

## **P27- Examining? Free Prior and Informed Consent': empowering publics or producing consent?**

### **Whose consent to what? Problems and promises of operationalizing FPIC as a deliberative process**

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**Abstract:** Consultations based on the principle of Free, Prior and Informed Consent (FPIC) is central to indigenous peoples' exercise of their right to self-determination in relation to developments affecting their land or resources. It carries a promise of a change in conditions for indigenous peoples' influence on their own situation with regard to land-use and natural resource governance. However, criticisms of FPIC-procedures point to a need of focusing on the underlying values of FPIC. FPIC definitions and guidelines reveal a large correspondence with deliberative democracy thinking, and I therefore merge deliberative criteria and FPIC-requirements to create a framework to identify conditions that promote or constrain deliberative democracy in a FPIC-consultation. I apply the framework to data collected in an Indigenous Territory and National Park in Bolivia, where a proposed highway through the territory has triggered massive protests, and where a late consultation has caused division in indigenous leaderships and communities. The case illustrates a profound difference between the parties in their definition of FPIC and exposes that FPIC, as a deliberative process, has an inherent paradox in that it is applied in a situation fraught with economic and political interests, which challenges the premise of a deliberative situation.

**Keywords:** Consultation, deliberation, indigenous peoples, TIPNIS, Bolivia

### Introduction

*“...the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making”*

UN Special Rapporteur on the Rights of Indigenous Peoples, in Feiring, 2013)

### The controversy in TIPNIS

In August 2011, the lowland indigenous peoples conduct their eighth protest march towards Bolivia’s seat of Government, La Paz; *‘in defence of the Isiboro Sécore National Park and Indigenous Territory (TIPNIS) against the planned construction of the Villa Tunari - San Ignacio de Moxos highway’*. The highway is part of the Initiative for the Integration of the Regional Infrastructure of South America, IIRSA, of which Brazil is the prime mover.

*“We march because it’s the only way they listen to us. We want to show that the indigenous peoples are united; what happens in TIPNIS will happen in all the indigenous territories. If we can make that TIPNIS is respected, all territories will be respected”.*

(Indigenous leader in Paz et al., 2012:18)

The three peoples, Chimán, Yuracaré and Mojeño-Trinitario, living inside the 14.000 km<sup>2</sup> territory of TIPNIS had not been consulted about the planned highway of which only the part going through that territory is not yet built. The march got increasing attention, especially after a violent police intervention. That this march took place in an institutional context supposedly highly favourable to the demands of indigenous peoples, namely the new constitution of the Plurinational State of Bolivia, causes a rupture in the relationship between President Evo Morales and the lowland indigenous movement who helped bringing him into power in 2005.

The marching protesters achieved the enactment of Law 180, declaring that TIPNIS is protected by status as ‘intangible zone’. The road plans were abandoned, but diverging interpretations of ‘intangibility’ became the core of an ongoing conflict and the main topic in the subsequent consultation. In the law there is no definition of ‘intangible’. Assembly members from Morales’ party immediately interpreted ‘intangibility’ in a very comprehensive way: *“...it means no hunting, no cutting wood, no sowing and no touching of the ground (...) it is a territory that can never be touched, ever”* (Senator Avalos in Paz et al., 2012:223).

The indigenous leaders objected to this interpretation, referring to the constitutional principle of rights to sustainable use of natural resources in indigenous territories (Paz et al., 2012).

In January 2012 another march, emanating from the south of TIPNIS, reached La Paz. Communities associated with the Indigenous Council of the South, CONISUR, pleaded the right to be consulted about the road and the Law 180, seeking its annulment *“because we have not been consulted”* (Paz et al., 2012:258). Law 222 was issued, establishing the right of the affected communities to Free, Prior and Informed Consultations about the intangible nature of TIPNIS in general and the road specifically. The quoted leader from this contra-protest represents ‘the polygon 7’ (Fig. 1), mostly comprising of highland colonist farmers, affiliated with the coca-grower unions, of which President Morales is still the leader. He comes from this area; the hope for the coca-farmers is that he will provide them with more land, which is exactly what the lowland indigenous peoples fear. New state land distribution policies to encourage migration of highland

colonists to lowlands (Reyes-García et al., 2014) combined with a new road, remind them of the first colonisation projects in the 1970's that gave land to the Aymara and Quichua peoples from the highland, reducing the subsistence resource base of the lowland peoples. In the 1990's, coca-farmers entered and deforested about 10 % of TIPNIS. Their communities are not part of the collective indigenous territory. This migrant group is expected to benefit directly from new the public investments (Delgado-Pugley, 2013).

### Free, Prior and Informed Consent (FPIC): Participatory process or 'tick in the box'?

FPIC is a principle primarily applying to indigenous peoples and communities. It refers to their right to give or withhold their consent to proposed measures that will affect them which is central to their exercise of the right to self-determination. The principle is most expressly used in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP Articles 19 and 32), but has been adopted into various conventions and standards, and affirmed in national and regional instruments as well as in the jurisprudence of international human rights treaty bodies. Following the FPIC framework, peoples affected by an intervention must be involved in a participatory process towards a negotiated result, of which they can approve. This is an essential change in relation to natural resource management interventions in areas with indigenous peoples, and the significance of the principle has already been demonstrated<sup>1</sup>

There is no exact definition of indigenous peoples, but the International Labour Organisation's Convention on Indigenous and Tribal Peoples, ILO 169, applies to peoples with *own social organization and political institutions whose culture and way of life are different from the other segments of the national population*. The ILO was the first international organisation to recognise the particular circumstances of indigenous peoples and specifically address them in their conventions<sup>2</sup>.

The definitions of the FPIC elements resemble principles of deliberative political interaction which I account for in more detail in the theory section. These principles are formed by norms, attitudes and assumptions that people must presuppose when engaging in political communication, most importantly that anyone can take part in discourse, introduce claims or challenge them. Further, participants must view each other as equals in deliberation, and be under no compulsion. Equality relative to the principles of deliberative democracy is already much debated (e.g. Shapiro, 1999; Dryzek, 2001). Obviously, FPIC-consultations, invented as a tool to be used under conditions of inequality, raise the question: Can conditions be created so that a FPIC process meets the ideals of deliberative democracy?

