



Latin America has seen a surge in consultation processes – taking a variety of forms and pushed by different actors from the state, private companies and civil society.

# MANAGING CONFLICT THROUGH CONSULTATION: LATIN AMERICA'S EXPERIENCE

## SUMMARY

Experience from Latin America shows how community consultation can be an important strategy used to manage conflict in Extractive Industries activities. This Brief characterises and analyses the different types of local consultation seen in the region, focusing on the diverse actors that lead the processes and providing illustrative examples of each. It also describes the main factors that made consultations more widespread in the region and that have improved their effectiveness. Finally, the Brief draws out lessons that could be useful for other regions aiming to establish or enhance their own community consultation processes.

## KEY CHALLENGE: MAKING COMMUNITY CONSULTATION WORK

Consultation with local communities is fundamental to obtaining social licence<sup>1</sup> for extractive projects. In recent decades, both governments and private extractive corporations in Latin America have sought to improve consultation processes to better assess the viability of potential projects, particularly with regards to social impacts, strengthen sustainable development of the sector, and perhaps most importantly, reduce conflict. Lack of consultation – be it in Latin America, Africa or Asia – is often at the heart of conflict around extractive industries.

Implementing effective consultation, however, is not easy. Local consultations are complex processes that can be implemented in a variety of ways. Restrictive or mismanaged consultation can undermine rather than foster efforts to reduce conflict. Many consultation processes turn out to be 'consultative' in name only, due to lack of clarity on legal mandates or poorly developed procedures. Limited community participation, or processes where agendas were imposed by the State or private companies, have undermined consultation exercises, which then

## KEY LESSONS LEARNED

Clear consultation rules and transparency in the process are vital pre-requisites if extractive industry consultations are to be effective.

Consultation processes need to be all-inclusive and participatory for extractive projects to acquire social licence and lead to legitimate results.

State monitoring and public scrutiny help to legitimise community consultations in the eyes of local, national and international parties.

<sup>1</sup> Social Licence exists from the moment a project has the ongoing approval of the local community and other stakeholders. To learn more about social licence in the context of gaining access to land for Extractive Industry activities, read the [ELLA Brief: Latin America's Extractive Industry Land Access Strategies](#).



fail to gain legitimacy in the eyes of the local population. In other cases, local actors have implemented consultation processes which the state later refused to recognise.

Recently Latin America has seen a rise in experimentation with different consultation models. Examples from the region can demonstrate emerging good practice in carrying out successful local consultation to prevent and manage conflict.

### TEXT BOX 1 WHEN CONSULTATION GOES WRONG: DEFENDING TERRITORIAL RIGHTS IN ECUADOR

In 1996, the Government of Ecuador granted a concession to the *Compañía General de Combustibles* (General Fuel Company) in Block 23, where the indigenous Quechua community of Sarayaku is located. The company tried to reach an agreement with the Sarayaku people in order to mine for resources on community land, but the community denied them access. Ignoring the community's decision, the company began exploration activities, and carried out an Environmental Impact Assessment (EIA). The Governing Council of the Sarayaku Community sued the Ecuadorian State at the Inter-American Commission on Human Rights (IACHR),<sup>2</sup> alleging that no prior consultation was conducted before exploration activities were initiated.

Based on the principles of respect for the physical integrity of the Sarayaku people, and the protection of the relationship of the Sarayaku people with their territory, the Commission granted precautionary measures in favour of the community, meaning the court authorised procedures to enforce certain rights that have previously been recognised by both parties. Investigations into human rights violations were also conducted.

At present, the project has been halted. The Government of Ecuador has not yet acted in response to these precautionary measures.

Coba, L. 2004. *Pueblos en Lucha. Memorias del Foro Defensa de los Derechos Indígenas en el IV Congreso de Antropología Jurídica* (People in the Fight. Proceedings of the Defence of Indigenous Rights Forum at the IV Congress of Legal Anthropology). FLACSO & CIDES, Quito.

## COMMUNITY CONSULTATION PROCESSES: LATIN AMERICA'S NEW COMMON PRACTICE

Various community consultation processes regarding extractive industry projects have been carried out in Latin America over the last decade. In response to increasing local demand for consultation, a number of countries have enacted laws to enforce, promote, or at the very least, encourage consultation processes. As a result, consultation processes

have become common practice in Latin American extractive industry project development.

The International Labour Organization (ILO) [Convention 169](#) that affirms Indigenous Peoples' right to prior consultation has been ratified by the governments of Argentina, Bolivia, Chile, Colombia, Ecuador, Guatemala, Mexico and Peru. Some countries have gone farther: Peru enacted a prior consultation law in 2011, while in Colombia, the Constitutional Court can halt projects that do not include local consultation.

