

# The Right to Consult Ourselves: Conceptualizing the Proactive Function of the Right to Free, Prior, and Informed Consent

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## ABSTRACT

*Since the adoption of ILO Convention No. 169 in 1989, the right to Free, Prior, and Informed Consent (FPIC) has become a staple legal tool in the strategies of indigenous rights advocates. During these decades, scholars have provided reasons for both skepticism and optimism about the capacity of FPIC to advance indigenous interests. This Article makes a brief review of this literature, revealing that the academic discussion on FPIC has overemphasized its “protective function.” Up to this day, both critical and optimistic scholars have conceived of FPIC as a shield that indigenous communities use to block, delay, or mitigate the impacts of projects driven by external non-indigenous actors. This Paper argues that this perspective has overlooked the possibility of using FPIC as a legal strategy to promote indigenous-driven projects. Grounded in the experience of San Francisco Pichátaro, a Purhépecha community in Mexico, the paper introduces a case study that highlights the “proactive function” of FPIC. After enduring years of marginalization, this community deployed their right to FPIC as a de facto right to “consult themselves” about how they wanted the State to realize the budgetary aspects of their right to indigenous self-determination. In doing so, they managed to extract financial resources from the State and buttress their own project for self-governance. The Paper concludes with an invitation for scholars and activists to look beyond the protective function of FPIC and to explore how its proactive potential could further the more ambitious aspirations of indigenous peoples.*

## INTRODUCTION

According to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), states have a duty to seek the Free, Prior, and Informed Consent (FPIC) of indigenous communities before adopting any

legislative or administrative measure that may affect them.<sup>1</sup> The normative roots of this entitlement can be traced back to 1989, when the International Labor Organization adopted Convention No. 169 (ILO Convention 169), which codified the right of indigenous peoples to be consulted in good faith and with the purpose of achieving agreement.<sup>2</sup>

Today, the right to FPIC has become a staple legal strategy in the toolkit of indigenous rights activists. All across the globe, indigenous peoples invoke their right to FPIC to defend their territories, self-determination, and lifestyles. The diffusion of FPIC norms and processes has been primarily fueled through the work of international human rights bodies,<sup>3</sup> but other international institutions have also played a part.<sup>4</sup>

1. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 19 (Sept. 13, 2007).

2. International Labor Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) arts. 6, 15, 17, Jun 27. 1989, 28 I.L.M. 1382.

3. After the International Labor Organization codified indigenous consultations, the UN Committee on the Elimination of Racial Discrimination (CERD) became one of the first institutions to engage in developing standards about the right to Free, Prior and Informed Consent. In its General Recommendation No. 23, it established that States should seek indigenous consent before making any decision that could directly affect indigenous rights. CERD, *General Recommendation No. 23: Indigenous Peoples*, U.N. Doc. A/52/18 annex V, ¶¶ 4(d), 5 (Aug. 18, 1997). The CERD then reaffirmed that States should have the expectation of obtaining “prior informed consent” before exploiting resources in indigenous lands. CERD, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador*, U.N. Doc. CERD/C/62/CO/2, ¶ 16 (Jun. 2, 2003).

Also during the early 2000s, the Inter-American Commission on Human Rights (IACHR) developed its own—quite nuanced—interpretation. The IACHR opted to go further into the technicalities that a consultation needed to follow in order to be considered as being oriented towards achieving consent. For instance, it specified that seeking genuine consent was only possible “under conditions of equality, and with fair compensation.” See *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 5 rev. 1 ¶ 131 (2002). The IACHR also established that consultations had to make sure that all members of indigenous communities were “fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate.” *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 142 (2004). Subsequently, the Inter-American Court on Human Rights developed more rigorous FPIC standards to determine whether a consultation was adequately implemented or not. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs Judgement, Inter-Am Ct. H.R. (ser. C) No. 172, ¶ 133–137 (Nov. 28, 2007); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations Judgement, Inter-Am. Ct. H.R. (ser. C) No. 245 ¶ 177 (Jan. 27, 2012); *Garífuna Community of Triunfo de la Cruz and its Members v. Honduras*, Merits, Reparations and Costs Judgement, Inter-Am. Ct. H.R. (ser. C) No. 305, ¶ 158–161 (Oct. 8, 2015); *Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations and Costs Judgement, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 174–176 (Feb. 6, 2020).

4. The World Bank Group has also regulated indigenous consultations. In 1991, the World Bank adopted Operational Directive 4.20, which was a revision of the preexisting policy toward indigenous peoples identified as Operational Manual Statement 2.34. This framework aimed to prevent the adverse effects of development projects, and it also hoped to provide certain “culturally compatible social and economic benefits.” The World Bank Grp. [WBG], *Operational Directive 4.20*, ¶ 6 (Sept. 1991). However, this directive generally saw informed consultations as a strategy “to approach indigenous peoples within the development process” and not much more. See Shelton H. Davis, *The World Bank and Indigenous Peoples*, Paper presented at Panel on Indigenous Peoples and Ethnic Minorities at the Denver Initiative Conference on Human Rights, University of Denver Law School (Apr. 16–17, 1993), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/387581468762591091/the-world-bank-and-indigenous-peoples> [https://perma.cc/HV9A-L754].

However, even if the basic standards of FPIC are widely accepted today, the jury is still out regarding whether indigenous consultations effectively further indigenous interests. As indigenous consultations have become more common, scholars have scrutinized the social and political dynamics triggered by their practical implementation.<sup>5</sup> This literature seeks to assess whether the right to FPIC has met the expectations of indigenous rights activists. Perhaps unsurprisingly, conclusions have been contradictory. While some scholars consider FPIC a useful legal tool, others have raised important concerns about its limits, and even counterproductive effects.

This growing literature has successfully illuminated many of the tensions involved in putting FPIC into practice. Nevertheless, despite its empirical richness and divergent opinions, the discussion has rested on a relatively narrow conceptualization of how the right to FPIC operates. For the most part, scholars have understood indigenous consultations as a legal strategy that is primarily intended to protect indigenous peoples from harm. They have studied cases in which indigenous communities have deployed their right to FPIC as a shield to defend themselves against non-indigenous actors (typically a government or a corporation) who are trying to implement a potentially damaging project (such as the construction of a mine or a dam). Consequently, they have come to appreciate the practical usefulness of the right to FPIC in terms of its *protective function*, that is, its capacity to block, delay, or mitigate the impact of these external threats.

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The regulatory efforts of the World Bank towards indigenous consultations continued even after UNDRIP was adopted. In the last decade, the World Bank's Environmental and Social Framework (ESF) incorporated a duty to obtain consent under certain circumstances but kept seeing consultation as a way to avoid risks or mitigate adverse impacts in Bank-funded projects. Even if the ESF mentions that indigenous communities should be given an opportunity to participate at every stage of project design, the overarching purpose of engaging in that exercise is still to ensure that a borrower's project will mitigate and avoid harmful impacts over those populations. See The World Bank Grp. [WBG], *Environmental and Social Framework*, at 75–82 (2017).

Similarly, the United Nations Environment Program has also incorporated notions of indigenous peoples' rights to FPIC as part of its policy guidelines. This guideline makes direct reference to the way FPIC is regulated by the United Nations Declaration on Indigenous Peoples' Rights. See United Nations Environment Program [UNEP], *UNEP and Indigenous Peoples: A Partnership in Caring for the Environment*, at 10 (Nov. 2012), <https://wedocs.unep.org/handle/20.500.11822/11202> [<https://perma.cc/3C58-KPE7>].