Evaluations of FPIC processes indicate the challenges involved in actual implementation. Difficulties owing to complex layers of legislation, unsettled land-tenure, low government capacity, lack of existing institutional infrastructures and transparency regarding compensation, as well as problems of local representation, limited timeframes, one-off decisions, and lack of basic understanding of the proposed activity or the purpose of the process are among the issues mentioned in the emerging literature (Schilling-Vacaflor, 2013; Delgado-Pugley, 2013; Mahanty and McDermott, 2013; UN-REDD, 2013c; Szablowski, 2010). Colchester (2010) points to problems with verification of compliance with the FPIC-principles. Criticism

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<sup>1</sup> In Panama, disputes regarding indigenous participation in the United Nations Reducing Emissions from Deforestation and forest Degradation programme, UN-REDD, resulted in the suspension of all programme activities in 2013 and led to the overall evaluation of the UN-REDD guidelines (Feiring, 2013). In Ecuador, 2012, the community of Sarayacu raised and won a case against the state in the Inter-American Human Rights Court because they hadn't been consulted about oil-extraction on their land.

<sup>2</sup> Convention 107 from 1957; convention 169 from 1989

include complaints of turning FPIC into a formality no longer based on customary laws, and complaints about manipulated processes and certifications issued by government to companies without due verification of procedure in the community. Criticism related to third party verifications include the concern that the failure of companies to obtain consent to operate on customary lands apparently considered is a 'minor non-compliance' to be corrected subsequently. These findings match a concluding concern in the revision of the UN Guidelines addressing a tendency to

*"...delink the requirement for free, prior and informed consent from consultation, participation and capacity-building (...) There is a risk to reduce the concept [of FPIC] from constructive collaborative decision-making to a reaction to externally defined projects or to a single event with no longer-term engagement"*  
(Feiring, 2013)

These concerns relate to the risk of FPIC becoming another 'tick in the box', and express the need to focus on the underlying deliberative values of the process itself.

The reviewed issues resonate with the more general debate about the difficulties of realising the promises of deliberative democracy (see e.g. Bohman, 1998; Gutmann and Thompson, 2004). One fundamental problem seems to be dissimilar notions of the deliberative facets, such as the idea of 'equality'. In a contribution to this debate, Thompson (2008) suggests a conceptualisation of the deliberative elements and a need to align standards in order to compare studies. Indeed, a clarification of concepts is needed in order to examine FPIC as a deliberative process, and would quite possibly reveal that many FPIC processes concerning matters of land use or natural resources would not qualify as deliberative democratic in the first place. I will relate deliberative concepts and standards to FPIC requirements, to develop a workable method to evaluate the quality of FPIC processes.

### Objective

This paper aims to contribute to an improved understanding of the inherent problems of operationalising the ideals of deliberation in FPIC-processes. It is, however, not merely meant as a conceptual critique; the conceptualisation of the deliberative elements should enable practitioners and policy-makers to focus on the objective: To identify conditions that promote deliberative democracy, and concentrate on the extent to which constraining conditions can be changed. The paper is based on my examination of the consultation process conducted by the Bolivian government in TIPNIS where 58 indigenous communities were consulted about a specific intervention, the planned highway, and a more abstract amendment of Law 180, concerning the maintenance of TIPNIS as an 'intangible' zone. The study was done in 2013 and is primarily based on the narratives of 52 interviewees, directly involved in the process.

After presenting theoretical and analytical approaches, the case and methods used, I present my empirical findings. These findings concern the consultation process as perceived by participants, the events prior to the consultation and the consequences of it. The findings also comprise descriptions of the local governance system. Subsequently the analytical framework is applied in order to assess the deliberative qualities of the process, and the results of the analysis are discussed in a more generalised context.

### *Theory and operationalisation of it*

#### FPIC's resemblance with deliberative democracy.

Principles of equality, reciprocity and inclusion are institutionalised by the right to FPIC. Processes must consider indigenous peoples' rights, knowledge and practices, respect customary laws and be conducted openly and transparently. The condition of Consent is qualified by the elements *Free, Prior* and *Informed*. *Free* refers to a decision-making process, self-directed by the community, free from manipulation, intimidation and coercion. *Free* also refers to the free participation of all community members. Consent must be obtained before implementation of any project and the time needed to understand and evaluate the activities under consideration by the community must be respected. Hence, *prior* refers to a period of time in advance of an activity, as well as the period between when consent is sought and when consent is given or withheld. *Informed* refers to the provision of information in forms and languages that allow affected communities to make informed decisions and answer their questions. Consent refers to the option to accept or oppose a development proposal, including the option to reconsider if activities change or new information emerges. Communities may choose to grant their consent on the basis of certain conditions. If conditions are being met, ongoing consent is implied (UNDRIP, 2007; Maharjan et al., 2012; Colchester, 2010; UNPFII, 2005; Morris et al., 2009)

Deliberative democracy focuses on the talk that precedes decision. Reason, rather than coercion, in a process of collective deliberation where participants are treated equally and fair, legitimise decision-making. Decisions are legitimate to the extent they receive approval through participation in the free and unconstrained deliberation by all those subject to a decision (Cohen and Benhabib in Dryzek, 2001). Mediators in the negotiation should be accepted by all parties, participants should have access to relevant information, the deliberative process should be transparent and scrutinized by media or other citizens, and all participants must accept final decisions as binding (Bohman, 1998; Bobbio, 2003). The thinking on deliberative political interaction derives from Habermas' core assumption of *communicative action*: The power of the better argument and the public sphere, where citizens discuss common affairs. Facing these concepts is the threat of the "*system's colonisation of the lifeworld*", where market and bureaucracy, using money and power as strategic, steering instruments, replaces communicative action (Fultner, 2011; Habermas, 1996; Habermas, 1988/1998).

#### Conceptualisation and relation to FPIC guiding principles

From the presuppositions of communicative action, an important part of the criteria to evaluate processes of deliberation can be derived. Even when communicative processes fail to meet the standards, these failures can be understood only in relation to them, Thompson (2008) argues. He distinguishes between 'Conceptual Criteria', stipulating what is necessary for a practice to count as deliberation, and 'Evaluative Standards' specifying what counts as good deliberation. The Conceptual Criteria relate directly to the fundamental problem that deliberative theory is intended to address: "*In a state of disagreement, how can citizens reach a collective decision that is legitimate?*" (Thompson, 2008:502). In a situation that requires FPIC, '*a state of disagreement*' denotes the conflicting interests that give rise to the seeking of consent. '*A collective decision*' denotes that the aim of the consultation should be to reach a binding agreement, while the criterion for '*legitimacy of the decision*' is mutual justification; presenting and responding to reasons. The quality of the deliberation can be assessed through four Evaluative Standards, and related to FPIC-guidelines (UNPFII, 2005; SIFDE, 2012b; Morris et al., 2009) in the following way:

*Public spiritedness*: Arguments and ‘other-regarding reasoning’ are important here, according to Thompson (2008), and it does not rule out affective, rhetorical, or informal appeals. In FPIC: The parties should establish a dialogue allowing them to find appropriate solutions that reflect the will of both parties in an atmosphere of mutual respect and in good faith.

