosta 2010).

Previous studies have investigated causal links between resource wealth and de-democratization by focusing on government spending, tax regimes and occupational specialization (*ibid.*). But, they have fallen short in taking into account the role of citizen participation in resource governance. I argue that purely parliamentary decisions and those from the executive branch are insufficient when it comes to administrative measures that have profound impacts on specific groups of society – for example, extractive projects in indigenous and peasant territories. This insight found its way into development planning, which has been shown to be more effective when it has incorporated deliberative processes than when it has been based solely on expert opinion (McCormick 2007: 233). The need for local perspectives is particularly clear in the case of decisions that involve the environment, since the local population is not only the most affected group, but it can also contribute its profound local knowledge.

Deliberations are likely to be accurate decision-making forums particularly for indigenous peoples in Latin America, as their own political norms and procedures – in Bolivia con-

stitutionally recognized as “communitarian democracy” – frequently contain time-consuming deliberations and consensus-based decisions, rather than representative and delegative forms of democracy (van Cott 2000: 9, 191 ff.; Albó 2002).

In this article, prior consultations are conceived of as arenas of deliberations, which on one hand are shaped by the specific democratic regime of the country, and on the other might themselves – when carried out properly – contribute to democratization or de-democratization. In a nutshell, deliberative procedures should exhibit the following characteristics: mediators in the negotiation should be accepted by all parties involved; everybody affected by a decision should ideally have the right to participate (or the selection process should guarantee certain representativeness of the involved actors); deliberators should have equal opportunities to present interests and preferences; the participants should have access to relevant information; the deliberative process should be transparent and scrutinized by the media and by other citizens; arguments should be presented and decisions justified so that they are understood by all participants; and all participants must accept final decisions as binding (Bohman 1996; Habermas 1992; Dryzek 2002; Bobbio 2003).

Many scholars of deliberative democracy have criticized the idealized conception of fair deliberations (e.g. from Habermas and Rawls) and have instead investigated hurdles that frequently emerge in practice and ways to overcome them (Bohman 1996; Dryzek 2005; Fraser 1990; Deveaux 2003; McCormick 2007; Gutman and Thompson 2004; Gastil and Levine 2005; Fung and Wright 2003; Benhabib 1996): among them, deliberative inequalities and other challenges that result from the existence of cultural pluralism or social inequalities. Some of their insights on the creation of favorable conditions for carrying out fair deliberations will be picked up in Section 4 of this article, where I will apply them to meaningful consultations.

### **3 Human Rights Protection and Prior Consultations**

Bohman emphasized the interconnectedness of HR and democracy, stating that “human rights require democracy in order to be exercised, but democracy requires human rights in order to be self-enforcing and non-tyrannical, and thus minimally just” (Bohman 2005: 103). In the case of prior consultations, the link between an accurate procedure and substantive improvements is particularly close: prior consultations with indigenous-peasant communities should not only guarantee them control over their lives through political participation, but also contribute to the protection of HR that might be at stake. This is crucial in the case of extractive activities, which frequently have severe socio-environmental impacts at the local level, among them the dispossession from lands and the contamination of water, as well as the transformation of ways of life and social organization (see Stavenhagen 2004; Paz Patiño 2005; Anaya 2005).

With these interrelations in mind, we can reason that indigenous peoples’ right to prior consultation is of particular importance, as their members still represent the largest margin-

alized and impoverished group in the region (Hall and Patrinos 2005). These procedures could contribute to empower indigenous-peasant communities and to reduce the poverty under which they disproportionately suffer. According to World Bank chief economist Nicholas Stern: "Empowering poor people so that they can participate in economic growth requires [...] building institutions that enable them to participate in decisions that shape their lives" (Stern 2003: xvii). This statement can be supported by interviews with more than 60,000 economically poor persons worldwide, wherein most of them expressed that one of their main priorities was that their voices be heard and that they become able to shape decisions that affect them (see Narayan 2000).

Nevertheless, the widespread assumption that an accurate consultation would lead to substantive changes like the adaptation of proposed projects to local needs and to adequate agreements on mitigation measures as well as on benefit-sharing has not yet been convincingly tested. The great majority of previous research focused on the procedural dimension of consultations. The following analysis of consultations in Bolivia will present some preliminary results about connections between their procedural and substantive dimensions.

The right to prior consultation is derived from the right to self-determination and is justified by the facts that indigenous groups have generally been historically marginalized and underrepresented in state politics and that they (at least partly) maintain their own institutions, which should be taken into account in participatory processes. One of the core elements of ILO C169 is the right of indigenous peoples to prior consultation before any legislative or administrative measure is taken that affects them (Art. 6 and 15 ILO C169). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) goes beyond ILO C169 as it explicitly recognizes indigenous peoples' right to self-determination and to FPIC.<sup>4</sup> The four countries that in the end voted against it (Australia, Canada, New Zealand and the U.S.), afraid of the indigenous right to veto, indicated the provisions on FPIC as a major reason for their opposition (Barstow and Baker 2008: 423).