Private companies in the region have also voluntarily incorporated some degree of local participation into their decision making procedures. Such is the case with Rio Tinto and their [La Granja Project in Peru](#), as well as with Barrick's [Cerro Casale Project in Chile](#).

## VARIETY OF CONSULTATION IN LATIN AMERICA

Due to the wide range of policies and practices across the region, experiences with community consultation vary greatly depending on the different political and legal frameworks in place, specific procedures and levels of participation. Accordingly, there are no specific local consultation templates that can be followed, but rather lessons learned from a variety of contextually-specific experiences.

One useful way to categorise Latin American experiences is by the main actor responsible for leading the process: State agencies; private companies; or civil society groups.

**State-led Consultation:** In a State-led consultation, a designated Government agency sets the rules, brings together stakeholders and declares the outcome. The consultation process is enshrined within a policy document and is legally enforceable. Governments monitor the process directly or indirectly through their executive branches, such as through Energy, Mining or Environmental Ministries.

This kind of consultation process is often carried out when the State has a special interest in expanding extractive industry activities, or when private companies are unable to obtain a social licence. In other countries, though, such as Peru and Bolivia, this type of consultation is mandated by consultation law or supreme decree.

In most cases, State-led consultation involves indigenous communities and aims to gain access to indigenous territories for extractive industry development. When

<sup>2</sup> The [Inter-American Commission on Human Rights](#) investigates cases of human rights violations and makes recommendations to the relevant country. The Commission has intervened in cases where countries have been accused of violating consultation rights, such as in Argentina, Bolivia, Brazil, Ecuador, Guatemala and Mexico.



successful, these consultations result in agreements that establish indigenous territorial rights, afford certain state protection for indigenous lands and can lead to some direct benefits – such as financial compensation or infrastructure improvements – in exchange for community permission to move ahead with extractive projects (see Text Box 2).

In cases where community and extractive industry interests could not be reconciled, or where consultations are poorly carried out, State-led consultation processes have come to a complete halt. In such instances, the State has often waited for a change in political context, such as a change in indigenous leadership, before giving up on the process.

In other cases, indigenous people have been able to stop extractive industry projects for good. In 2009, the Colombian government conducted a prior consultation process with community leaders in the territory between Antioch and Chocó, which resulted in the Muriel Mining Company being granted exploitation rights. In 2010, leaders of the Embera

#### TEXT BOX 2 BOLIVIA'S SUCCESSFUL CONSULTATION

In 1998, Veritas, subcontracted by the Argentinean oil company Pluspetrol, began exploration within the territories of the Guarani people in Santa Cruz, Bolivia. In 2010, after years of conflict between the company and the local entities working to protect indigenous territorial rights, the Bolivian Ministry of Hydrocarbons and Energy coordinated a consultation process to secure local consent for continued exploration. The resulting agreement signed by both parties included protection measures for water, air, flora and fauna, the creation of local employment opportunities and US\$ 100,000 in compensation.

Bascopé, I. 2010. *Case Study: Bolivian Government Consultation with the Guarani Indigenous Peoples of Charagua Norte and Isoso*. CEJIS and OXFAM, La Paz.; Bascopé, I. 2010. *Lecciones Aprendidas Sobre Consulta Previa (Lessons Learned about Prior Consultation)*. CEJIS, La Paz.

Katio indigenous group that lives in the disputed territory alleged that the State had not included them in the consultation process. They went all the way to the Constitutional Court of Colombia to demand a halt to further exploitation activities. The Court ruled that further exploitation activities were to cease until the proper consultation process was carried out and an Environmental Impact Assessment submitted.<sup>3</sup>

**Private-led Consultation:** In this model, the company is in charge of designing and implementing the consultation process, and deciding the outcome. In most cases, to give legitimacy to the exercise, companies follow legal frameworks established by the national government or the [World Bank's Policy on Indigenous Peoples](#), though this does not necessarily mean that these institutions supervise the process (see, for example, Text Box 3).

Some countries, such as Peru, have specific laws requiring private companies to undertake a community consultation process prior to implementing any extractive project. In other countries, the state plays no role at all. In Argentina, although the Constitution recognises community consultation rights, there are no laws or regulations to enforce that these rights be respected.