5. See Megan Youdelis, "They Could Take You Out for Coffee and Call it Consultation!": *The colonial antipolitics of Indigenous consultation in Jasper National Park*, in 48 ENV'T. PLAN. A 1374, 1388 (2016) (using the concept of antipolitics to argue that state-led consultations implemented in Canada's Jasper national park were easily coopted); Therese Bjärstig et al., *The Institutionalisation of Sami Interest in Municipal Comprehensive Planning: A Comparison Between Norway and Sweden*, in 11 INT. INDIG. POLICY J. 1, 14 (2020) (comparing the performance of consultations across the national borders of Norway and Sweden and arguing that even if "Sami rights have stronger formal protection in Norway," indigenous interests "often lose out to those of other stronger actors" in both countries); Lucía Xiloj, *Implementation of the right to prior consultation of Indigenous Peoples in Guatemala*, in THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA: INSIDE THE IMPLEMENTATION GAP 243–260, 258 (Claire Wright & Alexandra Tomaselli eds., 2019) (noting that even if indigenous peoples of Guatemala have judicialized FPIC for over thirteen years the implementation of consultations in Guatemala is increasingly restrictive and losing legitimacy).

This Article expands this narrow understanding of indigenous consultations. It argues that, in certain contexts, the right to FPIC also has a *proactive function*. This proactivity does not refer to the possibility that an indigenous community can actively demand or participate in a consultation. Indeed, it goes much further. The proactive function highlights that the right to FPIC can promote indigenous initiatives vis-à-vis governmental actors that may be opposing, obstructing, or marginalizing them. In other words, this paper argues that besides serving as a shield, the right to FPIC has the potential to be brandished as a sword.

The argument is structured in three parts. First, it briefly reviews the socio-legal literature about FPIC and classifies the different reasons scholars are skeptical or optimistic about using consultations as a legal tactic in indigenous struggles. Second, it explains how this literature has overemphasized FPIC's protective function and conceptualizes this tendency as the result of three commonly held beliefs about the temporal limitations, the source of initiative, and the flow of legitimacy generated through indigenous consultations. Third, it introduces a case study that challenges each of these three beliefs and demonstrates that FPIC can also perform a proactive function.

The case study will take the reader into the Purhépecha Plateau, an indigenous region located in the northwest of the State of Michoacán, Mexico. Over the past decade, this region has been the stage of one of Mexico's fiercest movements for indigenous self-determination. This movement has demonstrated a remarkable ingenuity in devising legal strategies to advance their struggles. One of these strategies was conceived back in 2016, when the Purhépecha community of San Francisco Pichátaro (Pichátaro) deployed their right to FPIC to bolster an innovative project for indigenous financial autonomy. Unlike the stereotypical FPIC scenario, the community of Pichátaro did not have any corporation or government seeking to build a dam, excavate a mine, or take over their territories. In fact, their struggle was the exact opposite. Instead of facing an invasive external threat, Pichátaro confronted the neglect of government authorities indifferent to their needs. For years, the community had asked the government to pave their old dirt roads, build new classrooms, improve the potable water system, and provide better trash collection services. Although the authorities made many promises in response, they invested barely any resources in improving the living conditions of the community. Tired of this persistent neglect, the inhabitants of Pichátaro mobilized to demand direct access to a share of public funds. Somewhat ironically, this mobilization led to a legal strategy that used the right to FPIC to extract resources from the State that had otherwise been unavailable to the community.

The title of this Article summarizes the structure of this legal strategy. Through their engagement with a *de jure* process of FPIC, the indigenous community of Pichátaro carved a *de facto* right to "consult themselves"

about how they wanted the State to materialize the financial aspects of their self-determination. This tactic forced state authorities to recognize that the will of the community (as expressed through an indigenous consultation) had legal implications and ought to be respected by administrative and fiscal authorities. Ultimately, the consultation gave Pichátaro direct control over a share of the municipal public budget and allowed them to implement an indigenous-driven experiment on local self-governance that has been replicated by many other indigenous communities in Mexico.

While this Article is grounded on the concrete experience of Pichátaro, indigenous rights activists in other jurisdictions can extract valuable lessons from the case. Conceiving of the right to FPIC as a proactive, as opposed to just a protective, strategy could open new strategic fronts for other indigenous struggles.<sup>6</sup>

### I. THE AMBIVALENCE OF FPIC: ARGUMENTS FOR SKEPTICISM AND OPTIMISM

Scholars have long debated the effectiveness of human rights law as a tool for social justice. Some have conceptualized how activists use human rights to successfully bring about social change.<sup>7</sup> Others have problematized the tendency of human rights activism to entrench the unjust structures it intends to subvert.<sup>8</sup> And yet another trend of scholarship has sought to theo-

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6. I have previously argued for the importance of looking beyond prototypical FPIC cases. See Angel Gabriel Cabrera Silva, *At the Margins of the Indigenous Rights Ecosystem: Underrepresented Struggles for Self-Determination*, HARV. HUM. RTS. J. ONLINE, Apr., 2021, <https://harvardhrj.com/2021/04/at-the-margins-of-the-indigenous-rights-ecosystem/> [<https://perma.cc/MH3L-FBE3>].

7. See MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: NETWORKS IN INTERNATIONAL POLITICS* 12–13 (1998) (arguing that human rights strategies operate through a form of boomerang pattern that connects local and international advocacy networks); Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 3, 5–7 (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 2013) (arguing that human rights advocates utilize a “spiral model” that produce social pressure to induce behavioral changes in powerful actors). See BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 113 (2009) (arguing that ratified human rights treaties “influence agendas, litigation, and mobilization in ways that should be observable in government policies post-ratification”); Varun Gauri & Daniel Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 1, 6 (Varun Gauri & Daniel Brinks eds., 2008) (arguing that courts can help advance human rights by overcoming political blockages, channeling information to political actors, creating deliberation, and holding states accountable).

8. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 14 HARV. HUM. RTS. J. 101, 107–124 (2002) (presenting a list of “pragmatic worries and polemical charges” about the human rights movement); STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* 20–23 (2013) (arguing that the arrival of a multipolar world would bring the end to the Human Rights movement). SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 213 (2018) (“human rights, even perfectly realized human rights, are compatible with inequality, even radical inequality”). MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 150–153 (2002) (arguing that human rights discourses will likely fail in coping with the legacy of apartheid because its malleability makes it also a tool to protect the interest of the powerful).

size how human rights practices gradually subvert (or resist) these structures.<sup>9</sup>

The narrower field of indigenous rights has figured in this literature, and FPIC has also made sporadic appearances.<sup>10</sup> Like any other human right, the right to FPIC possesses the ambivalence inherent in the workings of international law<sup>11</sup> and its heavily procedural nature only serves to sharpen its double-edgedness as a tool for activism.

This Section traces this duality within the debates about FPIC and its capacity to advance the interests of indigenous peoples. Overall, scholars have provided both reasons for skepticism and optimism about FPIC—sometimes even formulating both viewpoints in the same paper.<sup>12</sup> Therefore, instead of trying to categorize scholars as either skeptical or optimistic, this Section organizes the literature according to the different aspects of an FPIC process that they address. For this purpose, it contrasts skeptical and optimistic viewpoints as they speak to A) the intra-procedural performance of FPIC; B) its extra-procedural effects; and C) its systemic or politico-economic implications. This typology reveals how, at each layer of discussion, both sides assume that FPIC performs an exclusively protective function.