The criteria for defining meaningful consultations contained in international HR instruments largely overlap and, as I will show below, are complementary with those of fair deliberations. The standards of deliberative democracy are formulated in a more abstract and general way in order to fit a great variety of deliberative constellations, while the requirements for prior consultations specifically focus on deliberations with indigenous peoples and communities. The latter point out that meaningful consultations must

- a) be carried out in good faith,
- b) be based on a genuine and constant dialogue between the state and the affected communities,

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4 Article 32.2 stipulates: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their 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."

- c) be carried out prior to the planned measure,
- d) involve legitimate representatives from all local communities affected,
- e) be carried out in a social, linguistic and culturally adequate way,
- f) aim to achieve the consent of the consulted communities, and
- g) recognize established agreements as binding (Morris et al. 2009; DPLF 2010).

**Table 1: Comparison of international human rights standards on meaningful prior consultations and standards of deliberative democracy ()**

	<i>International Human Rights Standards</i>	<i>Standards of Deliberative Democracy</i>
<b>General Characteristics of Consultation/ Deliberation</b>	Genuine and constant dialogue between representatives of state institutions and indigenous communities, carried out previously to a planned legislative or administrative measure, in a climate of confidence, mutual respect and good will	Climate of the deliberations should be respectful, without discrimination; mediators in the negotiation should be accepted by all parties involved
<b>Participants</b>	Representative institutions of the indigenous peoples and legitimate representatives of all affected communities participate in the process; consultations must take into account affected groups' own norms and procedures	Everybody affected or their legitimate representatives should have the right to participate; deliberators should have equal opportunity to present interests and preferences; all significant interests should be represented
<b>Information/ Transparency</b>	Complete information about the planned project must be submitted to the local communities, including information about the expected environmental and sociocultural risks and impacts	Access to broad information contributes to fair deliberations; the deliberative process should be transparent and scrutinized by media and other citizens; informed public debates also in informal arenas
<b>Cultural, Social and Linguistic Adequacy</b>	Consultation should be adapted to the social and cultural models of the indigenous peoples (e.g. values, conceptions, handling of time, reference systems and modes to conceive the consultation)	Arguments should be presented and decisions justified so that they are understood by all participants
<b>Establishment and Binding Character of Agreements</b>	Consultations must have the sincere objective of achieving a common agreement; consultations should help shape the planned measure; agreements obtained as a result of the consultations are binding	Deliberative processes should reach shared understandings of common good; all participants must accept final decisions as binding; principle of revisability of decisions

Source: Author's own elaboration.

#### **4 Case Studies: Prior Consultations on Hydrocarbon Activities in Bolivia**

The dependency of Bolivia's economy on the export of natural resources – particularly gas – has further increased in the past few years (see Bebbington and Humphreys Bebbington 2010;

Gudynas 2010). The production of gas almost doubled between 2001 and 2009.<sup>5</sup> The leftist government under President Morales has openly maintained its objective of using the nationalized exploitation of hydrocarbons as a strategy for developing the country economically and for financing ambitious social policies.<sup>6</sup> This strategy has enjoyed wide citizen support and had even been one of the main demands of social movements during the “Gas War” in October 2003 that had protested neoliberal policies and rallied for the establishment of a constituent assembly (Perreault 2008: 14 ff.).

Morales’ government also carried out progressive legal reforms regarding HR and environmental standards. In 1991 ILO C169 came into force in Bolivia, in response to the March for Territory and Dignity in 1990, organized by the Confederation of Indigenous Peoples of Bolivia (CIDOB). Nevertheless, in the following years, the high expectations tied to these legal reforms were frustrated, and in the likewise CIDOB-organized March for Territory, Land, Political Participation and Development in 1996, one of the central goals was the implementation of meaningful consultations and the adoption of a law that would regulate this procedure (Fuente Jeria 2005: 146). It was not until Evo Morales assumed the presidency that an SD (29033) was released in 2007 that regulated the consultation procedure in the hydrocarbon sector, very much in line with the visions of the indigenous organizations and international HR.