In a company-led consultation, a key issue is ensuring significant and broad enough participation to be accepted by communities. Companies that try to secure positive outcomes by excluding opposition groups generally fail to get the necessary public consent for a social licence. In these cases, the consultation can be perceived as invalid, setting a negative precedent for further attempts to reach mutually-beneficial outcomes with local peoples. In Colombia, for example, the U'wa community sued Occidental Petroleum (OXY) for claiming that a meeting attendance list was proof of community acceptance of the outcomes of a consultation process, a process that they say never actually took place. As a result, the Colombian Constitutional Court suspended OXY's oil extraction project.<sup>4</sup>

As we see from the example above, the main challenge in company-led consultation is to ensure a fair process that is seen by participants as legitimate. Although ensuring fair processes is a general challenge in all consultation types, communities tend to be especially suspicious when the same company that wants to extract resources on their land leads the consultation process. The solution here seems to be to obtain stakeholders' *free prior and informed consent* (FPIC). This is a principle stated in [IFC Performance Standard 1, Section 22](#) as well as in [World Bank Operational Policy 4.10, Section 6c](#). Though the concept itself is widely accepted, how to achieve FPIC is still the subject of debate.<sup>5</sup>

<sup>3</sup> 24 March 2010. *Corte Constitucional Ordena Suspender Explotación en Complejo Minero Más Importante del País*. (Constitutional Court Orders Suspension of Activities at the Most Important Mining Complex Operating in the Country). El Tiempo, Bogota.

<sup>4</sup> Yrigoyen, R. 13 July 2011. *Prior Consultation: A Fundamental Right for Indigenous People*. Latin American Press. Note that this publication includes analysis of a variety of Latin American case studies.

<sup>5</sup> For more information about FPIC, see: Laplante, L., Spears, S. 2008. *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*. *Yale Human Rights and Development Law Journal* 11: 69-116.; Schilling-Vacafior, A. 2012. *Democratizing Resource Governance through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector*. GIGA Working Paper No. 184; Szablowski, D. *Re-Empaquetando El CLPI: Las Conexiones Globales y el Debate Sobre El Consentimiento Indígena para La Extracción Industrial de Recursos* (Re-Packaging the CLPI: Global Connections and the Debate over Indigenous Consent for the Industrial Extraction of Resources). *Antropológica* 28(1) 217-238.



If the company is able to reach an agreement with the local community, it is more likely to avoid conflicts in the future, creating stable project conditions in the long-run. Interestingly, in some cases where a project that was originally undertaken after a successful consultation process later faces community opposition, the original consultation process has not been invalidated (see Text Box 3).

If the project is rejected by the community, transparent processes can help the company successfully re-design the project, taking into account local concerns. Clear state or private frameworks and public scrutiny are some of the mechanisms that can ensure a more transparent and socially-acceptable process.

**Civil Society-led Consultation:** The third consultation model is led by civil society groups, which generally are afforded only partial or no state recognition, and only have the authority to carry out non-binding local consultation processes. In this model, local leaders, sometimes with support from NGOs, organise what they believe to be a truly democratic consultation process, which often takes the form of a community referendum on a specific extractive project.

**TEXT BOX 3 RESPECTING CONSULTATION DECISIONS IN THE LONG-TERM: THE CASE OF BOLIVIA**

YPFB Transport SA is responsible for a 6000 km pipeline network which transports natural gas and liquid hydrocarbons through 7 Bolivian departments and more than 670 TIOC's (*Territorios Indígena Originario Campesinos* or Peasant Indigenous Native Territories). Following Bolivian law, Supreme Decree No. 29033, the company conducted a participatory consultation process that generated local community consent for six projects, including the expansion and interconnection of gas pipelines.

Recently, however, the Guarani People's Assembly, *Itika Guazu*, denounced the launch of a joint campaign by the Ministry of Hydrocarbons and Energy and YPFB Transport SA, which they say is aimed at pressuring the Guarani into approving environmental licences for new oil projects. However, they have continued to recognise the previous consultation process for the gas pipelines.

YPFB Transporte. 2007. *Memoria YPFB Transporte 2007 - Parte 2* (YPFB Transport Annual Report – Part 2). YPFB Transporte, Santa Cruz.; Plataformaenergetica.org. 30 November 2011. *Asamblea del Pueblo Guarani Denuncia Sucia "Petrocampana" contra los Indigenas*. (Guarani People's Assembly denounces Dirty "Oil Campaign" against Indigenous People) CEDLA, La Paz.

Civil society-led consultation processes have been organised in response to company and state attempts at consultation that have failed to achieve social licence. In this sense, civil

society-led consultations can be regarded as a protest against consultations that are poorly designed or implemented.

While there are only a handful of documented examples of this consultation model taking place in Latin America, such as in the communities of Tambogrande and Majaz in Peru, or [Sipacapa in Guatemala](#), they have become emblematic of environmental activist groups that view civil society-led community consultation as a democratic mechanism to defend local ways of life against extractive sector development.