*Accommodation* prescribes a positive effort towards cooperation. In FPIC: Propositional and constructive dialogue and co-responsibility for the execution of the process.

*Equal respect*: The reasoning must show respect for the participants and their arguments, and arguments must be presented in accessible terms and respond to the opponents’ reasonable arguments. In FPIC: The information provided must be in forms and languages that allow affected communities to make informed choices and decisions, and clarify their doubts. Processes must consider rights and practices, and respect customary laws, as well as cultural diversity.

*Equal participation* applies not only to the discourse itself but also to the distribution of membership in the deliberative body. As a minimum, no-one must completely dominate the process. In FPIC, requirements determine the free participation and decision of all community members, and the important establishment that consent cannot be valid if taken from authorities or groups not recognised by, or accountable to, the community.

Further, FPIC-guidelines deal more specifically with the type of information that should be provided, relating to the nature of the proposed activity and its potential impacts. Thompson (2008) argues that the knowledge of the political views of other participants is as important as knowledge of issues. If you are to respect your fellow participants, and to be open to their persuasion, you must understand their views and reasons for holding them.

These criteria, standards and considerations of information amount to an analytical framework, useful to apply in FPIC-consultation evaluations.

## Methods

### Case and context

The National Park ‘Isiboro Sécure’ was founded in 1965. At that time, the indigenous peoples living here, in the lowland, were in the hands of missionaries, while the rest of the country was developing the state, including large land reforms in the 1950’s, converting much common (high-) land into private plots. The establishment of the protected area did not seem to affect the indigenous peoples, mainly due to poor protection enforcement (Reyes-Gracia et al. 2014). The lowland has experienced various commodity-rushes; e.g. for vanilla, rubber, quinine and timber (Reyes-Gracia et al. 2012), while actual colonisation of this area accelerated only after the mid/late 70’s due to colonisation programs and concurrent opening of roads. The lowland indigenous peoples began to organise during the 1980’s to defend their land and resources, and in 1990 they conducted the first of a series of marches, all of which have resulted in achievements promoting collective rights and the ratification of ILO 169 (Reyes-Gracia et al. 2014). In 1990, the National Park became Native Community Land (TCO). Subcentral TIPNIS was established as the

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indigenous administration of the TCO, and in 2009 it was granted the property title. Same year, UNDRIP became national law, and the right to FPIC thereby established even stronger. The area is to be governed in cooperation with the National Service of Protected Areas, SERNAP, and is divided into zones defining for what purposes and to what extent its resources can be used (fig. 1). The core area, red on the map, is subject to the highest protection, while the yellow management zones allow for traditional use of resources. The green zones, where natural resources can be used, include the settlements of the indigenous peoples (SERNAP, 2005).

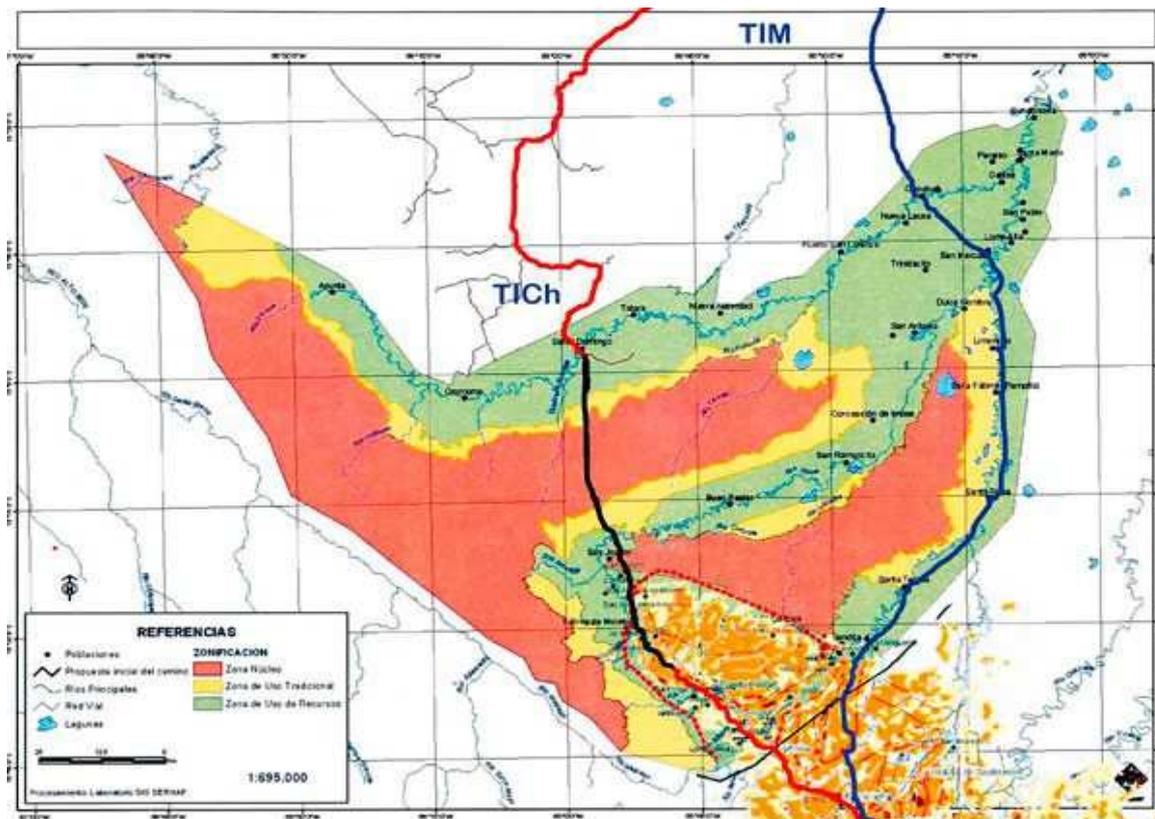


Fig. 1. Map of TIPNIS indicating its management zones. The proposed road is the black line between the red lines that show the road already constructed. The orange-spotted area in the south indicates the area which is part of the Park but not the indigenous territory, the 'Polygon 7', represented by the organisation CONISUR. Source: SERNAP

Indigenous politics are dominated by highland indigenous organisations, while the lowland indigenous groups remain marginalised, living below the poverty-line with low levels of education. They organise in extended families with high levels of autonomy in egalitarian societies (Reyes-Garcia et al., 2010), not specialising professionally but applying similar ways of living. The lowland indigenous peoples do not recognise a 'unique leader' for the whole community (Díez Astete, 2011) but do elect a *Corregidor* to represent the community and be responsible of coordinating common work. The position as *Corregidor* or other community-authority is a duty more than a privilege. Their power is very limited; they are appointed with considerations to experience, are in charge of ensuring good social relations and can be replaced if the families are not satisfied with their performance. The leaders of the Subcentral are appointed by the

*Meeting of Corregidores*, an assembly where all communities of the territory are represented, and which constitute the highest authority of the territory.