This decree stipulates the following: the competent authority for carrying out prior consultations is the Ministry of Hydrocarbons and Energy (MHE); the norms and procedures as well as the representative decision-making institutions of indigenous peoples and peasant communities are taken into account; the consultation mechanisms are established jointly between the MHE and the indigenous-peasant communities in each case; and consultations must comply with the phases of coordination and information, organization and planning, and execution of the consultation and agreement-finding. The results of the consultation shall be recorded in a signed agreement and the concerted observations should be considered fundamental criteria for the elaboration of the EIAs (Environmental Impact Assessments).

Moreover, in November 2007 Law 3760 was promulgated, which declares the UNDRIP national law.<sup>7</sup> During the constitutional change process, the indigenous organizations expressed their discontent with previous consultation procedures and demanded the inclusion of the right to FPIC in the new constitution. But, oppositional forces and representatives of the Movement towards Socialism (MAS) party favored a weaker version, the right solely to consultation, which was finally passed.<sup>8</sup> The new Electoral Law (Art. 39) from 2010 even ex-

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5 Data based on <<http://websie.eclac.cl/sisgen/ConsultaIntegrada.asp>> (20 July 2011).

6 Among them, newly created funds for children (Bono Juancito Pinto), for pregnant women and mothers (Bono Juana Azurduy) as well as for elderly persons (Renta Dignidad).

7 Bolivia is the first and, to date, only country worldwide to do so.

8 Art. 30.15 of the constitution establishes the right of indigenous peoples and peasant communities “to be consulted by appropriate procedures, and particularly, by taking into account their own institutions, every time

PLICITLY stipulates that the results of prior consultations are not binding. Moreover, in June 2010 it became publicly known that the executive branch was preparing changes to the hydrocarbon law that would limit the right to consultation, which was presented by the government as being a blockade to Bolivian economic development (Ribera Arismendi 2010: 64 ff.).

Aside from contestations over the legal design of prior consultations, tensions and contradictions regarding the extractivist orientation of the current government in practice have recently come to the surface and have stood in the center of contentious politics (see Tilly and Tarrow 2007). Among them, tensions between a (formally) plurinational state with the indigenous right to self-determination and a post-neoliberal, plural economic system versus the current enhancement of a centralist, state-driven economy; the governmental Pachamama and *vivir bien* discourse versus its practice of expanding the extractive frontiers to non-traditional zones of exploitation, national parks and protected areas;<sup>9</sup> and between the government's expressed goal of constructing a democracy with enhanced participatory and communitarian elements versus its increasingly authoritarian traits (see Wolff 2012; Humphreys Bebbington 2011).

The protest march by the local Mojeño, Yuracaré and Chimán peoples against the construction of a road through the indigenous territory and national park Isibore Securé (abbreviated TIPNIS), with neither an EIA nor prior consultations, started in September 2011 and has since attracted international attention. This street is part of the IIRSA (Initiative for the Integration of Regional Infrastructure in South America) and is supposed to connect the Bolivian departments Cochabamba and Beni. Among the aims of the marchers was the following: "We demand [that the government] respect [...] the right to consultation and participation in all projects of exploration and exploitation of hydrocarbons, mining and other mega-projects, streets and hydro-electric installations that could affect the indigenous peoples" (<[www.cidob-bo.org](http://www.cidob-bo.org)> 10 October 2011). The exhortation of the government to comply with the promise to implement meaningful consultations had already been expressed publicly in April 2010 at the Alternative Climate Summit in Cochabamba (Bolivia) – from which Working Group 18, which was critical of Bolivia's extractivist economic model, was excluded – and in June 2010 during the Seventh Great Indigenous March for Territory, Autonomies, and the Rights of Indigenous Peoples (also organized by CIDOB). In response to these protest activities, the government represented the critical social organizations as traitors to the "change process" (*proceso de cambio*) and/or as tools of oppositional forces like national elites or United States organizations (CIA; USAID).

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that legislative or administrative measures affecting them are planned. In this framework, the right to prior, obligatory consultation regarding the exploitation of natural resources in the territory they inhabit, carried out by the state with good will and in a concerted manner, will be respected and guaranteed."

9 For example, on 3 April 2008 YPFB and PDVSA signed a contract that led to the formation of the consortium YPFB Petroandina S.A.M. and allowed for the exploration of the Securé, Madidi, Chispani, Lliquimuni and Chepite blocks, which overlap national parks and indigenous territories in non-traditional areas for hydrocarbon activities in the north of La Paz, Cochabamba and Beni (Chumacero 2009: 160).

According to Bolivia's MHE, 21 consultations were held between 2007 and 2010. Most of them concerned planned explorations or the construction of gas conduits (see <[www.hidrocarburos.gob.bo](http://www.hidrocarburos.gob.bo)> 26 September 2011). In order to analyze the – more often than not contested – consultation cases, I have collected information from multiple sources, among them governmental institutions; non-governmental, HR and indigenous-peasant organizations; and hydrocarbon corporations. The collected data were analyzed systematically by referring to the criteria outlined in Table 1 and with the support of the program for qualitative social analysis, ATLAS.ti. For the sake of brevity, not all primary sources are cited in this section, but they are held by the author of this article.