The consultation process in Esquel, located in Patagonia, southern Argentina, is a well-known example throughout Latin America for the referendum conducted to decide whether or not to permit an Argentinean subsidiary of Meridian Gold to operate an open-pit mine on the community's land. In 2003, 1500 people petitioned the Esquel City Council to evaluate the impact of mining in the area. As a result, the Council repealed the City Ordinance accepting the national Mining Law, and organised a community consultation via referendum. The following month, 81% of voters rejected the proposed mining project. This model of consultation set a precedent for other communities in Argentina, including Epuýén Trelvelín and Lake Puelo.<sup>6</sup>

Civil society-led consultations are generally well-received by the public. Sometimes they even achieve partial recognition from the State, mainly from Ombudsman offices. Thus governments and private companies have sometimes accepted the outcomes of civil society-led consultations in political terms, even if they did not recognise them as legally legitimate.

**IMPROVING CONSULTATION: A CROSS-CUTTING ANALYSIS OF LATIN AMERICAN EXPERIENCE**

Latin America's consultation exercises highlight some important cross-cutting strategies that could help strengthen consultation processes, regardless of the specific model employed. These are inclusiveness, effective participation, transparency and legitimate institutional monitoring.

**Inclusiveness:** Consultations that do not include all relevant stakeholders are likely to fail. The consultation process should be open to the public and held in an appropriate location and at a time that facilitates significant local participation. Consultations that are seen more as democratic events rather than confrontational meetings clearly generate more inclusiveness.

<sup>6</sup> Environmental Defender Land Center. 2003. *Argentina: the Esquel Mine and Corpus Dam Votes*. Environmental Defender Land Center, Massachusetts.





**Effective Participation:** Consultation rules, procedures and the development of the process itself should be carried out in a participatory and transparent manner in order to generate broad-based participation. States could incorporate mechanisms such as a local referendum, such as in Esquel, Argentina, in order to achieve broad participation. States and companies can even assure active civil society participation when developing and enacting the laws that regulate consultation processes, while rules must be adaptable so as to apply to different extractive projects given the diverse range of social contexts. Public debates over how to implement FPIC consultation laws in Peru demonstrate the complexity of the issue.<sup>7</sup>

**Transparency:** Detailed consultation outcomes, including agreements, conditions and disagreements, must be made available to the public. This worked well in Bolivia (see Text Box 2), where during the consultation process, the local community requested and received information about the potential environmental impacts of oil exploration.

Latin American countries still have a long way to go, however. Government and private company-led consultations still fail to disclose detailed minutes and outcomes of the process. They tend to prefer to release only the good news, hiding outcomes that may be perceived negatively by the public. The result is that ‘successful’ consultations often appear as one-dimensional processes with no dissent, while ‘unsuccessful’ stories are discarded. When problematic consultation processes are made public, they are commonly portrayed as having been misused or misunderstood by small, politically-manipulated local groups. While seemingly possessing a democratic quality, civil society-led consultations can also be portrayed as straightforward processes with unquestioned outcomes, generally always in opposition to extractive projects. Here, too, there is sometimes little room for dissent in these self-supervised, civil society-led consultation processes.

**Institutional Monitoring:** Legitimate monitoring is fundamental. On the one hand, in State-led and most private company-led consultations, governments monitor the process directly or indirectly through their executive branches. State agencies and private companies are not always transparent with the public, undermining consultation outcomes. In Latin America, Ombudsman offices have played an important role in monitoring consultation processes, not only by linking the government with

the public in state-led processes, but also by officially recognising some civil society-driven consultations.

Typically in consultations carried out by civil society there is no state monitoring, which may undermine the effectiveness and outcome of the process. The Sipacapa community, for example, organised the first community consultation in Guatemala, in which a proposal from the Canadian company Glamis Gold to mine on community land was rejected.<sup>8</sup> Guatemala’s Constitutional Court declared, however, that while the consultation was legal, it was not binding, and therefore Glamis was free to move forward with the proposed project. This example shows how consultation processes, however well designed and implemented, depend on wider political and legal frameworks – and ultimately on Government policy – for success.