The consultation was conducted in 2012; it was comprehensive and lasted six months. President Morales personally opened the consultations with gifts and speeches. The indigenous organisations, including the local leadership, Subcentral TIPNIS, did not recognise the consultation and held a fixed position against the process itself. They physically attempted to prevent the 15 consultation teams from entering the territory. 58 communities were visited by the teams, while 11 communities resisted. According to the government 55 communities agreed to the highway construction and 57 communities opposed Law 180 (MOPSV and MMAyA, 2012). The government identified 69 communities to be consulted, while the Subcentral said only 63 belong to the indigenous territory. The consultation-commissions comprised two main parties; executive consultants contracted by the ministries in charge with the consultation, and observers recruited from the regional departments of the Supreme Electoral Tribunal (TSE).

### Field access and data collection

I gained access to the territory through contacts made with inhabitants visiting the provincial capital, Trinidad, and visited two communities with very different experiences related to the consultation. In Puerto San Lorenzo, the community-members were strongly divided regarding the consultation, which had triggered a fight between community members, literally, and not all had participated in the consultation. I stayed with a family that had actively resisted the consultation which prevented me from interviewing a few persons, including the Corregidor. The community Tres de Mayo rejected the consultation. Later, several meetings led to the decision to participate anyway. They were not divided, but very suspicious; I was not allowed to work until the community had gathered in order to understand the purpose of my presence and my study. Yet, once accepted, all households were eager to receive me. I spent five weeks in the two communities; then I approached officials and indigenous leaders to get their perspective (see Table 1).

Initially, I asked the community-members about their livelihoods, then their knowledge and thoughts of the road plans. They were asked the meaning of the territory being 'intangible', and whether they participated in the consultation. Even if they didn't, I asked how it happened: Were they all invited, how, what kind of information was provided and what was the agreement. Finally I asked about visions for their community. In later interviews, informants were asked their understanding of the concept 'consultation', as it appeared there were no common comprehension and a lot of doubt about the meaning. I recorded all interviews with the consent of the interviewees, and the gender division was about even. Some were interviewed more than once, and I sometimes interviewed two at a time. Participant observation and group discussions form important part of the data.

Secondary data included meeting minutes from the consultation in Tres de Mayo, the observation and accompaniment plan elaborated by the Intercultural Service to Strengthen Democracy, SIFDE, under TSE, and the management plan elaborated for TIPNIS by SERNAP, the co-managing state agency. It also consisted of reports about the consultation published by the Government and the TSE respectively, as well as a report by two civil society organisations, Caritas Bolivia and the Permanent Assembly for Human Rights in Bolivia, APDHB, challenging the results of the government. I was lucky to attend two meetings they held in the provincial capital Trinidad.

### Processing data

I used a research diary to sketch interesting patterns, develop new questions and draw maps to locate households with help from community-members. In Tres de Mayo, I had the opportunity to present my findings at a meeting, while in Puerto San Lorenzo I had key findings verified by individual community-members. All interviews were transcribed and coded by myself using the QSR-NVIVO software. Some data are presented as quotes from the interviewees, translated into English.

Table 1. Conducted interviews

Informants	No. of interviewees
Community-members, Puerto San Lorenzo	16
Community-members, Tres de Mayo	18
Indigenous leaders	6
Officials:	
Ministry of Public Works, Services and Housing (MOPSV) (Consultant)	1
The Supreme Electoral Tribunal (TSE) (Observers):	
Trinidad Department	2
Cochabamba Department	2
National Service of Protected Areas (SERNAP):	
Trinidad (Park guards)	1
La Paz (Strategic planning)	2
Other Key-informants:	
Civil Rights Lawyer	1
School Director, Sécure, TIPNIS	1
Teacher, Tres de Mayo	1
Emigrated community-member from Puerto San Lorenzo	1
<b>Total</b>	<b>52</b>

Table 2. Meetings and group discussions

Community meetings in the 'Cabildos'	2
Group discussions in the communities	3
Caritas/APDHB	2
Meetings in Sub-central TIPNIS	2
<b>Total</b>	<b>9</b>

## Empirical findings

### Division and distrust

Initial observations and informal conversations gave an immediate impression of disunity in the territory in the sense of great suspicion and distrust towards other community-members and leaders. I sensed this tense atmosphere already during visits at the Subcentral TIPNIS in the outskirts of Trinidad. Families were camping outside the building; they came from inside the TIPNIS to take care of necessities, some to attend to political meetings. There was a pronounced dissatisfaction with some of the young *Corregidores*:

*"For 21 years we have defended our territory even though people couldn't read or write, and then it's the first graduates that are being tricked" and "In the past everything would be ignited by now, but none of the new raises their voice."*

The families and leaders I met here were among the opponents of the consultation and had either been actively involved in, or sympathized with, the resistance towards it. At this point I was not aware of the extent of the disunity. Not until visiting the community Tres de Mayo did I understand how a new leadership, a second Subcentral, had emerged during the consultation process and how manifest and strong it already was. I was met by a unified, but suspicious, community:

*They ask me which authorities I coordinated with. They haven't been informed about my arrival, they are suspicious, insecure, worried. "Before someone enters we always get information, but now – nothing". They explain about the two Subcentrals: Subcentral Sécure is new, or rather, it has new leaders. The old leaders were replaced at the time of the consultation. Subcentral Sécure used be 'sub' to Subcentral TIPNIS, now it works independently and is more present in the territory than the 'old'. They are concerned, angry, about the missing contact. "They are bad leaders". Their own Corregidor left with the consultation-commission four months ago to pick up a generator they had been promised. They haven't seen him since then and consider appointing a new. They read my permit to travel in the territory, issued by Subcentral TIPNIS, aloud. They are interested in who signed and what their positions are. They talk about the importance of controlling who is moving about in their territory, "we are all authorities". Now it's like their Subcentral has two heads, they say.*

Back in Trinidad the President of the new Subcentral agreed to an interview. He insisted that everybody at the office should attend. Among those was the missing Corregidor from Tres de Mayo and individuals who participated in the consultation as 'indigenous facilitators'. They are the legitimate leaders, he insisted, elected by 'the base'. He would *not* attend to the upcoming Meeting of Corregidores concerning the situation of TIPNIS relative to the recent consultation. He *did* want a meeting but not with any outsiders or NGO's "that do not know". He said the 'old leaders' sold their souls to the NGO's and that Law 180 is the root of all division. The old leaders approved of this law without consulting with 'the base', a law that generalised all activities; the tourist-project in his own community must shut down now. A group discussion, of when and how the division began, started. Some accused Law 180; some said when CONISUR was established and affiliated with the coca-unions; some talk about leaders with personal interests in timber-trade. They put their names and stamps in my notebook; these were studied intensely in the other Subcentral.