9. See Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 39, 44–47 (Hernandez Truyol ed., 2002) (arguing that human rights can become an emancipatory language if they are reconceptualized as multicultural); Boaventura de Sousa Santos & Cesar A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 1, 15 (Boaventura de Sousa Santos & Cesar A. Rodríguez-Garavito eds., 2005) (proposing the concept of subaltern cosmopolitanism as a way to “articulate new notions of rights that go beyond the liberal ideal of individual autonomy”); Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 *THIRD WORLD Q.* 767, 770 (2006) (arguing that despite the hegemonic facet of human rights “the expansion of the political use of human rights discourse was also in a counter-hegemonic mode during the 1980s in a range of democratic struggles spanning Eastern Europe to Latin America”).

10. See KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 2 (2010) (arguing that the growing reliance on cultural rights has replaced other types of indigenous claims such as autonomy and development); SHANNON SPEED, *RIGHTS IN REBELLION: INDIGENOUS STRUGGLE AND HUMAN RIGHTS IN CHIAPAS* 19–33 (2008) (explaining how the interrelation and tension between the rise of neoliberalism, human rights, and indigenous rights appeared in the context of Chiapas). For an article focusing more specifically on the right to FPIC, see Cesar Rodríguez-Garavito, *Ethnicity.Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 *IND. J. GLOB. LEG. STUD.* 263, 273 (2011).

11. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 58–67 (1989) (explaining how the structure of international law is irremediably captured in a contradictory oscillation between “utopian” arguments, that emphasize normativity beyond States, and “apologetic” arguments that rely on the concreteness of State practice).

12. See Rodríguez-Garavito, *supra* note 10, at 298 (arguing that power asymmetries between the parties in consultation processes produce a “domination effect” against indigenous peoples). *But see id.* at 301–02 (arguing that consultation processes create opportunities that indigenous peoples can seize to produce an “emancipation effect”).

### A. *Intra-Procedural Performance of FPIC*

Doctrinally speaking, the right to FPIC is an eminently procedural right whose purpose is to operationalize the substantive right to indigenous self-determination.<sup>13</sup> Rather than imposing a strict template for conducting consultations, FPIC standards establish a set of normative requirements that a process must follow to be considered a “free,” “prior,” and “informed” way to obtain indigenous consent.<sup>14</sup>

The first axis of debate seeks to determine whether participating in consultation processes allows indigenous peoples to exercise their right to self-determination, or if the procedure fails to deliver on this promise. Skeptical viewpoints argue that legal formalism prevents FPIC from fulfilling its purpose, while optimistic arguments claim that, despite its imperfections, FPIC remains an important legal tool for indigenous peoples.

#### 1. *Dangers of Formalism*

Indigenous rights advocates have long worried that powerful actors could reduce indigenous consultations to an empty legal formality. Since the early drafting of ILO Convention 169, the Meeting of Experts expressed this concern by noting that a simple right to be consulted “could quickly be perverted . . . to mean *pro forma* consultations.”<sup>15</sup>

Despite the continuous development of FPIC norms, this preoccupation persists. Regrettably, the UN Special Rapporteur on the Rights of Indigenous Peoples still must condemn the “tendency to conceive of consultations with indigenous peoples as mere formalities,”<sup>16</sup> and scholars continue to document cases in which consultations are seen as a “box-ticking exer-

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13. SEBASTIAAN J. ROMBOUTS, *HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE PRIOR AND INFORMED CONSENT* 399 (2014).

14. For an overview of the expectations set by these standards, see Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, ¶¶ 20–30, U.N. Doc. A/HRC/39/62 (Aug. 10, 2018). See also Mauro Barelli, *Free, Prior, and Informed Consent in the UNDRIP*, in *THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY EDITED* 247 (Jessie Hohmann & Marc Weller eds., 2018).

15. International Labor Organization, *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI(1), 75th Session, at 30 (1988).

16. Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rights of Indigenous Peoples*, U.N. Doc. A/HRC/45/34, ¶ 51 (Jun. 18, 2020).

cise,”<sup>17</sup> or as “one more procedural rung on the ladder of bureaucratically acceptable decision-making processes.”<sup>18</sup>

From a strictly legal perspective, this problem could be understood as the consequence of lax rules leaving enough leeway to implement FPIC in a flawed and superficial manner. This is partly why indigenous rights advocates keep pushing to adopt stricter standards.<sup>19</sup>

However, codifying stricter rules about indigenous consent is not enough to acknowledge all the dangers that legal formalism poses to FPIC. As critical scholars warn, the formalistic application of legal rules is not a problem in and of itself. Rather, it becomes dangerous when powerful actors rely on such formalistic applications to reinforce pre-existing inequalities.<sup>20</sup>

Depending on the context, formalism can be abused in different ways. In some cases, rules can be applied superficially to rush through a consultation or validate a skewed process.<sup>21</sup> In other contexts (especially where indigenous communities are already mobilized), powerful interests can use a con-

17. Claire Wright & Alexandra Tomaselli, *From the implementation gap to Indigenous empowerment: prior consultation in Latin America*, in *THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA* 279, 283 (Claire Wright & Alexandra Tomaselli eds., 2019). See also Luis Carlos Arenas, *The U'wa Community's Battle against the Oil Companies: a Local Struggle Turned Global*, in *ANOTHER KNOWLEDGE IS POSSIBLE: BEYOND NORTHERN EPISTEMOLOGIES* 120, 130 (Boaventura de Sousa Santos ed., 2007) (describing how the consultation ordered by the Colombian Council of State was deemed valid even though it was only required to presentation the project and collect opinions); Alexander Dunlap, *A Bureaucratic Trap: Free, Prior and Informed Consent and Wind Energy Development in Juchitán, Mexico*, in *29 CAPITALISM, NATURE, SOCIALISM* 88, 90 (2018).

18. Derek Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24(1) *AM. INDIAN L. REV.* 21, 25 (2000).

19. These perspectives are generally based on the belief that such formal legal requirements could mitigate the risk of formalistic interpretations. See Dominic Leydet, *The power of consent: Indigenous peoples, states and development projects*, 69 *U. TORONTO L.J.*, 371, 403 (2019) (“the veto dimension of consent is crucial in structuring the interaction between the parties in a way that makes it more difficult for the more powerful party (the state) to ignore or marginalize the weaker party (the Indigenous people concerned”). See also Isabel Madariaga Cuneo, *ILO Convention 169 in the Inter-American Human Rights System: Consultation and Consent*, 24 *INT'L J. HUM. RTS.* 257, 261 (2020) (arguing that the implementation of FPIC standards as a minimum principle is crucial to improve the respect of indigenous peoples rights).

20. For a couple of classical texts explaining how legal processes tend to reproduce social hierarchies, see Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & SOC. REV.* 95, 149 (1974) (“Favorable rules are not necessarily (and possibly not typically) in short supply to ‘have-nots;’ certainly less so than any of the other resources needed to play the litigation game . . . . The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages.”). See also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 *HARV. L. REV.* 1685, 1700 (1976) (“[A] regime of formally realizable general rules may intensify the disparity in bargaining power in transactions between legally skilled actors who use the legal system constantly, and unskilled actors without lawyers or prior experience.”).

