NEGOTIATING CONSENT
LESSONS IN DEFENDING THE RIGHT TO DECIDE

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Indigenous peoples have long asserted and defended their rights and customary land tenures against the unlawful enclosure of their territories. This briefing paper distills lessons from Oxfam’s work defending community consent in Peru. Drawing on research published by Oxfam partners, it seeks to contribute to collective thinking around ways to improve the implementation of free, prior, and informed consent (FPIC) processes, processes that are manifestly political. With land inequality worsening, land grabbing continuing unabated, and basic environmental and social protections being rolled back, upholding the standard of consent is more important than ever.
SUMMARY

As the urgency to respond to the climate crisis grows and as countries fight to attract investment dollars as part of their pandemic recovery plans, competition for the world’s finite land resources will continue to grow. For the world’s Indigenous peoples, who are estimated to be custodians of an area of land twice the size of Africa, such increased competition for land poses significant threats from extractive industries, agribusiness, forestry, carbon offsetting, and other infrastructure.

In the last three decades, important global normative progress has been made in relation to the recognition of the rights of Indigenous peoples. The sheer growth in the number of standards, policies, and jurisprudence requiring the free, prior, and informed consent (FPIC) of Indigenous peoples before projects can move ahead is an example. In practice, of course, FPIC is just one element of the demands of the Indigenous peoples’ movements. The main demand is for a new relationship between their peoples, the state, and private sector actors.

Companies spanning the extractive industries and agribusiness sectors, as well as international financial institutions and global banks, today recognize FPIC and have incorporated it into their corporate policies and lending conditions. Yet translating these company and investor commitments into improved outcomes on the ground has not been easy.

This policy brief aims to contribute to action to improve the implementation of FPIC processes. It does so by distilling lessons from Oxfam’s work defending community consent in Peru, work that has extended across almost two decades. The overall purpose is to demonstrate the relevance of these lessons for those seeking to address similar injustices in other regions across the globe.

Peru is an important context in which to examine FPIC in practice for two main reasons. First, the last decade has seen a dramatic expansion of extractive industry concessions, which has heightened tensions with Peru’s Indigenous peoples who, alongside rural communities, collectively manage almost 50 percent of Peruvian territory. Second, Peru was the first country in Latin America to introduce, ten years ago, a national Indigenous peoples’ consultation law.

In the last three years, Oxfam partners in Peru—Cooperacción, Organización Nacional de Mujeres Indígenas (ONAMIAP), and Pueblos Indígenas Amazónicas Unidas en Defensa de Sus Territorios (PUINAMUDT)—have published research examining the politics and practices of the implementation of this law.

The reports titled Consúltame de Verdad (Consult Me for Real) and Sin Mujeres Indígenas, No! (Without Indigenous Women, No!) analyzed the consultations and agreements reached in Peru between 2012 and 2018. They document important issues with the design of the law and its implementation, some of which were foreshadowed by Indigenous leaders.

“FPIC requires governments to cede power to Indigenous and Tribal peoples over key decisions that would affect their rights.”
during the drafting of the law and its regulation. The institutional and political shortcomings have led Indigenous Peruvians to call for the law to be revisited.

*Sin Mujeres Indígenas, No!* went a step further and examined these consultations to understand the specific barriers that Indigenous women face in participating fully in these decision-making processes. This research concluded that while some efforts have been made to bring a gender lens to public policy reforms like this one, the results have varied widely from case to case.

The report titled *Sin Derechos, No Hay Consulta* (Without Rights, There Is No Consultation) documents the community consultation process implemented as a precondition to the proposed 30-year extension of oil activities at Peru’s oldest—and most controversial—oil block, Block 192 (formerly Block 1AB). It unpacks the underlying conditions within which the 2015 consultation took place, describing how, despite the ongoing public health emergency—documented in the report titled *La Sombra del Petróleo* (In the Shadow of Oil)—latent conflict, broken promises, and constantly fluctuating levels of political will, Indigenous leaders demonstrated a commitment to dialogue and build agreement on the future of oil production in the region.

**KEY TAKEAWAYS**

Conflict is inevitable when extractive industry frontiers expand and encroach on the lands and territories of Indigenous peoples. The safeguard provided by FPIC will continue to be of paramount importance for communities—but only if it is implemented effectively. Increasing the effectiveness of FPIC will require:

- Ensuring there is political space for people to speak out—even if they voice opposition to or criticism of an investment project. The ensuring of political space is a fundamental precondition or threshold for an effective FPIC process;

- companies being prepared to cede power to Indigenous peoples, including using their influence to positively shape power relationships and institutional arrangements that can support the full and meaningful participation of women and men. Companies must commit not to proceed with a project if community consent is not secured;

- strengthening communities’ negotiating power by improving coordination, information sharing, and coalition building among and between Indigenous peoples and allies, as well as making more effective use of nonviolent direct action. Indigenous led organizing around Block 192 is emblematic of how these tactics can be combined;

- understanding the differential impacts of mining, oil, and gas projects on women and other vulnerable groups, and the additional (existing) forms of discrimination they face. Community consent processes should support efforts to overcome these barriers (e.g., literacy programs, supporting women’s leadership, and securing women’s access to communal land and forest resources);
• adequately resourcing community consent processes at each of the key decision points in the project cycle, including ensuring communities have access to the independent technical and legal support they need to negotiate on a more equal footing;

• enshrining the standard of consent in national law when Indigenous peoples seek it. Doing so gives effect to international law and jurisprudence, but it also creates legal certainty for project developers and investors, while helping to balance negotiating power between Indigenous peoples, mining companies, and government agencies. The standard of consent requires that companies and governments respect when Indigenous communities decide they do not want projects to proceed in their territories.