The attitude towards the consultation had also been significantly different in the south, where CONISUR coordinated the consultation. These people were more cooperative, an observer told, although they live with the greatest impact of colonisation and have suffered the most. "They want access to political decisions and institutions". They organise for this purpose, they ask for recognition. That doesn't sound inconsistent with the interests of the 'old' indigenous organisations; for decades they have struggled for political participation and recognition. The 'old' leaders said the government should have brought the details about the project to the Subcentral as the representing institution:

*"We would discuss and analyse it technically, bring it in, and tell the communities: Look, this is what the government wants, these are their pretensions, now you have the word".* President, Subcentral TIPNIS

Regarding the relation between Subcentral TIPNIS, Subcentral Sécure and CONISUR, he explained that Subcentral TIPNIS is the only rights-holder, that the property title is in their name. This was confirmed by

SERNAP, who, however, also confirmed that they will implement a drinking water project in coordination with Subcentral Sécure. Subcentral TIPNIS has lost support from NGO's:

*"(...) they are discouraged. The government has threatened that those who help in TIPNIS will lose their permit to function in Bolivia<sup>3</sup>."*

President, Subcentral TIPNIS

The state of the office supported his statement: Two outdated computers, no internet-connection and only a few personal cell-phones with 'pre-paid' connections to their disposal.

The division and distrust was not limited to the leadership, it pervaded the atmosphere in the community Puerto San Lorenzo, where families had been divided over the consultation. No meetings had been held in the *Cabildo* for a year when I visited. Cabildo is the communal assembly and refers to both the actual building where meetings take place, and the governance system itself. Since the consultation, village maintenance had been sporadic and people did not visit each other, *"life has disappeared"*. Some community-members were neither strongly against nor in favour of the consultation, just confused and unhappy about the situation: *"As you see now, there are no reunions, all this time there have not been reunions, no word of what work we must do"*.

### The consultation in Puerto San Lorenzo

In August 2012, community-members opposing the consultation joined 'the resistance' to prevent the consultation commission from going ashore. 'The resistance' also counted people from other communities; they stayed in the community-centre for a month. Not all agreed to it:

*"They said: 'We won't let anyone enter TIPNIS' [but] we could have embarrassed the government because we could have demonstrated our friendliness (...) we will not accept it [the road] but better receive those who come, listen to them, hear their proposal, what they promise and what they lie. We wanted to know how the consultation is, we know the word consultation, but we don't know its content"*

The consultation-commission entered by planes when most of 'the resistance' had left. Subsequently a plane with indigenous leaders attempted to land, but the runway was blocked by supporters of the consultation. Others tried to clear it: *"I fought with the men with fists. My husband wasn't there"*

In the Cabildo, food and gifts were provided by the consultation-commission. Very few stated that they attended the meeting; some said they passed by just to listen. Those who didn't attend thought there was an agreement about the road: *"Those who were there decided to accept the road, but us, no! Not even if they kill us"*. No-one I talked to said they had conceded to it. On the contrary, everybody shared the same worries about it.

### The consultation in Tres de Mayo

In this community, the consultation took a different course: Upon arrival, the consultation-commission were received in the Cabildo by all community-members, then asked to leave again. Afterwards Cabildo-meetings went on for a month. They agreed to accept the consultation, but to be firm in their rejection of the planned highway. They would, however, like a road connecting them to neighbours not situated by the river. They had changed their mind because of an understanding that the community risked being

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<sup>3</sup> Subsequently, the Danish NGO, 'Ibis', who had been supporting the 'old' leadership, lost its permission to operate.

neglected by the government in the future if it rejected the consultation. The understanding stemmed from various sources, among these two pro-government radio stations, the consultation team itself, a park-guard and visitors from other communities. The consultation lasted eight hours and had the following agenda:

1. Intangibility/Law 180
2. Road/Transport system
3. Development vision
4. Safeguards

Regarding point 1., the community had not prepared thoroughly what to respond. I found no consistent understanding of 'intangible' or implications of its cancellation:

*"What word is that? This I don't know, madam (...) since I'm illiterate"*

*"The leaders have explained the intangibility, it is for strangers. They cannot enter to cut timber or hunt. But those who came with the consultation heard it another way, they said that none of us who live here can take any wood, not even to consume, not even for a house. This is why it is no longer intangible".*

Only a few dared to challenge the interpretation of the consultants and insist on their constitutional rights about subsistence use. The understanding that Law 180 prohibits all use of resources was prevailing, and the wish to cancel it was finally signed by all. Some felt betrayed by their leaders at this point, and began to doubt other information they had received from them, and their motives. Less severely, some believed their leaders had made a mistake. As a result of both, various community-members believed they had been misinformed about the consequences of Law 180 by their leaders.

The quality of the consultants' explanations of intangibility varied: *"Intangible is like having a wife you cannot touch"* (heard by observer). Another consultant spelled out what the intangibility would imply:

*"I agree with the intangibility, we must take care of our natural resources, animals, and plants. But I don't agree that you stay in the same conditions as you are now. You must speak up and say if you want to be intangible or not"*

Consultant

Point 2., the road, was no big issue; they had rejected its construction. No-one could tell much about the proposal, some referred to an ecological or 'hanging' road, others talked about a 'tree-tunnel':

*"I still don't understand how they will make it, because supposedly it will not be on the ground (...) this is what we don't understand; they say it will not destroy anything, because it will be above".*

Point 3., 'Development vision' took most of the time. It concerned possible development projects that the community had been encouraged to suggest. The proposals were mostly very specific, like *boat engine '15'*. Answering if it was alright to mix the discussion of development with the consultation two observers responded:

*"It's not ok, but it derives from the initial error; the state had no presence. The community-members had to seize the presence of the executive".*

*“It had to be mixed. Because it is part of their reality linked to the prolonged absence of the state (...) and above is a political constitution, a big confusion of rights that they do not quite know but want to exercise. [There was a discussion of] whether generators or solar panels were better. We engaged 1-1½ hour in this, but I found it rich because that’s really the discussion of development visions that must generate”.*

The observers related that the consultants used a ‘development discourse’, repeatedly emphasising the *right* to development. Some community-members were cautiously optimistic about projects coming, and satisfied that the government had actually visited and paid attention to their proposals. Those against the consultation said they will never see any projects; that their territory had been sold for a generator.