As I already mentioned, it can be positively noted that in Bolivia's hydrocarbon sector prior consultations have been carried out, led by the state;<sup>10</sup> indeed, quite a few months-long deliberations and negotiations between state, corporation and community representatives have taken place that have resulted in signed agreements (see Bascopé Sanjines 2010; Costas Monje 2009; Giné and Villaroel 2011; Humphreys Bebbington 2011; Ribera Arismendi 2010; Martínez Crespo 2011; <[www.hidrocarburos.gob.bo](http://www.hidrocarburos.gob.bo)> 28 December 2011). Nevertheless, many procedures were deficient, in the following ways, among others: the corporations had already entered the territory at stake and established contacts with the local population before the consultation officially began; the executive branch or the corporations exercised pressure to get a fast “social license” instead of establishing real deliberations; the corporations and the MHE emphasized the socioeconomic benefits related to the projects while trying to hide expected damage; it was not clear who the representative institutions and persons were, as mistrust toward these organizations was great, or parallel organizations existed; during the consultation procedure negotiations with individual community members were held and local authorities were corrupted; the transmission of complete information about the planned project was absent or the quality of the EIAs was insufficient; many prior consultations were complicated by increasing polarization and conflicts within and between local communities (ibid.).

Beyond this general list of frequent shortcomings and challenges, it is worth it to look at a few of these cases in more detail and to see how they were shaped by specific dynamics, practices, context conditions and other influencing factors.

#### 4.1 The Ipati-Aquio Case

In 2007 a prior consultation was carried out with the Guaraní communities from Alto Parapetí, Iupaguasu and Muyupampa in Santa Cruz and Chuquisaca about the planned explorations in the Ipati-Aquio block by the French corporation Total E&P. Bolivia's Guaraní peoples represent 1.5 percent of the total population according to the last census (2001), but just over 83 percent of Bolivia's gas reserves lie under Guaraní land in the Chaco region (Perrault 2008: 9).

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10 In many cases in Latin America, this state duty has been delegated to the respective corporations in charge (e.g. Rodríguez-Garavito 2010 on Colombia).

Humphreys Bebbington states that, nevertheless, the indigenous peoples have been the ones least served by the gas in the region (Humphreys Bebbington and Bebbington 2010: 145). The data about the recent consultation on the Ipati-Aquio block indicate that this participatory process probably has not changed much about this general trend. The procedure started in June 2007 and lasted five months. It included 241 participants, among them 149 representatives of the national, departmental and local Guaraní communities, though, as usual, very few of them were women (Rojas 2008). Originally, 21 objections were made against the planned project during the consultation procedure, all but five of which were accepted by the corporation in charge, who then took corrective actions (see Giné and Villaroel 2011: 46). The MHE, the corporation and the consulted participants finally signed an agreement.

A process that at first sight seems like a rather “good practice” example turned out to be highly contested afterwards. Some months after the agreements had been signed, the consultation was declared invalid by the regional and national Guaraní organizations. They argued that indigenous authorities had been “bought” by the corporations: “The project got the green light, but it was under pressure, buying the conscience of the authorities of the indigenous representatives [...] the communal authorities have been given good jobs” (ibid.: 46). Many community members complained that they had not been informed: neither about the consultation nor about the planned exploration of hydrocarbons. Moreover, due to the fact that no specific norms exist that establish adequate procedures for calculating the appropriate compensation and indemnification payments, each community negotiated separately with the corporation, achieving very distinct results. The agreed sums were transferred to the bank accounts of the local indigenous organizations, but due to the lack of investment plans and transparency within the organizations, a great amount of this money disappeared without having been invested in the interests of the communities (ibid.: 53 ff.).

#### **4.2 The Lliquimuni Case**

The Lliquimuni block is located in a non-traditional hydrocarbon area in the north of La Paz and is of strategic interest for the Bolivian government, as the Bolivian–Venezuelan consortium YPFB PETROANDINA S.A.M. is in charge of the operations, and the Bolivian government argues that the resource extraction from this region will contribute to more regional equality within the country. Among the affected communities are indigenous Mosestén and Leco peoples and settler communities that migrated into this area more recently. As in many other places in Bolivia, social conflicts between these two groups over lands, natural resources and decision-making power are virulent. The government first carried out a short, deficient and superficial prior consultation with the settler communities (who have close ties to the government), which resulted in a signed agreement on 14 October 2008 (Bascopé Sanjinés 2010: 67).