With land inequality worsening, land grabbing continuing unabated, and basic environmental and social protections being rolled back, the safeguard of FPIC is more important than ever. Yet, despite normative recognition of FPIC—and public commitments by major multinational companies, international financial institutions, and global banks to apply the standard of consent—power imbalances continue to undermine the quality of agreements being reached. It is time companies, investors, and others look beyond paper commitments and take the steps necessary to ensure quality agreements are reached with Indigenous peoples and are maintained across the life of projects.
1 INTRODUCTION

Faced with ever-more catastrophic droughts, forest fires, floods, and plagues—driven by the extraction, transportation, burning of fossil fuels, and the deforestation of the world’s forests—public attention on land, land use change, and land rights has never been stronger.

Indigenous peoples have long asserted and defended their rights and customary land tenures against the unlawful enclosure of their territories. Throughout history, the colonial imperatives to widen and deepen “extractive” frontiers—whether for sugar, oil, gas, mining, logging, or commercial agriculture—have consistently been used to justify these enclosures and legitimize the violation of Indigenous peoples and the dismissal of their land rights. They are still on the frontlines of these struggles and their activism continues to drive the growing recognition of Indigenous peoples’ rights.

Today, Indigenous leaders everywhere are sounding the alarm and alerting the world to the way the global pandemic (and recovery from it) and the climate crisis risk are being manipulated to further undermine their rights. Stark new evidence shows that since March 2020—while public attention was focused on the rapidly escalating public health crisis—governments actively took steps to weaken key environmental and social safeguards, including:

- Promoting the expansion of new energy projects, including mining, infrastructure, and logging activities;
- Failing to enforce existing protections, especially around natural protected areas;
- Passing new laws that undercut public participation and community consultation processes; and
- Directly and indirectly sanctioning intimidation, criminalization, and attacks on community leaders who sound alarm bells and speak out. In fact, 2020 saw a record number of environmental and human rights activists killed for defending their lands and territories.

Environmental and social safeguards have long been framed as unnecessary red tape that create barriers to investment. Calls for unrestrained investment as part of the economic recovery from the pandemic are growing. So too are calls to sidestep these safeguards and fast-track new mining approvals, lest global supply of the key minerals fall short of what is needed to build the low-carbon infrastructures we need to get out of the climate crisis.

These claims have always remained unsubstantiated and continue to be. But that has not stopped governments from using their powers to give effect to them. And with raw material commodity prices soaring, the rush to extract at all costs is gaining momentum.

“Across the world, an area of land twice the size of Africa—some five billion hectares—belongs to Indigenous Peoples and local communities whose legitimate land rights are not yet recognized.”

“..."
A LEGAL RIGHT PROTECTED BY LAW

For Indigenous peoples, the power to give or withhold consent to extractive industries or other large-scale infrastructure projects is a right protected by international law, one that has become a crucial safeguard for the protection and realization of their collective autonomies, resilience, and self-determination. In practice, of course, FPIC is just one part of the demands of the Indigenous peoples’ movements, whose main demand is for a new relationship between their peoples, the state, and private sector actors. And this is why defending the right to FPIC has been a core pillar of Oxfam and our partners’ campaign and advocacy work, cutting across land, agriculture, energy, and extractive industry programs.

While FPIC processes vary depending on the distinct decision-making customs of each Indigenous nation, there are common elements:
- Free—from coercion and manipulation;
- prior—to each phase of project development;
- informed—meaning full and timely access to all relevant project information in formats that ensure understanding of project risks and impacts and promote engagement;
- consent—requires that communities have the power to give or withhold their consent to a project. Consent is a collective decision made by the community or communities, based on their own decision-making processes.

FPIC is being interpreted as a best practice standard for affected local communities who do not fit the international law definitions of rights-holding Indigenous entities. This is especially the case across the African continent, where courts are finding the right to give or withhold consent exists in many customary law systems, despite these consent rights having been ignored or distorted in many contexts, to the detriment of most community members. In this way, FPIC represents a principle of best practice for sustainable development generally, a crucial project safeguard that can increase the legitimacy of a project in the eyes of all rights holders.

BUT IMPLEMENTATION CONTINUES TO LAG BEHIND

In the three decades since the International Labour Organization (ILO) Convention 169 entered into force, important global normative progress has been made, as evidenced by the sheer growth in the number of standards, policies, and jurisprudences requiring FPIC. Companies spanning the extractive industries and agribusiness sectors, as well as international financial institutions and global banks, today recognize FPIC and have incorporated it into their corporate policies and lending conditions.

“FPIC requires governments to cede power to Indigenous and Tribal peoples over key decisions that would affect their rights.”

“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.”
Yet translating these company and investor commitments into improved outcomes on the ground has not been easy. Efforts to explain and address these gaps between policy and practice vary. Important analysis has focused on understanding the effects that the presence—or absence—of dedicated legal frameworks has had on outcomes for Indigenous peoples. And while technical design and institutional arrangements of FPIC processes remain important, an understanding of power and politics is increasingly seen as key to explaining the quality of FPIC processes.

ABOUT THIS REPORT

This synthesis aims to contribute to action to improve the implementation of FPIC processes. It does so by distilling lessons from Oxfam’s work defending community consent in Peru, work that has extended across almost two decades. The overall purpose is to demonstrate the relevance of these lessons for those seeking to address similar injustices in other regions across the globe.

Peru is an important context in which to examine FPIC in practice for several reasons. First, notwithstanding the historical significance of mining and hydrocarbons extraction, the last decade has seen a dramatic expansion of extractive industry concessions, which has heightened tensions with Peru’s Indigenous peoples who, alongside rural communities, collectively manage almost 50 percent of Peruvian territory. Second, Peru was the first country in Latin America to introduce, ten years ago, a national Indigenous peoples’ consultation law. Reflecting on this anniversary, Oxfam partners in Peru—Cooperacción, ONAMIAP, and PUINAMUDT—have published research reports examining the politics and practices of the implementation of this law.