In my interviews, vision of a good life often concerned better education opportunities inside TIPNIS. Further, the land and its resources were integrated in their vision; this can be understood from the concerns relating to the road-construction alone. The possibility to pass it on to future generations was essential:

*“We have a lot of wood and if they enter, if they take the wood, the oil, where can we go to give to our grandchildren, then worth nothing?”*

Under point 4., the community agreed to the establishment of an ‘ecological brigade’, emphasising its role as guardian of the territory. Most community-members were content with the meeting and the consultants: *“They understood us. There were also seniors (...) they listened well and we agreed. That no!”*

The commission-members felt very welcome. Prejudices were disproved, and all parties expressed that they were animated by the conversations they had. The opening appeal of the community-members seemed to have made an impression:

*“They said ‘tell us the truth. We ask our visitors this, that they tell us the truth. That they do not lie to us’. Most of the meetings started with this.”*

Observer

SERNAP, the co-managers of TIPNIS, was not consulted nor directly involved in the consultation itself.

Consultation-stories from other communities provide an impression that these were generally unprepared to receive the commissions, let alone to be consulted. The stories include that of a consultation-commission arriving after dark, wanting to gather the community the next day; nobody understood who they were until then. The commission was told that the Corregidor was not present, that it was too late to advice people, and that it had been decided to reject the consultation. The informant wondered how it was possible for Tres de Mayo to accept the consultation without accepting the road, indicating that the concept of consultation itself was not clear. In another community, protests resulted in a relocation of the meeting with only some families participating, bypassing the Cabildo, the formal community authority.

### Concerns

Concerns about the road related to the coca-farmers, that they *will drive us off the land and bring crime with them*. Many referred to President Morales being *‘their man’*. Another concern was contamination, that fish and animals will disappear. A third major concern was oil-exploitation and that the timber will be stolen. The concerns were shared by SERNAP in Trinidad: *“We worry because all the water comes from*

*there, this road will dry out rivers (...) it's a major concern, how it can destroy. If there is a liquid oil-spill it will be all over the park".*

The consultants responded to the concerns by entering a discussion of safeguards: *"I know a lot have entered in the south (...) but brothers; today we must say how we want to protect ourselves"*

### Biased agenda

*"A political position to promote acceptance of the road was prevailing", an observer stated and continued that economic interests lured behind the political component. He referred to a workshop during preparations of the process, where a Canadian consultant shared her experience: "I got to the conclusion that consultation in other countries is a negotiation opportunity, simply to legitimise works that will be done, independently of what the consulted says" [And here? This road is already planned. And they will make it] "most likely, yes, they will make it"*

In Canada, indigenous peoples have both customary and property rights securing their engagement in use of their reserve lands, limited, however, to requirement of compensation (Mahanty and McDermott, 2013) which establish a negotiation situation exactly as perceived by the observer. The impartiality of the consultants was questioned by another observer due to the fact that they were contracted by the ministries with direct interests in the result. The observers believed that their own presence had improved upon the process: *"Look, the executive [consultant] does not ask 'what do you think?' This is provoked by our presence."*

However, the results of the consultants were not always coinciding with the notes of the observers: *"Because it's not the same answer to say 'yes' to the road as an absolute, or to say 'yes' to the road, 'but on the following conditions'."* The final reports make no mention of such inconsistent perceptions or nuances in the deliberation. Conditions are generally referred to as recommendations, and the summary of the results presents 'yes or no' answers. 55 out of 58 communities said yes to the road, and 57 out of 58 decided to repeal law 180.

### Divergent conceptions of democracy

The way strangers were received in Tres de Mayo is illustrative of how decisions are made here, namely by consensus, based on analysis of the available information. At meetings everybody can participate, bring up issues, present their view on matters and get the word as long and as many times needed. Sometimes meetings go on for days. When returning to the divided Puerto San Lorenzo again the drums sounded, calling for a Cabildo-meeting, the first in a year. I observed the meeting:

*I count 23 men, 16 women and many children. We sit on benches along the walls, the women gather in one end. The agenda seem 'safe', only point three and four relate to the conflict: 'Information about generator' and 'Information about boat-engine'. The Corregidor opens the meeting. The word is free to speak to point one: Location of the new college and housing for the teachers. The debate starts; some suggest the sports-area, others to clear new land. Documents and drawings are passed around. The fact that this is the first meeting in a long time gives rise to ceremonial speeches; they all want to express their gratitude and hopes for the future. Next point: Location of a new house for the women's group; possibilities are sketched out by the women's president. Now the talking is less organised, everybody discuss simultaneously but suddenly there is an agreement. Point 3, 4, 5 are solved by appointing committees to administer generator, motor*

*and radio respectively. Point 6 takes an hour and a half. It concerns the doctor, whom they are unhappy about because he is never there, and a rumour that the health clinic is to be placed elsewhere. A letter must be written to the Subcentral concerning the doctor; a teacher withdraws to make it, comes back later and read it aloud. They will send it downriver, I wonder to which Subcentral. A commission of two persons must travel to San Ignacio to raise their voices in order to keep the clinic. There is a long discussion of who they should send. They agree, and decide to send a member of the church-committee too to put pressure for a church project, in order to make the journey worthwhile. After four hours the meeting ends with the agreement of another meeting two weeks later.*

In Cochabamba I found the two observers who visited Tres de Mayo. They were dedicated to the challenge of making the new Plurinational State function. They would like to play a more active role in future consultations and had specific suggestions on how to develop the concept.