The prior consultation with the indigenous peoples lasted longer and was more contentious. In this case, the EIA was incomplete, not all affected communities were a party to the

consultation, and representatives of the government and the hydrocarbon company carried out negotiations with individual community members on several occasions. In addition, according to critical voices, the umbrella organization of the Mositén and Leco peoples, CPILAP (Central de Pueblos Indígenas de La Paz), was excluded from the deliberative procedure and instead a parallel organization that was more supportive of the planned project, composed of the communities directly affected by the seismic tests, was given an important role (see CEADL 2010: 28-31; Martínez Crespo 2011: 128; Costas Monje 2009: 159-172; CPILAP 2008).

In response, the government started a public campaign in which it tried to delegitimize the CPILAP by stating that it was being instrumentalized by USAID to debilitate the government. In response to this accusation, CPILAP president José Ortiz declared in a press conference: "The CPILAP analyzed the exploration project in the north of La Paz thoroughly, we have been supporting the change process, we are not the opposition. We want to support the change process, any development project in the north of La Paz is welcome, but we want to be consulted" (cited in Costas Monje 2009: 165). Evidence indicates that the organizational fragmentation in this case was related to the fact that the directly affected communities were not willing to share their compensation payments with other local communities and their regional representatives (*ibid.*: 163 ff.). Anyhow, a series of social conflicts within and between local communities resulted from the consultation procedure, as did a legitimacy crisis for the CPILAP.

### 4.3 The San Isidro Case

In the San Isidro block (Santa Cruz), the exploration of the Tacobo and Tajibo fields was carried out by Pluspetrol, in cooperation with the public corporation Yacimientos Petrolíferos Fiscales Bolivianos (YPFB). This is a traditional area for hydrocarbon activities; the local Guaraní population already had relevant experience and skills that proved to be crucial in shaping the consultation procedure. In December 2009, the responsible state entities organized meetings with the authorities of the affected communities and, as usual, they started implementing a deficient prior consultation. The underlying EIAs were incomplete and far too general, the local community members were not well-informed, the process was not transparent, the dialogue was not carried out in a socially and culturally adequate form, and the regional organization from the Asamblea del Pueblo Guaraní (APG) was excluded (Bascopé Sanjinés 2010: 159 ff.).

But in this case, the Guaraní organizations took a leading role in the consultation procedure. They elaborated a new agenda for the procedure; demanded that the regional and local authorities as well as all community members be well informed about the process; carried out new field inspections jointly with state representatives to complement the deficient EIAs; and ensured the support of experts and consultants during the process (*ibid.*: 266-267). The

local socio-environmental surveillance operators – legally sustained by SD 29103 from 23 April 2007 – played an important role in revising and improving the EIAs as well as in formulating changes on the originally proposed project. The government and the corporation grudgingly accepted the requirements proposed by the APG, and an agreement was reached. It contained changes to the intended project, including the translocation of seismic lines in order to protect water resources, the restriction of water use by the corporation to one specific well, and the implementation of more rigorous monitoring programs such as a transparent early-warning system (*ibid.*: 273-289). With regard to monetary compensation, the APG initially demanded 580,000 USD but finally accepted the offer of 100,000 USD (*ibid.*: 238), with the fund being administered by the APG.

## **5 Enabling and Constraining Factors in Democratizing Resource Governance**

The adoption of a legal norm that regulates the consultation procedure in the hydrocarbon sector (SD 29033) proved to be a necessary condition for improving prior consultations in practice. This fact becomes particularly clear when comparing current consultation procedures in this sector with ones carried out before the adoption of this norm (see Paz Patino 2005) or with ones carried out in other economic sectors, which lack a similar regulating norm and where consultations generally have been absent (DPLF 2011; Bascopé Sanjines 2011).

Nevertheless, consultations regarding the exploration, exploitation and transportation of gas continue to be a highly contentious issue in contemporary Bolivia. The respective struggles in the juridical and political fields should not be automatically seen as negative phenomena. Rather, it is worth mentioning that the mobilizations of indigenous and other citizen organizations contributed to important institutional changes (e.g. the ratification of ILO C169 in 1991) and to the improvement of consultation procedures (e.g. the San Isidro case). Among the contentious repertoires of the communities affected by extractive industries and their allies have been legal mobilizations, protest activities, the publication of official statements, and bargaining processes with government and corporation representatives. All of that not only caused conflicts but also bore the potential to improve the deliberative position of the claim makers in regards to the state and extractive corporations. In the following, I will discuss other enabling and constraining factors in the implementation of meaningful consultations, by referring to HR standards and those of deliberative democracy (see Table 1).