Consúltame de Verdad (Consult Me for Real) analyzed the first 38 formal consultations that were concluded between 2012 and 2018. For each of these formal processes, they examined what was being consulted, who decided the content (and therefore the scope of the consultation), how the process took place, and what the outcomes or results of the processes were. The research concluded with highlighting important institutional and political shortcomings in how the law and supporting regulation were being implemented, shortcomings that have led Indigenous Peruvians to call for the law to be revisited.

Sin Mujeres Indígenas, No! (Without Indigenous Women, No!) examined these same consultations (plus an additional five that had been concluded in the interim) to understand the specific barriers that Indigenous women face to participating fully in these decision-making processes. This research concluded that while some efforts have been made to bring a gender lens to public policy reforms like this one, the results have varied widely from case to case.

Sin Derechos, No Hay Consulta (Without Rights, There Is No Consultation) provided the most extensive study of the consultation process, which was initiated in 2012 and concluded in 2015, and which was a precondition to the proposed 30-year extension of oil activities at Peru’s oldest—and most

“Almost all countries in Latin America have ratified ILO Convention 169 but real consultation (not to speak of free, prior and informed consent) rarely occurs.”

“FPIC is fundamentally about shifting power over certain decisions from one set of historically privileged actors to another set of actors, who have typically been marginalized; as such, it is unsurprising that attempts to implement the right would be highly politicized.”

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controversial—oil block, Block 192 (formerly Block 1AB). By situating the current consultation process in a four-decade-long struggle of Indigenous peoples to secure justice and remediation for the legacy of oil spills and contamination that have plagued oil production, this research reveals several important successes and lessons, not least the importance of strategies and tactics to hold governments accountable to negotiating in good faith with Indigenous peoples.

Environmental remediation and reparations for public health impacts were left unresolved in the initial negotiations to extend the oil concession over Block 192. *La Sombra del Petróleo* (*In the Shadow of Oil*) tells this history. Using government data, it documents the impact of 474 oil spills between 2000 and 2015, which contaminated more than 2,000 sites, the majority of which remain contaminated. Spills were documented not only in Block 192, but also in the adjoining Block 8, 31 (B, D, and E), 64, 67, 95, 131, as well as along the length of the North Peruvian pipeline that transports the crude oil to the Peruvian coastline for export and refining. The cumulative failure to remediate these sites has produced a major public health crisis, according to Peru’s Ministry of Health. With the numbers of Peruvians exposed to heavy metals from mining and hydrocarbon activities growing exponentially in the last decade—and with only 0.06 percent of the national health budget being allocated to address this issue—this case is a stark reminder of what is at stake when governments fail to hold mining, oil, and gas companies accountable to basic environmental and social safeguards. In cases like this one, it should come as no surprise when Indigenous peoples withhold their consent to new projects.

While each of these pieces of research takes a different analytical and methodological approach, they all speak to the contested relationships between the Peruvian state and Peruvian society in general with Indigenous peoples, sets of relationships that are characterized by histories of marginalization, exclusion, and racism.

Transforming these inequalities is no simple task. Each of these pieces illustrate some of the political challenges in implementing what was, at the time, a significant achievement in terms of recognition of the rights of Peru’s Indigenous peoples. Importantly, each provide clear and concrete recommendations for tackling some of the deficiencies that have been identified to date.
2 PERU’S NATIONAL CONSULTATION LAW

On June 5, 2009, Peruvian police clashed with Awajún and Wampis protesters who were peacefully demonstrating against government plans to further open the Amazon to mining, oil, and gas projects, and plans to strip them of their rights to give or withhold consent to new projects. Twenty-three police, 5 Indigenous protesters, and 5 non-indigenous protesters were killed, and more than 200 people were injured, after security forces broke up the peaceful blockade on a stretch of highway in Bagua, in the northern Peruvian Amazon, some 800 kilometers from the capital, Lima.39

Public outrage about the violence at Bagua paved the way for political support for a national consultation law that sought to give effect to the protections in ILO Convention 169. Peru’s Prior Consultation Law40 was passed on September 6, 2011, with its supporting regulation coming into effect on April 2, 2012. It was the first law of its kind enacted in Latin America.41 And while it was historic, under the final law the Peruvian government held onto the power to override an agreement reached at the community level. This significant departure from the evolving international norms is something that in practice has left communities, forced into negotiating extractive industry projects, in a vulnerable negotiating position.

Between 2012 and 2018, 43 consultations were conducted in accordance with the law. Of these, the majority (72 percent) related to mining (15), oil and gas (12), or energy (3) projects. Oxfam partners analyzed these consultations and documented significant implementation issues, many of which were foreshadowed by Indigenous leaders during the drafting of the law and its regulation.43 These include:

- successive governments and ministries sought to limit who should be consulted, which often exacerbated existing power dynamics within communities, pitting some communities against each other. And this was despite the already narrow definition in the law of who is entitled to be consulted;

- consultations showed a consistent failure to first consult communities on the process, format, timelines, and content of the consultation [also known as the pre-consultation phase]. This failure to consult also extended to decisions about whether to enter dialogue with the government in the first place. The Wampis Nation, whose territories extend across the Santiago and Morona Rivers, along the border with Ecuador, have determined not to enter negotiations with the Peruvian government about future oil concessions or other extractive industries;44

- each of the consultations showed evidence of asymmetries of knowledge between Indigenous participants and the government counterparts. These asymmetries manifested in many ways, including: [a] when and where the consultations occurred; [b] the heavy reliance on