21. This risk is what some scholars have called the “domination effect.” See César Rodríguez Garavito & Carlos Baquero Díaz, *THE RIGHT TO FREE, PRIOR, AND INFORMED CONSULTATION IN COLOMBIA: ADVANCES AND SETBACKS* 13 (2018), <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/FPIC/GaravitoAndDiaz.pdf> [<https://perma.cc/95XM-CXXD>]. For instance, during the consultation to the Embera people in Colombia, certain community leaders received payments in exchange for performing certain tasks related to the organization of the consultation process. This was a source of tension and distrust between indigenous actors. See Laura Calle Alzate, *El Espejismo de la Autonomía Indígena: Mirada a la Situación de una Comunidad en la Orinoquía Colombiana*, 12 *ANUARIO DE ACCIÓN HUMANITARIA Y DERECHOS HUMANOS* 71, 93–94 (2014).



sultation to lure indigenous peoples into a “bureaucratic trap”<sup>22</sup> in which formalism can hinder indigenous interests by becoming dense, costly, and technical. For instance, Dunlap found that, despite the rebellious history of the community of Juchitán, Mexico, corporate and state actors used a consultation to “promote submission to procedural disciplines.”<sup>23</sup> Ironically, in these scenarios, having stricter rules would not necessarily further indigenous interests.

## 2. *Recognizing Progress*

In addressing human rights skepticism, Kathryn Sikkink noted the ways in which implicit “comparisons to the ideal”<sup>24</sup> obscure positive effects rendered visible through empirical comparisons (such as before/after or with/without scenarios). While Sikkink was not directly concerned with indigenous rights, her argument is applicable to FPIC. A skeptic could correctly argue that consultations often fall short of realizing self-determination. However, such criticism would implicitly compare real-life scenarios to an ideal world where FPIC performs perfectly. Making this comparison explicit can help us recognize the progress that the right to FPIC represents. The very existence of FPIC as an internationally recognized human right is a step forward from the legal framework that prevailed under the 1957 ILO Convention No. 107—which sought to assimilate indigenous peoples into the mainstream cultures of their host states.<sup>25</sup> In other words, even if the practical implementation of FPIC is often imperfect, “the fact that indigenous peoples do not reject consultation outright may be considered a (mini) success story.”<sup>26</sup>

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22. Dunlap, *supra* note 17, at 90.

23. *Id.* at 105. An example of this type of situation can be found in the way the Yaqui Tribe in northern Mexico was also entrapped in legal discussions about judicial compliance over the construction and operation of an aqueduct that extracts water from their territories. See Magdalena Gómez, *La consulta Indígena: ¿Antesala del Despojo o Estrategia de los Pueblos para la Defensa de sus Territorios?*, 34 EL COTIDIANO 133, 135–139 (2019).

24. KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 31 (2017) (“A comparison to the ideal involves contrasting what has actually happened with what should happen in an ideal world”).

25. ILO Convention No. 107 was the first relevant international legal instrument on indigenous rights. However, it saw indigenous peoples as “less advanced than the stage reached by the other sections of the national community.” International Labor Organization [ILO], Indigenous and Tribal Peoples Convention, 1957 (No. 107), art. 1(a), Jun. 26, 1957, 328 U.N.T.S. 247. The ILO has itself recognized that ILO Convention 169 sought to “leave behind the integrationist approach of its predecessor.” ILO, UNDERSTANDING THE ILO INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169): A TOOL FOR JUDGES AND PRACTITIONERS 25 (2021), [https://www.ilo.org/wcmsp5/groups/public/-dgreports/-gender/documents/publication/wcms\\_774745.pdf](https://www.ilo.org/wcmsp5/groups/public/-dgreports/-gender/documents/publication/wcms_774745.pdf) [<https://perma.cc/M5HK-Y2E7>]. See also, SEBASTIAAN J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE PRIOR AND INFORMED CONSENT 13 (2014) (“Even though ILO 107 is officially still in force, it was replaced because it focused not so much on the rights of indigenous peoples in the light of preserving their culture, but had a more assimilative approach, aiming at their progressive integration into the majority culture”).

26. Wright & Tomaselli, *supra* note 17, at 285.

This argument appears in various forms in discussions about indigenous consultations. For instance, Shilling-Vacaflor have noted that indigenous consultations offered an opportunity for the Guarani people to resist hydrocarbon projects in a context in which more transgressive tactics, like street blockages, were incapable of producing political influence.<sup>27</sup> Similarly, Flemmer describes how indigenous communities in Peru relied on FPIC to avoid expansion of hydrocarbon projects.<sup>28</sup> And Rodríguez-Garavito explicitly argued that “procedural regulations . . . can be a literal difference between life and death.”<sup>29</sup> While accepting that the right to FPIC is far from perfect,<sup>30</sup> these arguments remind us that indigenous struggles have benefitted from its existence and that improvements are possible.<sup>31</sup>

In a nutshell, the discussion about the intra-procedural performance of FPIC oscillates between those that see formalism as an unavoidable threat, and those that highlight the silver linings of consultations. One side affirms that powerful actors will always leverage the procedure to their advantage, while the other responds that, even so, the existence of FPIC can still make a difference.

Regardless, both camps ground their arguments in a protective understanding of FPIC. Skeptics see FPIC as a weak shield because it barely offers any protection against governments or corporations who can easily find a way to extract tainted forms of indigenous consent. Meanwhile, optimists consider that even if the shield is weak, it nevertheless offers some protection, or at the very least can “buy some time.”<sup>32</sup>

27. Almut Schilling-Vacaflor, *Who Controls the Territory and the Resources? Free, Prior and Informed Consent (FPIC) as a Contested Human Rights Practice in Bolivia*, 38 *THIRD WORLD Q.* 1058, 1067 (2017).

28. Riccarda Flemmer, *Prior Consultation as a Door Opener: Frontier Negotiations, Grassroots Contestation, and New Recognition Politics in Peru*, in *THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA: INSIDE THE IMPLEMENTATION GAP* 106, 114 (Wright & Tomaselli eds., 2019) (“communities that have refused to enter into State consultations have been able to use the State’s formal obligation to conduct prior consultations in order to avoid new hydrocarbon projects”).

29. Rodríguez-Garavito, *supra* note 10, at 302.

30. Lorenza B. Fontana & Jean Grugel, *The Politics of Indigenous Participation Through “Free Prior Informed Consent”*: Reflections from the Bolivian Case, in 77 *WORLD DEV.* 249, 258 (2016) (explaining that they do not “wish to argue against local consultation *tout court*. . . but we also have to recognize that FPIC is not a magic solution”).

31. For a couple of examples of how to improve consultation processes based on FPIC norms, see generally Terry Mitchell et al., *Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)*, 10 *INT. INDIG. POLICY J.* 21 (2019) (suggesting a “relational approach” to improve the performance of FPIC by incorporating not only respectful relations between parties, but also a deeper understanding of the unique relationship indigenous peoples have with their lands and territories); see Martin Papillon & Thierry Rodon, *Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior and Informed Consent in Canada*, 62 *ENVIRONMENTAL IMPACT ASSESSMENT REV.* 216, 223 (2017) (arguing the proponent-driven model of consultation that is used in Canada could be improved with FPIC standards, for instance, by making community engagement mandatory before consent can occur).

32. Rodrigo Llanes Salazar, *La consulta previa como símbolo dominante: significados contradictorios en los derechos de los pueblos indígenas en México*, 15 *LAT. AM. CARIBB. ETHN. STUD.* 170, 189 (2020) (arguing that FPIC is not really an effective mechanism to protect indigenous rights, but it can still be useful to slow harmful projects).

### B. *The Extra-Procedural Effects of FPIC*

The second axis of discussion about FPIC focuses not on the flaws in the implementation of legal standards, but on the impact of a consultation beyond the confines of the legal procedure. Indigenous consultations are always immersed in broader socio-political conflicts and, more often than not, indigenous communities participate in a consultation at the same time that they deploy non-legal tactics—like protests, campaigns, road blockades, etc. The scholarly attention to extra-procedural effects of FPIC follows from the realization that whatever happens inside a consultation has repercussions in these immediate contexts.