Undoubtedly, the main tension regarding the rights to consultation and to FPIC in Bolivia and elsewhere is whether they guarantee the communities a genuine decision-making role or whether they give them only the opportunity to express their opinions. Therefore, the single most conflictive issue is whether the results of the consultation are binding – including the veto right, in case the communities wish to refuse consent. This question has been extensively and controversially debated, not only by practitioners and in academia, but also in several courts all over Latin America and by the Inter-American Commission on Human Rights

(IACHR) (Rodríguez-Garavito 2010; Laplante and Spears 2008). Currently, the least controversial standpoint is that indigenous peoples have the veto right whenever the project at stake

- 1) implies their resettlement,
- 2) would deposit toxic materials in their territories,
- 3) cause the loss of their cultural identity, or
- 4) if the project would have severe social, cultural or environmental impacts on indigenous territories (see DPLF 2011: 24).

But, this understanding is still very vague and there is ample room for interpretation.

Not only have HR scholars and activists reflect upon the decision-making role of civil society in state policies, scholars of deliberative democracy have also done so. For example, Fraser (1990) distinguishes between the opinion-forming and the decision-making role of civil society in her definition of “weak” and “strong” publics. Her conviction is that strong publics with decision-making competencies would further democratization and social equality. But, governments worldwide – among them the Bolivian one – have tended to prioritize strategic economic interests and so-called “national interests” over livelihood issues and local conceptions of self-determined development, thereby reducing the real decision-making power of affected communities.

In contemporary Bolivia, the general democratic system and current state-society relations contain some relevant constraining factors for the democratization of resource governance. First, the horizontal control of governmental power is weak and the independence of the judiciary is questionable, particularly after the direct elections of judges to the highest courts on 16 October 2011. Therefore, some indigenous-peasant organizations have preferred submitting their claims to international organizations. For example, the indigenous organization Consejo Nacional de Ayllus y Markas del Qullasuyu (CONAMAQ) submitted the case of the allegedly deficient prior consultation concerning the Corocoro mining project to the IACHR at its 140<sup>th</sup> session on 28 October 2010. Rafael Quispe, the director (“*mallku*”) of CONAMAQ’s commission for extractive industries, justified this measure as follows: “What else can we do in Bolivia? The government has absolute political power, a two-thirds majority in the legislature; it names judges and prosecutors, the constitutional tribunal, the electoral organ. Where else should we have made our claims?” Second, governmental institutions tended to present the consent given in the framework of prior consultation as a political statement in favor of the “change process,” embedded in their general corporatist, clientelist and cooptive relationship patterns with civil society (see Schilling-Vacaflor 2011). The other side of the coin has been the delegitimization and marginalization of critical voices from deliberative procedures, by representing them as government opponents. In addition, the corruption and persuasion of local community members by state and corporation personnel occurred frequently in Bolivia’s consultation cases. But, as many of these strategies are located in legal “limbo,” they are generally difficult to sanction formally. At the very

least, their disclosure in public debates can considerably harm the reputation of the responsible actor.

Referring to the standard of deliberative democracy that the mediators of the negotiation should be impartial and equally accepted by all parties involved, I found that this has generally not been the case. The problem has been that in Bolivia – as in most other Latin American countries – the MHE has been responsible for carrying out the consultations. Obviously, this entity is not impartial and clearly has a conflict of interest, as it simultaneously acts as judge and interested party. This problem became particularly clear in the Lliquimuni case, where the corporation in charge largely lies in the hands of the state.

Another constraining factor in implementing a genuine dialogue in a climate of confidence proved to be time pressure. Deliberations are generally time-consuming and expensive, and the state and corporations aim to get the “social license” as quickly as possible. For example, in the case of the construction of a complex for separating gas from liquid in Rio Grande, the president of YPF, Carlos Villegas, attempted to accelerate the consultation process, arguing: “We signed a contract for the construction of this complex with the Astra Evangelista S.A. corporation that contains daily penalties; any delay would imply an economic cost for YPF and, thus, for the country.”<sup>11</sup> But, the acceleration of consultation procedures frequently proves counterproductive, as in the long term their deficiencies are likely to come to light and to instigate anger, protest activities, social conflicts or even the revoking of obtained agreements (see Ipati-Aquio case and Laplante and Spears 2008). HR standards indicate that the right to consultation does not end with the signing of an agreement, but that constant dialogue between the parties must continue. Deliberative theorists like Deveaux (2003: 792 ff.) moreover claim that agreements can be revised and adapted in the future.