“In [Peru and Bolivia], the State has implemented consultations without changing the status quo: Indigenous communities do not have a decisive say in extraction activities; they lack continuous channels for political participation; their basic social and economic needs are not met; and broader Indigenous rights to land, territory and political power are ignored.”42
overly technical content provided in languages and forms that were not easily understood by Indigenous women and men; (c) short time periods communities were given to make sense of the information disclosed; (d) incompleteness of project descriptions; (e) absence of independent technical advisors to support communities; (f) incomplete or inadequate responses given to information requests; and (g) facilitators who were not impartial (neutral) or skilled in intercultural dialogue. For instance, consultation processes were on average concluded in only 60 days, with a handful taking the maximum time permitted by the law, which is restricted to 120 days;

- across the consultations, the participation of women and other marginalized groups was generally very low, with less than one-third (1,649) of all participants (5,709) being women [see Figure 1, below].

Regional contexts tended to shape women’s participation, with the central regions in Peru (Huancavelica, Junín, Ucayali, and Huánuco) evidencing a higher percentage of women participants than the Amazon regions. Women’s participation also varied at different stages in the prior consultation process, declining significantly, in the case of mining, as processes moved towards decision making [see Figure 2, below];

“In eight instances, the internal evaluation of the project took place on the same day as the ‘information’ session, leaving communities only 2–3 hours to elect their representatives, who, in turn, had a few hours to analyze and evaluate the proposal. In mining, only 33% of cases reported the dialogue stage as actually having occurred.”


Figure 1. Participation by sex in consultation processes, 2013–2018.
Indigenous women face additional barriers that affect their ability to participate meaningfully. Women’s limited experiences participating in public spaces; their existing care work not being considered by those organizing when and where consultations are held; and their typically lower literacy and education levels were factors that were all found to have influenced women’s participation in consultations. Overall, while efforts were being made to bring an intercultural gender lens to the design and implementation of these processes, more needs to be done to guarantee Indigenous women’s participation and influence in decision making;

formal consultations often started after key decisions about project design had already been made. For instance, the Huini Corocochuayco and Pacopata communities filed an injunction against the Environment Ministry for failing to consult them prior to approving a change to the environmental license; there was a consistent failure to disclose adequate information about the specific impacts of the project. The information stage regularly involved just a presentation by the government of project “benefits.” Consultation processes [and the behavior of government actors] were generally described as designed to convince Indigenous communities to accept the projects (touting the “benefits” and downplaying the risks);

where communities reached consensus not to give their consent, this decision was not respected—either projects moved ahead regardless or developers quickly presented the same community with “new” project proposals.

Very few of the project specific consultations showed evidence of agreements that went beyond what was already required by law.

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Source: Public data from web portal of MINEM, in ONAMIAP 2018, 41.

Figure 2. Women’s participation in consultations, according to the phase of the consultation process (from preparation to information sharing, internal evaluation, and dialogue), 2013–2018.
Far from a level playing field

For complex, multigenerational projects like those in the oil, gas, and mining sector, the condensed timeframes for negotiations with affected communities that are often required by law make the negotiations a herculean task at best for any skilled negotiation team. Success in any negotiation depends on how prepared a community is going into the negotiation. How unified the community or communities are around their goals and objectives; how much information they have about the project; and whether they already have access to their own legal counsel and other technical advisors are all questions that should be resolved before starting a negotiation.

Access to legal and technical advisors to support community negotiators can help strengthen the quality of community consent processes. Resourcing this support can be a challenge—although innovative financing models are emerging, such as pooled basket funds, impact investment funds, third party funds, and in some cases, direct company funding—although these should be treated with extreme caution. In Suriname, for example, Surgold (later acquired by Newmont) made funds available to the Pamaka negotiating committee to hire their own anthropologist, lawyers, and community development specialist.

Expectations were high that the law would be the missing “bridge” that would enable effective intercultural dialogue between the Peruvian government and Peru’s distinct Indigenous peoples. The extent to which Peru’s law has contributed to this bigger aim is unclear. The overwhelming majority of all socioenvironmental conflicts in Peru today still relate to extractive industries, a signal that struggles over the control, use, and value of the subsoil remain.

“The so-called “normative progress” in environmental and indigenous rights has not corresponded, however, with structural changes in the pattern of economic development (in Peru).”
3 NEGOTIATING CONSENT

PERU’S BLOCK 192

Peru’s oldest—and most controversial—oil block, Block 192 (formerly 1AB), extends over more than 500 million hectares (ha) in Peru’s remote Loreto region in the northern Amazon. The oil concession extends across the Pastaza, Corrientes, Tigre, and Maranon River basins, which are the ancestral territories of the Quechua, Achuar, Kichwa, and Kukama peoples. Oil production began in 1970 with US company Occidental Petroleum operating the field. In 2000, Occidental Petroleum sold its rights to extract to Argentina’s Pluspetrol, who operated the block through to 2015, when the original oil production license expired. When Pluspetrol abandoned the block in 2015 and the Canadian company Frontera Energy took over operations, there were 12 production camps, 112 active oil wells, and hundreds of kilometers of oil pipelines. It is still one of Peru’s most important oil blocks, supplying around 17 percent of Peru’s oil, although this is down from almost 43 percent at its peak.