Socio-legal scholars have been especially attentive to these consequences. Although these scholars recognize the unintended ramifications that consultations have over the mobilizing capacities of indigenous communities, they have also documented how FPIC claims provide strategic possibilities that embolden indigenous struggles.

#### 1. *Unintended Consequences*

Scholars have found, to no one's surprise, that powerful actors often try to skew the outcome of a consultation, employing many tactics. Governments and corporations can retaliate against community members, bribe community leaders, and exploit or exacerbate inter-community conflicts. These maneuvers have been documented in various contexts and jurisdictions, including extractive industries in Bolivia,<sup>33</sup> development projects in Mexico,<sup>34</sup> and mining projects in Peru.<sup>35</sup>

These tactics are presumably deployed to influence an FPIC process, but they often have outward-reaching socio-political consequences. As third-party actors seek to tilt the consultation in their favor, indigenous communities may be deprived of their leaders, their coalitions might fracture, and their organizations could weaken. For instance, in the Bolivian context, Fontana and Grugel discovered that discussions about FPIC had not only magnified the tensions between indigenous peoples and other ethnic groups, but that they had also caused tension between traditional indigenous authorities and leaders of other indigenous organizations.<sup>36</sup> These

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33. See Almut Schilling-Vacaflor & Jessika Eichler, *The Shady Side of Consultation and Compensation: "Divide-and-Rule" Tactics in Bolivia's Extraction Sector*, in 48 DEV. CHANGE 1439, 1445 (2017).

34. See Dunlap, *supra* note 17, at 98–99. See also Centro ProDH, *Autoridades Exigen Detener Gasoducto; Denuncian Maniobras de División*, SISTEMA INTEGRAL DE INFORMACIÓN EN DERECHOS HUMANOS (Oct. 31, 2016), [https://centroprodh.org.mx/sididh\\_2\\_0\\_alfa?p=47627](https://centroprodh.org.mx/sididh_2_0_alfa?p=47627) [<https://perma.cc/S67W-C553>] (a communiqué denouncing how armed groups hired by the Mexican government confronted a community in the context of a consultation about a pipeline).

35. See Cathal M. Doyle, *Indigenous Peoples' Experiences of Resistance, Participation, and Autonomy: Consultation and Free, Prior and Informed Consent in Peru*, in THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN-AMERICA: INSIDE THE IMPLEMENTATION GAP 58, 66–67 (Wright and Tomaselli eds., 2019) (explaining that Peruvian authorities took criminal action against indigenous individuals protesting against a mine).

36. See Fontana & Grugel, *supra* note 30, at 254.

“shady sides”<sup>37</sup> of FPIC threaten to swallow up indigenous land and resources, while undermining the capacity of indigenous communities to organize and mobilize.<sup>38</sup>

The side effects of consultations are even more worrisome if we consider that such consequences arise not only from antagonistic actors (like corporations and governments), but through contact with allies, like human rights NGOs and lawyers, whose interventions in a community’s struggle can create dependency and disempower grassroots organizing.<sup>39</sup> Unfortunately, stories about the negative effects caused by the intervention of well-intended lawyers and activists are common in critical accounts of human rights.<sup>40</sup>

In other words, the extra-procedural risks of FPIC materialize through engaging with the consultation itself.<sup>41</sup> Even if a community claims victory, an FPIC implies an unavoidable contact with legal institutions, experts, and discourses, relationships that can dislocate preexisting forms of indigenous organization.<sup>42</sup>

This criticism, however, can be countered with a similar rationale. Just as skeptical arguments alert that FPIC can unintentionally harm the organiza-

37. Schilling-Vacaflor & Eichler, *supra* note 33, at 1457.

38. *See id.*

39. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N. U. L. REV. 455, 465 (1994) (“There are two traditional methods of public interest lawyering: providing individual legal services . . . and providing reform or impact litigation . . . Neither of these traditional forms of public interest lawyering is well suited to empowering. Both focus the power and the decision-making in the lawyer and the organization which employs the lawyer.”). For an analysis of the role of expert advisors to indigenous communities in the context of FPIC, see Jessica Eichler, *Indigenous Intermediaries in Prior Consultation Processes: Bridge Builders or Silenced Voices?*, 23 J. LAT. AM. CARIBB. ANTHROPOL. 560, 574–75 (2018) (arguing that lawyers and other experts who served as advisors to indigenous communities in consultation processes in Bolivia fell short of fulfilling their role as “bridge builders”).

40. See Rochelle Terman, *Backlash: The Unintended Consequences of Western Human Rights Intervention*, OPENDEMOCRACY.NET (Dec. 10, 2013) (arguing that western intervention in local campaigns in the Global South can delegitimize local advocates and have other unintended consequences), <https://www.opendemocracy.net/en/5050/backlash-unintended-consequences-of-western-human-rights-intervention/> [<https://perma.cc/EV34-ZTVL>]; Barbora Bukovska, *Perpetrating Good: Unintended Consequences of International Human Rights Advocacy*, in 4 SUR INT’L J. ON HUM. RTS. 6, 10–12 (2008) (explaining how international NGOs often revictimize, extract testimonies, and monopolize the struggles of local communities). For a similar argument in the context of FPIC, see Amanda Fulmer, *The Politics of a Strange Right: Consultation, Mining and Indigenous Mobilization in Latin America*, in THE USES AND MISUSES OF HUMAN RIGHTS: A CRITICAL APPROACH TO ADVOCACY 86 (George Andreopoulos & Zehra Arat eds., 2014) (alerting about the risk of human rights lawyers considering their “job as advocates done when ‘consultation’ is achieved”).

41. As Charles Hale describes, the cost of indigenous peoples’ involvement with legal languages and processes is “an unprecedented involvement of the state and of neoliberal development institutions in the community’s internal affairs.” Charles Hale, *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*, 28 POLIT. LEG. ANTHROPOL. REV. 10, 16 (2005).

42. For instance, in the case of the Urrá dam in Colombia, after the Constitutional Court ordered a corporation to undertake a consultation and compensate for damages, the disbursement of these funds eroded the preexisting relations of solidarity of indigenous communities. CEISAR A. RODRIGUEZ GARAVITO & NATALIA ORDUZ SALINAS, *ADIOÏS RÍO: LA DISPUTA POR LA TIERRA, EL AGUA Y LOS DERECHOS INDÍGENAS EN TORNO A LA REPRESA DE URRÁ* 175–76 (2012).

tional capacities of indigenous communities, optimist arguments point out that indigenous communities can intentionally seize these extra-procedural effects in their favor.

## 2. *Strategic Possibilities*

The general literature on social movements has recognized that the deployment of law is a political skill that activists use to further their agendas (though not without risks or costs). One of the best-known contributions in this regard is Michael McCann's analysis of the positive effects that legal mobilization had in the struggles for pay equity in the United States.<sup>43</sup> In the context of transnational activism, perhaps the most influential argument has been Keck and Sikkink's study of the capacity of human rights law to connect local groups with global advocacy networks.<sup>44</sup>

These broader theories are weaved into the literature on FPIC through arguments that recognize the strategic value of consultations processes. Under certain circumstances, indigenous consultations have facilitated transnational alliances,<sup>45</sup> and have also offered a space to reconstruct indigenous organizational cultures.<sup>46</sup> For instance, Rodríguez-Garavito and Arenas have described how the campaign of the U'wa people against Occidental Petroleum Corporation used a consultation to bring the case into the international spotlight.<sup>47</sup> Amanda Fulmer found that Guatemalan and Peruvian communities used the right to FPIC as a discursive tool to mobilize, gain political legitimacy, and build a coalition to challenge extractive industries.<sup>48</sup> As she puts it, FPIC is important "because it is vio-

43. MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 10–11 (1994) (theorizing a typology of four stages in which legal mobilization contributes to movement action, namely, "movement building processes," "the struggle to compel formal changes in official policy," "the struggle for control over actual reform policy development and implementation," and the "transformative legacy of legal action").