*“We are interested in how to best exercise intercultural democracy in our country. Based on the experience from TIPNIS, inputs are generated for the consultation-law that they are working on in the executive commission. Unfortunately we have not been asked to participate”* Observer

They advocated direct development planning between state and community, instead of having to organise through the Subcentrals, but believed that ‘political training’ is needed:

*“Perhaps the government through TSE could develop specific programmes to develop a democratic culture in communities where the state has been absent, like in TIPNIS”* Observer

### Effects of the consultation

One effect was the distrust reflected in fierce suspicion towards virtually all; outsiders, neighbours, leaders, consultants, NGO’s and government initiatives. Although part of this originate from events prior to the consultation, evidence points to the fact that those critical to the late consultation, and/or the intervention, faced various obstacles from the executing Ministries and the Subcentrals supporting them. SERNAP, Trinidad, had also lost support:

*“Before we had workshops for the park guards, but because we cannot count on resources, this has gone, two NGO’s have withdrawn. We need more capacity to face the situation that now really, with the issue of road infrastructure in all the Parks, is another menace for the environment and the natural resources that we have here.”*

While Subcentral Sécure tried to persuade communities *not* to attend the Meeting of Corregidores set up by the ‘old leadership’, authorities attempted to limit the access of ‘old’ leaders and their supporters to the territory by intensifying control with documents, and put limits to the amount of fuel purchases. I was told:

*“You must provide 200 litres of gas. This is difficult, you can only buy 60 litres at a time; they say it’s to prevent narco-traffic, but it is only to bother us [opponents of the consultation]”.*

A *missing* effect was a consistent understanding of the topics of the consultation, knowledge of what was decided, or the purpose of decided measures like the ecological brigade. Some believed the young people will be recruited to build the road, ‘develop’ the area, be military trained and further divide the inhabitants of TIPNIS, because *“how are we going to fight our own children?”*

The communities I visited did not know of the reports about the consultation published by both executing officials and observers. In Tres de Mayo I read the part of the observers report concerning their community to them, and the overall result. They were surprised that 57 out of 58 communities accepted the road:

*“What disturbs us is that the government says that we accept the road, but we do not (...) we told them clearly that we had discussed and debated to tell them that we are not against the road, but the only thing we want is that it doesn’t pass through the heart of TIPNIS. Because we accepted the consultation, now they say: Tres de Mayo says yes to the road, but that is not what we said (...) they have changed the words”*  
Group conversation

There were also positive effects. All officials stated that the consultation had been a personal learning task, *“in every sense of the word, [it is] part of our department that we only recently have gotten to know. Their reality. How they live.”* Observer

*“We stayed until five days in each community. They said ‘we are waiting for our Corregidor’. We stayed there quietly, playing with the children, exchanging phrases, practices, talking to a leader or a community-member, and little by little we gained trust”* Consultant

When reading the reports none of this appears. The results are presented schematically as ‘yes or no’ answers to the agenda topics. This was also a concern of one observer: *“I’m afraid that the richness in diversity that has generated in the consultation will not be captured (...) It was a multi-faceted space of different experiences”.*

## Analysis

The deliberation-evaluation framework is now applied. Some findings appear in several of the standards; this adds to the understanding of the multiple consequences of these key findings.

*‘A state of disagreement’* was not limited to differences between the intervening and the affected parties. Diverging opinions were found between and within communities. Some communities were ‘pro-road’, most were against. Many believed Law 180 will prevent any kind of development and have signed a wish to revoke it, but not all participated, and in some cases this decision was made by groups not accountable to their community. Nobody was against development projects, but some believed that gifts and projects were linked to the consultation in an inappropriate manner. The creation of an ‘ecological brigade’ separated opinions as well. Some support the idea of the combined military, park guard and capacitation opportunity, while others believe the brigade is meant to further separate the population of TIPNIS.

*‘The binding character of the agreements’* is established in the Bolivian legislation. However, the signed agreements did not represent shared understanding and acceptance; there were large differences in the perceptions of what was agreed.

The *‘legitimacy of the decision’* is evaluated through the following standards:

The *'good faith'* of the government was highly contested due to the distribution of benefits along with the agitation for the abolishment of Law 180. Also, the promise of 'development' was perceived as linked to acceptance of the consultation. The consultants were contracted by the intervening party and trained by an expert in negotiating compensations, while SERNAP, with an important stake in the result was excluded. Issues were mixed up without clear explanation of interlinkage; both the road and possible development projects became subordinate to the question of whether to revoke Law 180, but on the agenda in the communities the issues were side ordered. The expressed concerns relating to the highway were met by entering a discussion of safeguards; the road did not become a substantial issue though. Subsequently, the observers were excluded from the evaluation of the process, which forms the basis of the new consultation law being drafted.

*'Accommodation'*: The communities were asked about their development vision, and time was taken to finish discussions. The community-members were content with the attention, and team-members felt very welcome. However, some rejected the consultation and tried to obstruct the consultation, reflecting the fact that there was no consensus about consultation as a tool in this case. Conflict has previously proven effective in the struggle for rights and land, but in this case a strong position against the consultation prevented the leadership from participating in the process. There were no indications that the government sought cooperation either. That the leaders, who were part of the elaboration of Law 180, had more knowledge of the road plans and the FPIC concept, were not actively involved in the process had two serious consequences: One, the task of accommodating the consultation was imposed on each community, whose members had little prerequisites to anticipate the consequences of the agreements they concluded; and two, parallel organisations with new, more cooperative leaders emerged during the process because coordination was needed. This added to the pressure on community members. 11 communities were not consulted and in some communities not all participated, yet the decisions made will affect them directly.

*'Equal respect'*: The zone-division of the park was disregarded and the whole territory was declared 'intangible'. Discursive inequalities were abused e.g. by leaving the matter of 'development' up to the communities' decision upon 'intangibility', although their poor living conditions to a large degree relate to absent state services. Information of the ecological road was not understandable. SERNAP, with collaborative experience with the communities would presumably have been able to deliver the information in accessible terms, but was excluded. Although the governance structures of the peoples visited were known, the set-up of the consultation did not follow customary proceedings. The constant presence of state representatives may have intimidated and confused the participants. Picking out new leaders stimulated distrust and suspicion, because it caused uncertainty of leadership and procedures.

*'Equal Participation'*: It should be easy to identify who to consult in TIPNIS, yet there was uncertainty linked to six communities in favour of the road, and cases where random families were consulted. The authority of CONISUR to coordinate consultations was questionable because their members in Polygon 7 are not part of the indigenous territory. The legal title belongs to Subcentral TIPNIS, who did not recognise or participate in the consultation. Observers advocated the bypassing of the Subcentral, referring to both the ideal of direct democracy and the possible interests of the leaders, other than community development. According to their own agency, however, this consultation was not an act of direct democracy, but an act of indigenous peoples' right to self-determination (SIFDE, 2012b). The lack of participation of the Subcentral TIPNIS meant that communities were unequally prepared to receive the consultation teams. Timing shapes scope and

extent of equal participation in decision-making. Late consultation limited the discussion to safeguards about an intervention already initiated. Time between when consent is sought and answer is given allows for participation of all community-members and community-consensus on the topics presented, as the example of Tres de Mayo, where they initially sent off the commission, showed.