“After so much harm you’ve done to my home, first guarantee me my rights, and then we can talk about consultation.” (Aurelio Chino Dahua, [Federacion Indigena Quecha del Pastaza [FEDIQUEP]])

Sin Derechos, No Hay Consulta (Without Rights, There Is No Consultation) provides the most extensive study of the community consultation process that reached a temporary conclusion in 2015, and which was a precondition to the proposed 30-year extension of oil activities at Block 192. Negotiations to extend oil activities formally concluded in July 2021, with Indigenous communities securing important social, environmental, and economic gains.
This case has generated significant precedents for other consultation processes in Peru and the wider Amazon region. Indigenous peoples secured their right to be consulted on the terms of the new oil contract. In all other consultations involving oil and gas concessions in Peru, Indigenous communities were consulted only on the administrative action that gave effect to the already finalized and signed contract. Furthermore, leaders were able to secure concrete protections for their collective rights through amendments to the temporary contract between Frontera Energy, who operated the block from 2015 to 2020, and Perupetro, the state-owned company responsible for promoting investment in exploration and exploitation of hydrocarbons and negotiating, signing, and supervising contracts.

But it has not been an easy road. The Quechua, Achuar, Kichwa, and Kukama peoples from the four watersheds where Block 192 is located have struggled for more than four decades to secure justice for ongoing oil spills and contamination. Over the years affected communities have had to adapt to oil and its impacts. Not all have resisted. Some have accepted oil and its consequences. Today, however, there is broad consensus: the government and companies should remediate damage already done; compensate for harms committed; and guarantee that any future oil activities will not repeat the same mistakes.

Impacts of oil on public and environmental health in Loreto have a long history. In 1984, the Peruvian government first declared the area “one of Peru’s most damaged critical environmental habitats.” In 1989, a World Bank-funded report found evidence of oil contamination in rivers and soils in the region, caused by ruptures and breakages in production and transportation equipment. In 2002, the enforcement arm of Peru’s Ministry of Energy and Mines found 166 violations by Pluspetrol of Peru’s environmental laws, including violations on how toxic wastewaters, by-products of the oil production process, were being monitored, stored, and disposed of. In 2006, following the finding by Peru’s Health Ministry of heavy metals in populations in the region exceeding World Health Organization limits, massive public mobilization by the Achuar peoples forced the suspension of oil production. This activism forced the Peruvian government to require Pluspetrol to stop dumping “production” or wastewaters into rivers or nearby soils. The practice of reinjecting “produced” waters into empty oil wells has been standard operating procedure in the US since the 1970s.

A subsequent state of environmental emergency was declared in 2012. In response, a joint monitoring effort was established, and 92 contaminated sites were identified, covering more than 127 ha, 100 ha more than Pluspetrol had originally reported.

“Since the temporary contract with Frontera Energy was signed in 2015 83 new spills have been reported in Block 192.”
Since then, almost 2000 contaminated sites\textsuperscript{62} have been identified within Block 192, with 1,199 of those sites still without any plan for remediation in place.\textsuperscript{63} The costs of remediating just a small handful of contaminated sites far exceeds the government share of revenues generated by the oil activities (see Figure 4, below).

Figure 4. Budget earmarked and required for remediation in Block 192.

With the expiration of the oil production license, a short-term contract to operate the block was signed between the Peruvian government and Frontera Energy in 2015. Indigenous leaders\textsuperscript{64} agreed to this temporary arrangement on the condition that the Peruvian government would start remediation and pursue costs of clean-up and compensation from the past oil operators. One of the first steps under this agreement was for Peru’s Ministry of Health to commission an epidemiological study looking at heavy metal contamination in communities within and adjoining the oil block.\textsuperscript{65} Public pressure—in Peru\textsuperscript{66} and internationally\textsuperscript{67}—was needed before the results of this study were made public in 2019.

Since then, further oil spills have generated new protests and blockades—and production was largely suspended during 2017 and for periods in 2018 and 2019. In 2018, Indigenous leaders from FEDIQUEP, OPIKAFPE, FECONACOR, and ACODECOSPAT signed an agreement with the Peruvian government formalizing the requirement for their agreement prior to signing any new oil contracts.

Indigenous communities across the affected river basins have played a critical role in reporting and documenting oil spills. In 2006, following the mass public mobilizations led by the Achuar, an independent Indigenous-led environmental monitoring program was launched. This program provided crucial oversight and accountability functions that had been lacking. Importantly, the data generated by the monitoring program identified and corrected inconsistencies in the number of spills that had been reported to the government. The data also documented that the main causes of these spills were the deterioration and corrosion of pipelines, as well as operational failures. This has helped push back against claims, circulated in mainstream media, that Indigenous “saboteurs” or “extortionists” were responsible for the spills.\textsuperscript{68}
Histories, memories, and existing forms of discrimination all impede the effective realization of processes of consultation and consent. *Sin Derechos, No Hay Consulta* unpacks the underlying conditions within which the 2015 consultation took place, describing how despite the ongoing public health emergency—documented in the report *En la Sombra del Petróleo* (In the Shadow of Oil)—latent conflict, broken promises, and constantly fluctuating levels of political will, Indigenous leaders demonstrated a commitment to dialogue and build agreement on the future of oil production in the region.

It took three years of dialogue, disagreement, and direct action to achieve partial agreement on the minimum conditions for the realization of the consultation process for the proposed extension of oil production in Block 192. These temporary agreements were articulated in the Lima Act of March 10, 2015—something the Peruvian government described as an “historic act.” Approximately US$50 million was committed to deliver these “minimum conditions.” Although not all the conditions put forward by Indigenous negotiators were agreed to by the government, the federations agreed to move forward. Compensation and reparations, for example, were deferred. This commitment to continue dialogue exemplifies what fundamentally lies at the heart of Indigenous rights movements, of which the recognition of FPIC is just one part. Indigenous rights movements aim for a new relationship between Indigenous peoples, the state, and private sector actors.