44. See generally KECK & SIKKINK, *supra* note 7.

45. See Rodríguez-Garavito, *supra* note 10, at 274 ("sometimes FPIC is the only mechanism effective at slowing down extractive economic projects' dizzying pace . . . [and] ha[s] been [a] catalyst for the political mobilization of affected peoples along with national and international activist networks").

46. See Jennifer N. Costanza, *Indigenous Peoples' Right to Prior Consultation: Transforming Human Rights From the Grassroots in Guatemala*, in 14 J. HUM. RIGHTS 260, 271 (2015) ("Many activists see the consultations as part of a larger process of rescuing, valorizing, and even re-creating communities' organizational culture and ethnic identity").

47. See César A. Rodríguez-Garavito & Luis Carlos Arenas, *Indigenous rights, transnational activism, and legal mobilization: The struggle of the U'wa people in Colombia*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 241, 250 (Sousa Santos & Rodríguez-Garavito eds., 2005) ("The blockage of institutional avenues that this decision entailed would radicalize the political mobilization of the U'wa, prompt the judicialization of the case, and bring the U'wa cause to the attention of international audiences"). In this case, the legal front of the U'wa struggle was embedded inside an FPIC process, but at the same time their political tactics rejected the need to be consulted since the U'wa had already decided that their repudiation to oil extraction was non-negotiable. Arenas, *supra* note 17, at 129.

48. Amanda M. Fulmer, *La Consulta a los Pueblos Indígenas y su Evolución como Herramienta de Negociación Política en América Latina. Los Casos de Perú y Guatemala*, in 38 APUNT. REV. CIENCIAS SOC. 37 (2011).

lated so often”<sup>49</sup> that indigenous peoples can constantly raise legal claims, criticize the government, and mobilize support from international audiences.<sup>50</sup>

At large, the discussion over the extra-procedural effects of FPIC spans two contradictory arguments: one claiming that consultations can demobilize and fragment indigenous movements, and another asserting that indigenous communities can use FPIC to harness support and embolden their resistance. In real life, both arguments hold some truth, as the specific effects of a consultation likely depend on the particularities of any given context.

Again, regardless of viewpoint, both sides of the debate assume that FPIC serves only a protective function. Skeptics view FPIC as an armor so defective that instead of protecting indigenous peoples, it advantages corporations and governments. Meanwhile, optimists highlight how FPIC thickens the ranks of political support that protect indigenous communities from a corporate or government project.

### C. *The Systemic Aspects of FPIC*

The third axis of the debate around FPIC operates at a more structural level. It is less concerned with any particular consultation, and more about the implications of FPIC in the context of capitalist globalization. These arguments touch on issues of political economy and the possibilities for social emancipation. The skeptical argument considers FPIC to be a legal device that expands the “frontiers of capitalism,”<sup>51</sup> while the optimistic position hopes that FPIC can facilitate a “counter-hegemonic globalization.”<sup>52</sup>

#### 1. *Capitalist Impulses*

A couple of decades ago, Cooke and Kothari warned of the “tyranny” lurking behind the new participatory mechanisms promoted by international development institutions.<sup>53</sup> They argued that those mechanisms not only elicited narrow forms of participation, but also reproduced the unjust outcomes that had previously been imposed through top-down interventions.<sup>54</sup>

As a participatory device itself, FPIC is also susceptible to this criticism. Human rights lawyers are not the only ones driving the expansion of FPIC.

49. *Id.* at 58.

50. In fact, Fulmer argues that creating stricter standards could diminish the space available for these political maneuvers, thus reducing the pragmatic usefulness of FPIC. *Id.* at 56.

51. See ANNA TSING, *FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION* 27–50 (2004).

52. I borrow this concept from Santos & Rodríguez-Garavito, *supra* note 9.

53. Bill Cooke & Uma Kothari, *The Case for Participation as Tyranny*, in *PARTICIPATION: THE NEW TYRANNY?* 1 (Bill Cooke & Uma Kothari eds., 2001).

54. *Id.* at 3–7.

Institutions like the World Bank Group,<sup>55</sup> the Inter-American Bank,<sup>56</sup> and even some private entities<sup>57</sup> are also in the business of indigenous consultations. However, in contrast to the emphasis that human rights advocates put on the principle of self-determination, those institutions talk about consultations as a means of obtaining a “social license,”<sup>58</sup> or a process to avoid and/or mitigate the risk of an investment.<sup>59</sup>

This conception of FPIC illuminates its politico-economic implications. Indigenous consultations are not just a right of indigenous communities. From a capitalist perspective, they are also a legal tool that reduces the risk of social backlash whenever the market seeks access to lands and resources that would normally be out of grasp.<sup>60</sup>

As a legal technology of governance, FPIC “establishes a narrowly defined set of rules and practices, in order to produce a convenient alignment of people and things.”<sup>61</sup> Even when framed as a manifestation of self-determination, a consultation imposes a procedural “choreography” that defines

55. See *supra* note 4. See also INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARD 7: INDIGENOUS PEOPLES (2012), [https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7\\_English\\_2012.pdf?MOD=AJPERES&CVID=JIVQLD](https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7_English_2012.pdf?MOD=AJPERES&CVID=JIVQLD) [https://perma.cc/5WBB-WHZN] (establishing the objective of maintaining a relationship based on “informed consultation and participation”).

56. See FLAVIO MILANO & ANDREA SANHUEZA, PUBLIC CONSULTATIONS WITH CIVIL SOCIETY: GUIDELINES FOR PUBLIC AND PRIVATE EXECUTING AGENCIES 20–24 (2016).

57. See generally GRI—Global Sustainability Standards Board, *GRI 411: Rights of Indigenous Peoples*, GLOBALREPORTING.ORG (2016), <https://www.globalreporting.org/standards/media/1026/gri-411-rights-of-indigenous-peoples-2016.pdf> [https://perma.cc/8BV5-XWWMF] (This standard establishes that “an organization is also expected to respect the rights of indigenous peoples to free, prior, and informed consent in certain matters affecting them”). For an academic article tracing the creation of good practices and consultation standards by the mining sector, see generally Angus MacInnes, Marcus Colchester & Andrew Whitmore, *Free, Prior and Informed Consent: How to Rectify the Devastating Consequences of Harmful Mining for Indigenous Peoples*, in 15(3) PERSPECTIVES IN ECOLOGY AND CONSERVATION 152 (2017).

58. See MILANO & SANHUEZA, *supra* note 56, at 18. For an analysis of how the notion of “social license” is used, see John R. Owen, *Social License and Mining: A Critical Perspective*, in 38 RESOURCES POLICY 29, 34 (2013) (arguing that “social license is more about reducing overt opposition to industry than it is about engagement for long-term development”).