Most of the representative indigenous-peasant organizations that participated in the consultations analyzed here were elected by their own norms and procedures. But, the analyzed consultations showed that not all parts of local communities were equally represented: for example, frequently, more men than women participated, and in some cases government-critical organizations were marginalized. Power asymmetries within heterogeneous local populations tended to contribute to giving a louder voice to those individuals and groups that are more well-off, thereby possibly further exacerbating inequalities. Deliberative inequalities – not only between the state (and the corporations) and the communities, but also those at the local level – complicated the implementation of meaningful consultations. The widespread misconception of indigenous-peasant communities as homogeneous groups with a single “shared will,” without taking into account their dynamic, multiple and overlapping identities and interests, has contributed to increasing polarization and local conflicts.<sup>12</sup> Hence, mechanisms for dealing with diverse and divergent views and interests, without sidetracking local forms of organization, are badly needed for improving consultation pro-

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11 See <[www.reporteenergia.com](http://www.reporteenergia.com)> (23 September 2011).

12 See also Masaki (2009) on similar problems in prior consultations in western Nepal.

cedures. The greater inclusiveness of the composition of deliberators – as proposed by many advocates of deliberative democracy (e.g. Deveaux 2003; Benhabib 1996; Bohman 1996) – is likely to account better for the existing heterogeneity of local populations, in order to both avoid the exacerbation of power asymmetries and guarantee that minority interests do not go unheard.

The requirement of providing complete information to the affected communities has generally not been fulfilled. The given information often did not contain detailed descriptions of flora and fauna, and it lacked data concerning expected direct and indirect impacts. Therefore, in many cases it has been up to the communities to press for more specific information and to complement the deficient documents. These information deficits created situations of uncertainty and lack of knowledge within local populations, which contributed to polarized and unfounded opinions, a feeling of impotence, and mistrust toward state, corporation and community representatives. Current international HR standards only establish that complete information should be transmitted to the local communities, without reflecting upon the question of how to spread the information within them. Again, deliberative democracy's requirement that deliberations should be transparent and scrutinized by media and other citizens as well as expand from formal arenas to broader public debates (see McCormick 2007; Deveaux 2003) proves helpful. NGOs (for instance, HR and environmental organizations) frequently get involved in consultation procedures and shape media discourses about them. Though, they sometimes play ambiguous roles, especially when they have their own agenda, support only one side of local populations, and contribute to the radicalization of opinions and the polarization of social groups with divergent views (see, for example, Pfaff Czarnecka 2007; Rosenthal 2006).

The Bolivian state representatives in charge of carrying out the consultations showed certain degrees of sensitivity regarding their social, cultural and linguistic adequacy. Many of these processes have counted on translators in local indigenous languages and have applied diverse teaching methodologies with visual support, models of the landscape, and workshops with moderators who have good local knowledge. Nevertheless, the information about the planned projects generally contains very technical details that are quite difficult for laypeople to understand, and even harder for persons with low levels of formal education, as frequently is the case with members of indigenous and peasant communities. Thus, the presence of experts familiar with local realities that counsel the affected communities is a necessary condition for meaningful consultations. The participation of indigenous socio-environmental monitors, experienced in registering the socio-environmental impacts of hydrocarbon projects, proved to be helpful for informed debates between community members and state or corporation representatives (see San Isidro case).

The establishment of agreements was the aim of the consultations, and many of them influenced planned measures. The observations of the community members were often incorporated into the EIAs and some solutions for reducing expected environmental and sociocul-

tural impacts have been found. Thus, they have the potential to contribute to HR protection. In the San Isidro case, the communities even became empowered as a result of the deliberative process. Anyhow, it is questionable whether prior consultations can open windows of opportunity for alternative paths of development and whether counter-hegemonic values and forms of knowledge and argumentation can succeed in these deliberations. Importantly, the entanglement of financial and livelihood issues in consultation procedures is likely to produce adverse effects regarding environmental and HR protection by opening possibilities for questionable tit-for-tat strategies. This can be risky, as sustainable development paths might be played off (by the state as well as by civil society actors) against short-term economic benefits.<sup>13</sup>

The lack of clear standards for establishing compensation and indemnification payments also had adverse effects. It led to situations in which the power of local players rather than the expected damage and impact ended up being decisive for the establishment of the transferred sums. In more general terms, it is worth it to mention Rodríguez-Garavito's (2010: 273, 276) argument that in prior consultations a neoliberal logic based on freedom of contract and due process rights is confronted with the logic of HR protection, including indigenous self-determination. Putting a monetary price on the loss of livelihood and sociocultural aspects enhances neoliberal approaches and the mercantilization of nature. In addition, indigenous peoples and communities affected by resource extraction are generally more successful when submitting legal claims concerning improper consultation procedures than ones concerning specific substantive problems (e.g. the violation of environmental or social rights). With these phenomena in mind, Rodríguez-Garavito (2010: 273) speaks of a displacement effect, meaning "that the emphasis on procedure postpones or mitigates, but does not eliminate, substantive disagreements." It is likely that in the future the discontent concerning substantial interests will increasingly come to the fore of contentious politics.