The story of the four federations is emblematic for several reasons:

- First, it demonstrates the importance of increasing bargaining power through diverse tactics, including: the use of local and international media; the strategic use of litigation and international accountability mechanisms; and making—and acting on—credible threats of nonviolent direct action. These complementary tactics used by the federations forced the government to: (a) give them a seat at the table; (b) keep the negotiations going; and (c) be held accountable for commitments made;

- second, the case reinforces the importance of Indigenous communities’ knowledge and capacities regarding their rights, the sector, and project impacts; as well capacities to lead, coordinate, communicate, and faithfully represent and be accountable to the collective interests of their communities. Without these capacities internal to the four federations, the efforts by governments, companies, and others to divide the federations, foment division, and co-opt and otherwise undermine collective action may well have been successful;

- third, the strength and resilience of the leadership of the federations as well as their embeddedness in local, regional, and international networks was crucial in securing the financial, technical, and political resources the federations needed at different moments to strengthen their bargaining power;

- fourth, the environmental and public health data collected over many years by Indigenous community environmental monitors were critical to
challenging and contesting the incomplete and erroneous data that were tabled by Pluspetrol—industry data that had, historically, been privileged and used to discredit Indigenous knowledge.
4 LESSONS LEARNED BEYOND PRIOR CONSULTATION

Conflict is inevitable when extractive industry frontiers expand and encroach the lands and territories of Indigenous peoples. The safeguard provided by FPIC will continue to be of paramount importance for communities—but only if it is implemented effectively. Below are a series of lessons that governments, companies, and investors should act on.

FREE

• Ensuring there is political space for people to speak out—even if they voice opposition or criticism of an investment project—is a fundamental precondition or threshold for an effective FPIC process. If people or the organizations supporting them are being pressured or worse, it is unlikely that any agreement reached will be one that is defensible and contributes to the realization of the rights of Indigenous peoples;

• negotiations between Indigenous peoples, governments, and companies do not occur in a vacuum. They take place on playing fields that are shaped by existing inequalities and peoples’ differing abilities to participate and influence decision making. This unequal playing field can limit the negotiation position and power of Indigenous peoples. The effectiveness of any FPIC process will be questioned unless steps are taken to address those structural constraints;

• coordination, information sharing, coalition building among and between Indigenous peoples and allies, as well as the strategic use of nonviolent direct action are key tactics used to ensure governments and companies negotiate fairly and in good faith. The development of community protocols or community mapping initiatives are just two examples that can contribute to this.

PRIOR

• Land use planning should be negotiated with Indigenous peoples in advance of inviting developers or investors in. Doing so allows communities to weigh whether a project fits with their priorities. Participatory land use planning can assess cumulative impacts and identify and protect critical cultural heritage as well as strategic biodiversity and water sources;

• adequate time and resources should be invested into pre-consultation (or pre-negotiation). This step is essential and often overlooked, although there is no one-size-fits-all for it. At minimum, pre-consultation sets a roadmap for how a process of consultation will be implemented: identifying key decision-making moments where community consent is to be recorded, which at minimum, should include
exploration, pre-feasibility, approval, and closure. Clarity on these minimum decision points or gates should apply consistently across mining, oil, and gas projects;

• understanding the differential impacts of mining, oil, and gas projects on women and other vulnerable groups, and the additional (existing) forms of discrimination they face is a necessary pre-consultation step. Community consent processes should support efforts to overcome these barriers (e.g., literacy programs, supporting women’s leadership, and supporting women’s access to communal land and forest resources);

• Indigenous peoples must be able to define the scope of the “project” being consulted. The purpose of FPIC is to contribute to the realization of their collective autonomies, resilience, and self-determination. Indigenous peoples should have control and influence over identifying and managing environmental and social impacts, and therefore, over project design and operations that shape these impacts;

• once there is shared agreement on the definition of the “project”, subsequent decisions can be agreed on regarding what data are available; what additional data are needed; whether all relevant decision-makers (or their delegates) are present and able to participate (there is no point starting a consultation unless key decision-makers, or those with delegated power to make decisions, are present); how women’s and other vulnerable groups’ participation will be guaranteed; what reasonable time periods for each stage are, etc. This is also a key moment to identify capacity development priorities as well as for initial identification of support needs for technical and legal issues;

• for communities, the pre-consultation period can help strengthen internal cohesion, strengthen internal representative structures, and provide a chance for internal negotiation to manage the inevitability of internal disagreements and conflict, and use these constructively;

• given the sedimented histories of racism, governments and companies need to be prepared to listen to historical grievances if communities raise them.

**INFORMED**

• Information is power;

• consultation processes must be adequately resourced and iterative, addressing each of the key decision points in the project cycle (exploration; project definition; feasibility study; impact assessment; licensing; modification of permit; assignment or sale of rights; closure). This includes access to independent technical and legal support individuals, who can help communities understand key issues and provide strategic support at key moments during the FPIC process and afterwards;

• information sessions must consider existing work responsibilities of women and other vulnerable groups so that where and when consultations are held do not exclude them;

• direct translation of technical studies is necessary but insufficient.
Adequate time and appropriate methodologies are needed to ensure content is accessible and understandable by all community members, especially women and other vulnerable groups for whom literacy levels may vary significantly;

• evidence the community members have deliberated on the information provided should be available, along with evidence of how those deliberations have influenced the design of the project.