Regarding the information, based on which the communities made decisions, multiple sources, with intentions other than to inform and explain, led to diverse perceptions of the content and significance of the topics on the agenda. The position of the indigenous leaders prevented their support to the communities. The consultants provided inaccessible information about an ecological road, and a bias towards development of TIPNIS caused a rigid interpretation of intangibility. The observers advocated direct democracy on development issues between state and community, which lies outside the frame of indigenous self-determination and respect of customary procedures.

### *Discussion and conclusion*

A framework for analysing FPIC-consultation processes was developed by combining the Habermasian notion of deliberation with prescribed guidelines of FPIC. It was used to analyse the process of a consultation of two communities in TIPNIS regarding a proposed road-construction and amendment of a protection-law, and provided an understanding of the numerous factors that either promoted or constrained the quality of that process. With respect to legitimacy of the decisions in this case, a reasoning process *did* take place. However, the quality of the deliberation was criticisable to an extent that questions this legitimacy, depending to a large degree on the government's further conduct. The evaluative standards indicate that the government sought to legitimize a decision already made. Also, the late consultation raises doubt about the possibility to influence decisions; in the light of the costs of the highway already constructed it seems unlikely that a changed route could become reality. The idea that the consultation was a sham, with huge media coverage, ensured by the personal involvement of the President, lies too close at hand. Moreover, the indigenous peoples' organisations are left politically divided and unsupported by NGOs, preventing mass-mobilisation for protests, at least in the nearest future.

The consequences may prove to affect even deeper, in Puerto San Lorenzo the very foundation of the local governance system, *el Cabildo*, had not functioned well for a year. Political integration with non-indigenous norm structures did not happen until the 1980's, and is still new at community-level in the lowland. Economic integration has existed much longer, and has influenced the way the indigenous peoples use their land and resources (Reyes-García et al., 2012), but apparently this has not interfered with the governance systems of the lowland peoples. The way the consultation in TIPNIS was carried through has threatened the very foundation of the communities: The social cohesion between egalitarian families based on a system of consensus-based decision-making regarding the commons they hold.

This supports some of the criticism against Habermas: That inequality in power and social position gives weight to the coordinating force in interaction, not the power of the better argument (see e.g. Shapiro, 2009). But according to Habermas, formal legislation can match market and bureaucracy (Aakvaag, 2008) i.e. national law is assumed to be able to ensure indigenous peoples' access to decision-making. Let's assess the balance: The relationship between international rights-standards and local FPIC-practice is influenced

by national political economy; if the indigenous peoples hold no rights to the specific resource targeted by a proposed intervention, or if it is of 'national interest' like major infrastructure, FPIC is likely to become negotiation of impact-management and benefit-distribution, and thus become the domain of strategic communication, not deliberation. Where FPIC is required, economical and/or political interests will be substantial. In the TIPNIS-case it seems that even when indigenous peoples' rights are incorporated in national law, they cannot withstand market forces. The requirement of consultation did however slow down the process, an effect that has been observed in other FPIC-consultations (Rodriguez-Garavito, 2010), it created debate at national level about the legitimacy of the state-intervention, and it raised awareness about the lack of state services in the territory.

Experiences have been gathered in other settings. In the capital-intensive mining sector, FPIC is used as a safeguard to financial risk and has a 'legal compliance' goal. Financial institutions use the word *Consultation* instead of *Consent* in their requirements, arguing that international frameworks premised on consent may exceed national law and threaten sovereignty (Mahanty and McDermott, 2013). Some authors predict a new wave of oil/gas-activities in lowland Bolivia (Bebbington & Bebbington, 2011; Burchardt & Dietz, 2014; Gudynas, 2010). The Morales government has a clear long-term vision of where the country should be heading, and how it will get there. Natural resource extraction is an integrated part of this vision; Morales recognises the gravity of the country's many domestic problems, as well as how its vast resources could be used to alleviate poverty, exclusion, and inequality. Regional cooperation to promote extraction is part of the long-term strategy to achieve this goal. With the new constitution, this inevitably means continued encounters with lowland indigenous peoples through FPIC-consultations. In this regard, government officials at the extractivist frontier become key-performers at the operational levels.

The study showed that during the process, prejudices were disproved and the presence of state representatives encouraged discussions of necessities and projects, which is core in political deliberation, autonomy and self-determination. The possibility of meeting face-to-face motivated participation and sharpened the consultants' performances and, although not considered, important observations were made by a third party. Whether the values articulated in the constitution, and the personal encounters with different cultures within their departments, bring about change in the administration regarding the ability to acknowledge and respect local governance and local management procedures, or if the government's wish to develop the large indigenous territories in the lowland restrain such progress, remain to be examined.

Habermas acknowledge that differences in economic and social conditions matter in deliberative political interaction (Fultner, 2011), emphasising the importance of assessing the presuppositions of deliberative democracy against the background of material inequalities. Also, the recent political integration of lowland indigenous communities makes them vulnerable in the face of new norm structures. However, simply concluding that deliberation under these circumstances cannot comply with equality-standards should not be used to reject the deliberative forum. But the focus needs to be broadened. FPIC-consultation cannot be seen in isolation from other rights that the indigenous peoples have, whether specific as self-governing peoples, or as Bolivian citizens aspiring to reach the same level of state services as the rest of the population. Neither can it be regarded as a single procedure if deliberate standards guide the process. The 'public sphere' is found in the *Cabildo* and at the Meeting of *Corregidores*, and deliberations here are likely to be accurate decision-making forums, as the norms and procedures, constitutionally recognized as

'communitarian democracy', frequently contain time-consuming deliberations and consensus-based decisions, rather than representative and delegate-based forms of democracy.

To make it an FPIC-institution, it must be linked to the structures of state bureaucracy. The challenge seems not only a matter of power and will of the government, but also a reflection of the fact that recognising and respecting cultural differences and customary practices is really difficult; beyond theoretical understanding. The front-line officials said it themselves:

*"The ability to generate real spaces of respect to other ways of living has to start with you. And that basically means deconstruction processes of your own paradigm, of your own knowledge, of things you learned all the time you spent in school and university"*

Observer

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