59. The World Bank Environmental and Social Standard No. 7 explicitly sets as one of its objectives to “avoid adverse impacts of projects on indigenous peoples . . . or when avoidance is not possible, to minimize, mitigate and/or compensate for such impacts.” See The World Bank Grp. [WBG], *Environmental and Social Framework*, at 76 (2017). Anecdotally, Peruvian President Ollanta Humala makes this point clear when he described consultations “as an instrument that allows one to legitimize an investment and not an obstacle.” Emiliano López, Francisco Vértiz & Margot Olavarria, *Extractivism, Transnational Capital, and Subaltern Struggles in Latin America*, in 42 LAT. AM. PERSPECT. 152, 162 (2015).

60. See Roberto Suárez Santos, *Three Decades Since the ILO’s Convention 169: Reflections in Light of the Experience of the Private Sector with Prior Consultation*, 24 INT’L. J. OF HUM. RTS. 272, 274 (2020) (explaining that from the perspective of the private sector the “misapplication of prior consultation that has rather frightened and punished the sound investment which generates good employment”). See Marta Conde & Philippe Le Billon, *Why Do Some Communities Resist Mining Projects While Others Do Not?*, 4 EXTR. IND. SOC. 681, 690–93 (2017) (explaining that indigenous consultations are a factor that can reduce the likelihood of resistance against mining projects).

61. See Tom Perreault, *Performing Participation: Mining, Power, and the Limits of Public Consultation in Bolivia*, 20 J. LAT. AM. CARIBB. ANTHROPOL. 433, 449 (2015).

the appropriate forms of participation and resistance.<sup>62</sup> And as some scholars have discovered, depending on the socio-political conditions, participation in this choreography can be “disempowering”<sup>63</sup> (since indigenous peoples need to rely on specialists); “antipolitical”<sup>64</sup> (as technical discussions gloss over colonial power dynamics); or demobilizing (when it “lure[s] recalcitrant populations into rigged democratic theatrics”).<sup>65</sup>

In this way, an FPIC process can recognize cultural differences while simultaneously rationalizing the exclusion of non-capitalist indigenous interests.<sup>66</sup> Consultation mechanisms can include indigenous peoples while also filtering out those aspects of indigenous cultures that are most problematic to capitalist expansion—like collective governance structures<sup>67</sup> and the rejection of land as a commodity.<sup>68</sup>

In other words, skeptical viewpoints would see FPIC as another example of how human rights language induces indigenous peoples into the march of neoliberalism.<sup>69</sup> Here, it has been harder to articulate an optimistic counterargument, but theories of subaltern resistance offer a potential answer.

## 2. Subaltern Potential

Within the broad literature of human rights, Boaventura de Sousa Santos has advanced one of the most ambitious arguments in favor of using human

62. Laura Calle Alzate, *Prior Consultation as a Scenario for Political Dispute*, in *THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA* 91, 103 (Claire Wright & Alexandra Tomaselli eds., 2019).

63. Riccarda Flemmer & Almut Schilling-Vacaflor, *Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries*, 37 *THIRD WORLD Q.* 172, 183 (2016).

64. Youdelis, *supra* note 5, at 1377–78. See Almut Schilling-Vacaflor et al., *Contesting the Hydrocarbon Frontiers: State Depoliticizing Practices and Local Responses in Peru*, in 108 *WORLD DEV.* 74, 78 (2018) (identifying “practices for depoliticizing participatory events and taming dissent against extraction activities” used by Peru-Petro, a state entity, in the context of consultations).

65. Dunlap, *supra* note 17, at 105.

66. A particular example of this tendency can be found in the U’wa struggle against oil extraction activities. As Arellano describes, “the U’wa were baffled that both the Constitutional Court and Council of State had focused on their rights to participate in the consultation process rather than on the substance of their opposition to oil drilling . . . . In this case, the views of the U’wa were not taken into account in the decision-making process for granting licenses for oil drilling, effectively making their epistemologies non-existent.” See Juan Martín Arellano Martínez, *Indigenous Peoples Struggles for Autonomy: The Case of the U’wa People*, 12 *PATERSON REV. INT’L. AFFAIRS* 109, 117 (2012).

67. In other words, the way that FPIC performs can be seen as a species of the broader phenomenon described by Hale when he analyzed the way human rights related to indigenous political struggles. See Hale, *supra* note 41. As Eichler discovered in the FPIC processes conducted by Bolivian authorities, “indigenous governance structures were accepted as long as they did not reflect views that were too diverse for the sake of process efficiency.” Eichler, *supra* note 39, at 575.

68. See Jennifer Franco, *Reclaiming Free Prior and Informed Consent (FPIC) in the Context of Global Land Grabs*, in *TRANSNATIONAL INSTITUTE (TNI) FOR HAND OFF THE LAND ALLIANCE* 16 (2014), [https://www.tni.org/files/download/reclaiming\\_fpic\\_0.pdf](https://www.tni.org/files/download/reclaiming_fpic_0.pdf) [<https://perma.cc/3JMK-TWBZ>] (explaining how FPIC can be used by elite actors to engage with sectors of indigenous populations that are open to negotiate a land deal, in prejudice of those that express an outright rejection to land grabbing).

69. Hale, *supra* note 41, at 13.



rights in the pursuit of social emancipation.<sup>70</sup> His theory of “subaltern cosmopolitan politics and legality”<sup>71</sup> highlights the ways in which the political activity of subaltern social movements can gradually transform the functioning of law in ways that counter the expansion of global capitalist hegemony.<sup>72</sup>

Rodríguez-Garavito and Arenas have brought these theoretical insights into the conversation surrounding FPIC. In their study of a consultation with the U’wa in Colombia, they argued that an indigenous mobilization, organized around an FPIC claim, could redefine the substantive content of human rights and contribute to constructing a subaltern cosmopolitan legality.<sup>73</sup> However, their point was made in terms of a possibility as opposed to a concrete empirical finding. Rodríguez-Garavito and Arenas did not go so far as to argue that the specific case being analyzed facilitated a politico-economic transformation. Rather, they argued that the U’wa incorporated FPIC into a struggle that brought a collective dimension into the politics of rights, thus challenging the hegemonic focus on individual entitlements.<sup>74</sup>

Again, in both cases the protective function of FPIC remains a background assumption. On the one hand, skeptical arguments portray FPIC as a tool that pretends to protect indigenous communities, but in reality, serves the interests of capital. Meanwhile, the optimistic analysis of Rodríguez-Garavito and Arenas relies on a case in which a community used FPIC to resist the imposition of a hegemonic capitalist legality. In both scenarios, the right to FPIC tries (or pretends) to protect while capitalism attacks.

## II. THE LIMITS OF FPIC’S PROTECTIVE FUNCTION

Despite its almost three decades of normative development, the right to FPIC still sparks an important degree of practical anxieties and scholarly debates. Assessing whether activists should be optimistic or skeptical about FPIC is a glass half full/glass half empty problem. Even if scholars may never reach a conclusion, the fact that consultations are frequently a necessary move or a last-resort tactic in the real-life struggles of indigenous peo-

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70. See BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* 522 (2020).

71. Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 29–63, 30 (Santos & Rodríguez Garavito eds., 2006).

72. See also Santos & Rodríguez-Garavito, *supra* note 9, at 15 (arguing that subaltern cosmopolitan legality is an approach that seeks to “empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter”).

73. Rodríguez-Garavito & Arenas, *supra* note 47, at 262–63.

74. *Id.* at 247 (“indigenous peoples have vindicated a relational and collective understanding of rights thus adding collective rights to the liberal repertoire of individual guarantees”).

ples<sup>75</sup> makes every scholarly effort to understand their risks and potential worthwhile.