**CONSENT**

• Enshrining the standard of consent in national law can provide an important safeguard that gives effect to international law and jurisprudence. Doing so creates legal certainty for project developers and investors, while helping to balance negotiating power between Indigenous peoples, mining companies, and government agencies. But developing national consultation laws can be abused by powerful actors. Examples from Central America show how efforts to introduce laws that fall far short of international standards are intended to undermine Indigenous peoples and leave them worse off. In Honduras, for example, the government has sought to introduce a law that would, in practice, strip Indigenous and Afro-descendent peoples of their rights to FPIC and force them to accept bad deals or lose the right to negotiate entirely;72

• in terms of monitoring agreements, agreements need to be easily accessible to all members and enforceable. Additional support for community-level capacity to compile, store, and maintain key documents may be required;

• quality of any community consent process (and the quality of the outcomes reached) should be assessed in terms of the extent to which agreements:73
  - Protect cultural heritage;
  - create opportunities for Indigenous participation in environmental management;
  - address revenue sharing/royalties;
  - facilitate local employment and training;
  - create Indigenous business development opportunities;
  - recognize and protect Indigenous land rights;
  - are enforceable. Indigenous control is essential to achieve this enforcement. State agencies and mining companies cannot be relied upon to do so, as the historical record demonstrates.

• agreements that are reached must respect rights and should not leave Indigenous peoples worse off.
5 RECOMMENDATIONS

Consultations that fail to adhere to the standard of FPIC pose significant financial risks for investors and companies. Projects that fall short of these standards are already being contested in court, leading to project stoppages, production delays, and reputational harm.

COMPANIES

- Commit to apply FPIC, with detailed, public implementation guidelines and public monitoring of compliance with commitments in agreements reached with communities. Commit not to proceed with a project if community consent is withdrawn at any stage;
- be prepared to cede power and use your influence to positively shape power relationships and institutional arrangements that can support the full and meaningful participation of women and men. In practice, this means advocating in support of the legitimacy of human rights defenders in instances of denunciation by others (e.g., media, government). It also means developing a nuanced understanding of gender power relations as part of your baseline studies and how your operations can mitigate or exacerbate existing gender and other inequalities. From this basis, companies should mobilize their networks and resources to:
  - Facilitate equal access to information and capacity building, including ensuring communities have access to independent technical and legal advisory support during negotiations;
  - facilitate constructive action together with other actors (including through choice of appropriately qualified intercultural facilitators);
  - influence decision makers in relation to consultation processes, with emphasis on the mechanisms for full participation and understanding;
  - ensure processes are designed to enable intercultural dialogue, fully disclosing project impacts;
  - monitor and publish progress.

GOVERNMENTS

- Enshrine the standard of consent in law when Indigenous peoples seek this. A legal standard of consent can provide an important safeguard that can help balance negotiating power between Indigenous peoples, mining companies, and government agencies. The standard of consent requires that companies and governments respect when Indigenous communities decide they do not want projects to proceed in their territories;
- prioritize development of gender-specific strategies, methodologies,
and institutional capacities to address the barriers to Indigenous women’s participation;

• for ministries with authority to assess the merits of mining, oil, or gas projects, require companies to conduct gender power analysis as part of project baseline studies and require their impact assessments to explicitly identify and assess the gendered impacts of projects. These ministries should reserve the power to refuse development applications that fail to adequately address gender impacts;

• require all project developers to make, as part of the development application fees, compulsory contributions to basket funds that can be accessed by Indigenous communities to secure their own legal and technical advisors;

• encourage and facilitate access to justice by ensuring there are no technical or financial barriers for Indigenous peoples or their representative bodies to seek judicial review, appeal, or bring third party enforcement proceedings relating to decision making around extractive industry assessments and approvals.

INVESTORS

• Investors can use their influence and invest in companies that demonstrate not only a public commitment to Indigenous peoples’ rights, including FPIC, but also that have the internal management systems (including board-level oversight), detailed implementation guidance, and monitoring systems in place that can ensure quality agreements are reached with Indigenous peoples and maintained across the life of projects;

• This means asking questions about:
  • Executive- or board-level support for and oversight of social performance issues, including community engagement and consent;
  • key findings from a company’s human rights due diligence process, including the role that Indigenous communities played in the baseline studies, how their feedback was considered in the project design, and level of agreement or disagreement within communities;
  • how the differential impacts of the project on women and other vulnerable groups have been identified and addressed in project design. This is usually done as part of a human rights impact assessment, or as part of a specific gender impact assessment;
  • effectiveness of feedback loops or grievance mechanisms, especially regarding environmental and cultural heritage protection issues;
  • company’s commitment to not proceed with a project if community consent is withdrawn at any stage.
6 CONCLUSIONS

As the urgency to respond to the climate crisis grows and as countries fight to attract investment dollars as part of their pandemic recovery plans, competition for the world’s finite land resources will continue to grow.

With land inequality worsening, land grabbing continuing unabated, and basic environmental and social protections being rolled back, the safeguard of FPIC is more important than ever. Yet, despite normative recognition of FPIC—and public commitments by major multinational companies, international financial institutions, and global banks to apply the standard of consent—power imbalances continue to undermine the quality of agreements being reached.

The decades-long struggle for justice along the oil frontier in Peru’s northern Amazon shows what can be achieved, notwithstanding the significant power inequalities that characterize competition over natural resources. Central to the successes of the activism of these Indigenous leaders is the way they were able to increase their bargaining power through effective use of local and international coalitions and networks, and making—and acting on—credible threats of nonviolent direct action. These complementary tactics forced the government to: (a) give them a seat at the table; (b) keep the negotiations going; and (c) hold itself accountable for commitments made. These tactics were necessary given the ways in which powerful actors had been able to limit the effectiveness of Peru’s national consultation law.

Despite the ongoing public health emergency, latent conflict, and constantly fluctuating levels of political will, Indigenous leaders from the four federations demonstrated a commitment to dialogue and build agreement on the future of oil production in the region. This commitment to continue dialogue exemplifies what fundamentally lies at the heart of Indigenous rights movements, of which the struggle for recognition of FPIC is just one part. Indigenous rights movements have as their main goal a new relationship between Indigenous peoples, the state, and private sector actors.