## 6 Conclusions

In the context of the further enhancement of extractive industries in contemporary Latin America, contestations over prior consultations with the affected communities have increased in number and intensity. When done properly, these procedures are said to have the potential to contribute to democratization and HR protection, which are of particular importance in resource-reliant countries. This assumption, though, still lacks empirical foundation. This article aims to contribute to reducing this research gap by analyzing and discussing whether

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13 In this context, Barstow and Baker's (2008) finding that the recognition of community-based property rights over lands and natural resources can be helpful for the protection of their livelihoods and culture should be taken into account.

and under which conditions prior consultations democratize resource governance and help to guarantee the HR of affected populations.

I argue that prior consultations are important for democratization as they can give a voice to persons and groups in decisions that have profound impacts on their lives and future development. The right of indigenous peoples to prior consultations and to free, prior and informed consent (FPIC) has been enshrined in international HR norms; it is considered a fundamental right, as it represents not only a (procedural) right in itself, but also a measure for protecting other related (substantial) rights. I show that the standards applied by scholars of deliberative democracy and of HR to assess, respectively, just deliberations and meaningful consultations greatly overlap and complement one another. Hence, bringing those academic strands together can help improve consultation procedures as researchers can learn from the knowledge of scholars of deliberative democracy; the empirical data provided by the great variety of deliberative processes in the framework of consultations in Latin America can be valuable for further elaborating deliberative theories, particularly regarding deliberations in contexts characterized by cultural pluralism and social inequality.

This article as well as most previous research on prior consultations falls short in giving meaningful importance to the perspectives of local actors on these processes, a shortfall that should be overcome by further investigations. Hence, I plan to carry out in-depth case studies with ethnographic methods to examine how normative frameworks based on HR doctrine and on deliberative theories interact with local norms and perspectives on accurate decision-making. Simultaneously, by connecting the profound knowledge on specific cases, comparative analyses could help identify their common and unique characteristics and elaborate middle-range theories on meaningful consultations.

Seen through a deliberative theory lens, we find that most enabling factors for implementing meaningful consultations are those that contribute to reducing deliberative inequalities between the state, the corporation and the communities, as well as within local populations. Among those factors are: a progressive and specific legal framework; communities with access to expert knowledge and relevant information (for instance, reliable Environmental Impact Assessments), mobilization capacity and the opportunity to shape public debates; the support of international HR advocates and organizations; and the transparency of the process, including broader public debates and media scrutiny. In the same vein, generally constraining factors were those that further exacerbated deliberative inequalities like the weak horizontal control of governmental power; the cooptation and corruption of certain community members and groups, and the marginalization of others by state and corporation representatives, as well as power asymmetries, inequalities and social conflicts between and within local communities.

Moreover, I argue that it makes sense to complement HR norms on meaningful consultations with standards of deliberative democracy to better understand frequent shortfalls and elaborate possible measures for their improvement. For example, HR norms require only that

the state comply with its duty to carry out the consultations, but deliberative theories further require that the mediating institution be impartial. Our analysis of Bolivian consultation cases gave evidence that – due to its lack of impartiality – the Ministry of Hydrocarbons and Energy is not the best entity to run the design and implementation of prior consultations.

Regarding the composition of the consultation participants, HR norms stipulate that the representative institutions must participate in the process, but they fall short in accounting for the heterogeneous groups and interests that generally exist at the local level. Moreover, they do not reflect upon how to deal with power asymmetries within local populations. These misconceptions and the lacking specificity of the procedure tend to contribute to social conflicts, polarization, and the exacerbation of power asymmetries and inequalities of local populations. In the same vein, HR norms establish only that complete information about the planned project must be transmitted to the representative local institutions, but by referring to deliberative theories we can argue that this is not sufficient. Rather, the spread of information within local populations and inclusive, transparent, informed and egalitarian deliberations in public spheres are of crucial importance.

Taking into account the identified enabling and constraining factors could help bring prior consultations closer to being tools of emancipatory transformation. Nevertheless, I believe that in a context of a globalized economic system that is not directly bound by HR norms, combined with governments that tend to declare economic growth *the* indicator for development and the single most important “national interest,” the decision-making role of local communities will continue to be rather limited. Thus, the deliberations at local levels should go hand in hand with broader deliberations about desired paths of development in diverse national and international spheres.

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