#### TEXT BOX 4 STANDARDS FOR EXTRACTIVE INDUSTRIES’ COMMUNITY CONSULTATIONS

Extractives industries consultation standards have been developed by several multilateral agencies and organisations. In particular, the World Bank and International Finance Corporation (IFC) have steadily worked on their development since the 1990s. Since then, the main corporations have gradually incorporated the standards into their own CSR principles. The following are some of the key consultation standards in use:

- International Labour Organisation [Convention 169](#)
- United Nations (UN) [Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights](#)
- International Council on Mining and Metals (ICMM) [Sustainable Development Framework](#)
- Extractive Industries Transparency Initiative ([EITI Standard](#))
- Global Reporting Initiative (GRI) Sustainability Reporting Framework, [Mining and Metals Supplement](#) and [Oil and Gas Supplement](#)
- [Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#) of the United Nations Economic Commission for Europe (UNECE)
- Organization for Economic Cooperation and Development (OECD) [Guidelines for Multinational Enterprises](#)

To learn more about each standard, see: Canadian Civil Society, 2006, [Summary Critique of Standards Relevant to Extractive Industries](#). National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries, Canada.

<sup>7</sup> 22 February 2012. [Gobiernos Regionales Piden No Dilatar Más Reglamentación de Ley de Consulta Previa](#). (Regional Governments Call for the Immediate Implementing Regulations of the Previous Consultation Law). Andina - Agencia Peruana de Noticias.; 22 February 2012. [Native Peruvians See Loopholes in Prior Consultation Law](#). Inter Press Service.

<sup>8</sup> Spang, L. 2005. [Guatemala: Sipacapa community says No to Mining!](#) Bank Information Center, Washington, DC.

# CONTEXTUAL FACTORS

# ENABLING LATIN AMERICA'S SUCCESS IN CONSULTATION



There are three principle factors that have underpinned both the emergence of, and ongoing improvements in, consultation processes in Latin America.

First, states have gradually incorporated and institutionalised consultation procedures for different activities, especially those related to extractive industry development. In particular, the creation of Ombudsman offices in several Latin American countries over the last decade is seen as a significant improvement in official recognition of human rights, consultation rights included. Ombudsman offices in Argentina, Colombia and Peru have rapidly gained public approval, and gradually taken on new duties, including reporting on conflicts and consultation processes.<sup>9</sup> Because Ombudsman offices are generally perceived as independent state agencies, their involvement in extractive industry issues has been praised by most civil society groups.

Second, the emergence of more socially responsible companies that not only accept, but also sometimes even promote, consultation processes has been key. Over the last decade, multilateral agencies and most large extractive multinational corporations have gradually developed

and incorporated social standards (see Text Box 4), based largely on Corporate Social Responsibility (CSR) principles.

Consultation processes for many extractive projects have been organised within a CSR framework, sometimes even going beyond the State's mandate. Although only larger companies have adopted CSR standards to date, they have shown that a responsible private sector can promote some degree of local consultation. While CSR principles still may not be commonplace, the emergence of these new community consultation standards in Latin America has fostered an atmosphere that promotes the implementation of corporate-led consultation processes.

Finally, the gradual empowering of Latin American civil society actors has facilitated the implementation of fairer consultation processes. With the support of national and international NGOs, local communities have gained political visibility and voice, and consultation rights come first on their extractive industries agenda. Overall, civil society actors have started to pressure governments for more democratic policies regarding natural resource extraction, fostering more inclusive consultation processes.

<sup>9</sup> [Defensoría del Pueblo de la República Argentina](#), [Defensoría del Pueblo de Colombia](#), [Defensoría del Pueblo del Estado Peruano](#). Other examples are [Defensoría del Pueblo del Estado Plurinacional de Bolivia](#) and [Procuraduría de los Derechos Humanos de Guatemala](#).

## LESSONS LEARNED

- 1 Clear consultation rules are a vital pre-requisite if extractive industry projects are to be truly participatory and effective. Both governments and private extractive corporations in Latin America have sought to improve these rules by looking to take into account the scope of consultation, schedules, limits to the issues to be addressed and official validation.
- 2 Experiences in Latin America show that limited community participation, or processes in which agendas are imposed by the State or private companies, can undermine consultation processes because they fail to gain legitimacy amongst the local population, thereby failing to secure social licence. Organisers of consultation processes must ensure the active participation of both formal and informal community authorities, accredited state and company representatives, and the public.
- 3 Transparency is a vital characteristic of a trustworthy and fair consultation process. Consultation organisers must publicly disclose minutes from consultations, including discussions, comments, observations and preliminary agreements.
- 4 Most importantly, organisers must disclose detailed consultation outcomes, including agreements, conditions and disagreements. State monitoring and public scrutiny are necessary to legitimise community consultations in the eyes of local, national and international parties. The more credible a state's institutions, the more legitimacy government monitoring will have in consultation processes. In Latin America, Ombudsman offices have played an important role in providing oversight, thereby bringing legitimacy to consultation processes.

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