Indigenous and frontline communities across the globe are doing everything in their power to protect their rights, their territories, their cultures, and our collective futures. They cannot—and should not—shoulder this responsibility alone. Governments, companies, and investors should take seriously the recommendations set out in this report and, like the Indigenous leaders whose stories are documented in these research pieces, do everything in their powers to safeguard the protection and realization of First Nations’ collective autonomies, resilience, and self-determination. Only then will it be possible to identify and act on just solutions to the climate crisis.

“Customary lands are estimated to cover at least 50 per cent of the global landmass. Much of this customary land is not formally titled or officially recognized by governments.”75
NOTES


4 Ibid.


9 In the US, as just one example, most reserves of key battery minerals (copper, lithium, nickel, and cobalt) are found on or near the lands of Indigenous people, according to new research from MSCI. See https://www.msci.com/www/blog-posts/mining-energy-transition-metals/02531033947.


14 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Art. 32[2].


See Greenspan et al., “Community Consent Index.”

Ibid.

Christman-Cole, “Companies Spoke.”

Hawkes, “Consent is Everybody’s Business.”


Bebbington et al., Governing Extractive Industries.

Vergara, “Mujeres y Territorio.”

Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios.

Cooperación is a Peruvian non-governmental organization (NGO) that has worked for more than 20 years to support human rights knowledge, capacity building, and legal defense, as well as sustainable development of territory with a focus on gender justice and intercultural dialogue. See http://cooperaccion.org.pe/acerca-de-nosotros/que-hacemos/.

Organizacion Nacional de Mujeres Indigenas Andinas y Amazonicas del Peru (ONAMIAP) is a coalition of Indigenous organizations working collectively for the full realization of rights of Indigenous women in Peru. See more at http://onamiap.org/.

Pueblos Indígenas Amazónicas Unidas en Defensa de Sus Territorios (PUINAMUDT) is a platform comprised of Federacion Indigena Quecha del Pastaza (FEDIQUEP), la asociación Cocama de Desarrollo y Conservacion San Pablo de Tipishca (ACODECOSPAT), la Organizacion de Pueblos Indigenas Kichwas Amazonicos Frontierizos del Peru y Ecuador (OPIKAFPE), and la Federacion de Comunidades Nativas de la Cuenca del Corrientes (FECONACOR), four Indigenous federations representing the Indigenous peoples of the four territories (“cuencas”) that Lot1AB/192 overlaps. See
Since the entry into force of the Peru law, there has been significant growth (and variation) in the national laws, policy, and relevant jurisprudence giving effect to Indigenous rights laws, specifically relating to the right to free, prior, and informed consent. For detailed overviews of this evolution, see Due Process of Law Foundation (DPLF), “Right to Free, Prior, and Informed Consent in Latin America: Progress and Challenges in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru” (DPLF, Washington, D.C., 2015), http://www.dplf.org/en/resources/right-free-prior-and-informed-consultation-and-consent-latin-america.

Khamquis, “Contesting Indigenous-Industry Agreements,” 175.

Similar findings have been reached in other studies. See for example R. Flemmer and A. Schilling-Vacaflor, “Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia’s and Peru’s Extractive Industries,” Third World Quarterly 37, no. 1 (2016): 172; Khamquis, “Contesting Indigenous-Industry Agreements.” Khamquis argues that these deficiencies could be a basis for challenging the legality of the agreements reached.

For more information see https://nacionwampis.com/.
45 Leyva, “Consúltame de verdad.”

46 ONAMIAP, “Sin Mujeres Indígenas, No!”

47 Leyva, “Consúltame de verdad.”

48 Servicio Nacional de Certificación Ambiental para las Inversiones Sostenibles (SENACE) is an organ of the Environment Ministry.


55 Zúñiga and Okamoto, “Sin Derechos, No hay consulta.”

56 See Leyva, “Consúltame de verdad.”

57 Pastaza, Corrientes, Tigre, and Maranon River basins.


59 This data was provided by the Peru’s Environmental regulator (Organismo de Evaluación y Fiscalización Ambiental) on June 17, 2020 (see Carta N° 00849-2020-DEFA/RAI), in response to a Freedom of Information request made by PUINAMUDT. It covers the period from 2015 to May 2020. The data lists 84 environmental emergencies identified in Block 192, 83 of which involve spills of oil, production waters, diesel, and other derivative products. The remaining emergency involved a fire. See also SWI, “Indígenas peruanos exigen a canadiense Frontera limpiar derrames de petróleo” (Swissinfo.ch., Geneva, March 23, 2021), https://www.swissinfo.ch/spa/per%C3%BA-ind%C3%ADgenas_ind%C3%ADgenas-peruanos-exigen-a-canadiense-frontera-limpiar-derrames-de-pet%C3%B3leo/46472958.

60 Zúñiga and Okamoto, “Sin Derechos, No hay consulta.”

61 MINSA 2016

62 Contaminated sites include solid waste, contaminated soils, and water.

64. FEDIQUEP, OPIKAFPE, FECONACOR, and ACODECOSPAT. Only after mass public mobilizations forced the suspension of operations did the Peruvian government agree to abide by the minimum conditions for operating the block that had been negotiated.

65. Resolución Directoral N° 732-2015-OGITT-OPE/INS.


68. Leon and Zúñiga, “En la sombra del petróleo.”

69. Zúñiga and Okamoto, “Sin Derechos, No hay consulta.”

70. For more information see https://naturaljustice.org/community-protocols/.

71. Digital Democracy’s Mapeo is one example of a tool that communities can use for documenting and monitoring their territories. See https://www.digital-democracy.org/mapeo/.


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