As we have seen, the literature on FPIC has given careful attention to the positive and negative effects of consultations at various levels (intra-procedural, extra-procedural, and systemic). However, at every point, FPIC is continually assumed to play an exclusively protective function in indigenous struggles. In other words, every argument raised in favor of or against FPIC was made with regard to the capacity of consultations to block, delay, or mitigate the harm brought by an externally driven project.

This protective bias is hardly surprising, as it is partially rooted in the normative origins of FPIC. From its inception, this right was conceived as a tool for indigenous peoples to participate in decisions that “affected them,”<sup>76</sup> implying that a potential harm should exist before FPIC could be claimed.<sup>77</sup>

The focus on protection not only finds expression in legal doctrine, but also in the array of empirical cases that ground the theoretical discussion. Every argument reviewed in the preceding section was developed by reflecting on cases where communities are either resisting extractive industries,<sup>78</sup> challenging a development project,<sup>79</sup> or questioning a governmental policy.<sup>80</sup> To the extent that indigenous projects made an appearance in these cases, they were largely tangential to the formal consultation.<sup>81</sup> Naturally,

75. See generally Rodríguez-Garavito, *supra* note 10.

76. Ever since the negotiations to adopt ILO Convention 169, the governments talked about consultations as a way to “increase participation of these groups [indigenous peoples and tribal populations] in decisions which affected them.” International Labor Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report of the Committee on Convention No. 107, 75th Session, at 36/3 (1988).

77. A grammatical formulation that is replicated in the UNDRIP. See G.A. Res. 61/295, United Nations Declaration on Indigenous Peoples Rights, *supra* note 1, arts. 19, 32.

78. Most of the literature reviewed in this article is grounded on consultations intended to protect indigenous communities from extractive industries. Arenas, *supra* note 17 (a community resisting a mining company in Colombia); Schilling-Vacaflor & Eichler, *supra* note 33 (communities resisting hydrocarbon industry in Bolivia); Schilling-Vacaflor et al., *supra* note 64 (communities resisting hydrocarbon industries in Peru); Flemmer & Shilling-Vacaflor, *supra* note 63 (communities resisting extractive companies in Peru and Bolivia); Perreault, *supra* note 61 (communities resisting mining activities in Bolivia); Conde & Billon, *supra* note 60 (communities resisting mining projects generally); Alzate, *supra* note 62 (communities resisting oil companies in Colombia); Martínez, *supra* note 66 (communities resisting oil companies in Colombia); Eichler, *supra* note 39 (communities resisting hydrocarbon industries in Bolivia); Fulmer, *supra* note 48 (communities resisting mining projects in Peru and Guatemala); Mitchell et al., *supra* note 31 (communities resisting mining projects in Canada). López et al., *supra* note 59 (communities resisting extractive industries in Peru, Ecuador, and Argentina).

79. Dunlap, *supra* note 17 (an indigenous community resisting a wind energy park in Mexico); RODRÍGUEZ-GARAVITO & ORDUZ SALINAS, *supra* note 42 (a community resisting the construction of a dam in Colombia); Centro ProDH, *supra* note 34 (communities resisting the construction of an aqueduct in Mexico).

80. Youdelis, *supra* note 5 (a community vis-à-vis Canadian park management policies); Fontana & Grugel, *supra* note 30 (communities protecting their interests vis-à-vis a new law); Flemmer, *supra* note 28 (communities resisting a policy to privatize rainforest land in Peru).

81. Fulmer, *supra* note 40, at 85 (arguing that indigenous communities can “highlight a whole range of issues . . . as they protest the failure of the government to consult them about a mine or an oil project”).

this list does not exhaust all the literature on FPIC, but the author has yet to find an academic analysis of consultation that cannot be classified in one of these categories. And despite variations in argument, it is important to recognize the ways in which they all share in the same archetypal scenario. Each portrays an FPIC process that revolves around an external actor (a government or a corporation) who wants to pursue a project that may affect an indigenous community (a mine, a dam, a law, etc.), and thus the right to FPIC offers itself as a shield to *protect* the indigenous community from harm. Since both skeptical and optimistic arguments are grounded in instances that fit within this archetype, it is easy to understand why the literature has scrutinized FPIC based on its protective capacities.

The prevalence of protection-centered analysis is unsurprising but highly consequential. Protective deployments of FPIC are certainly the most common in practice. However, failing to recognize that they are not the only approach has also ossified the protective function as the legal paradigm. If it is difficult today to imagine that a consultation could be deployed differently, it is partly because this status quo has crystalized the way both scholars and activists understand FPIC.

However, this bias is not inescapable. To detach ourselves from it, this Part conceptualizes three fundamental assumptions that tie FPIC to the archetypal scenarios in which FPIC can only show its protective face. The first assumption relates to the temporal scope of the consultation process. The second pertains to the source of initiative of the project that is the subject of the consultation. The third concerns the direction of the flow of legitimacy enabled by a consultation. Consciously reflecting on how these assumptions structure FPIC will help us problematize and contrast them with the case study that, in the next Part, will explain how FPIC can also perform a proactive function.

### A. *The Temporality of Consultation Processes*

The very notion of a right to “prior” consent indicates the temporality of consultation processes. According to international human rights law, an FPIC process must give indigenous communities a say *before* a specific project is implemented.<sup>82</sup> While the reach of this temporality was once vague, contemporary human rights standards clearly establish that the duty to consult exists from the moment in which a project begins to be considered and extends throughout its implementation.<sup>83</sup>

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82. “Prior” consent refers to the temporality in which a consultation is meant to be implemented. However, sometimes the right of FPIC can be claimed against a project that has already been concluded, as it happened in the case of Urrá dam. See GARAVITO & SALINAS, *supra* note 42, at 16–17. However, even in these cases, the legal argument must conform to the rule that the project should have been consulted by the time it began to be implemented.

83. According to the United Nations Expert Mechanism on Indigenous Peoples Rights, “consultation and participation should be taken at the conceptualization and design phases.” Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 14, ¶ 21(a).

These standards were developed to maximize the protective scope of the right to FPIC so that it includes indigenous participation from the earliest stages of a project. However, these rules also create a temporal boundary that seemingly excludes the possibility to organize a consultation about projects that took place in the past.<sup>84</sup> In other words, the commonsensical understanding of FPIC posits that this right can only protect indigenous peoples against present or future dangers—if a grievance occurred before FPIC was recognized, it would be impossible to remedy.

An important pragmatic implication of this temporal boundary is that the lingering effects of historical injustices exist outside of the temporal scope of traditionally encompassed consultations. For instance, despite the many colonial vestiges that survive within modern day institutions, the routine operation or existing design of a state's administrative apparatus—such as fiscal systems, electoral systems, or even politico-administrative demarcations—are not subject to a consultation, even if they are all important mechanisms through which host states affect the everyday life of indigenous communities.<sup>85</sup> The seeming unavoidability of this time-based limitation adds to skepticism about the capacity of indigenous consultations to remedy systemic problems.

This assumption implies that, even if the right to FPIC recognizes historical processes of dispossession, its main function is to *protect* from further injustices. To escape this assumption, a proactive deployment would give indigenous peoples a chance to revert, or at least controvert, grievances committed in the far-gone past.

### B. *Third Party Actors and FPIC*

International human rights law establishes that a duty to consult is triggered by the presence of potential harm—not by the nature of a project. This standard seeks to maximize the protective reach of the right to FPIC by making it applicable to a broad swath of situations, from extractive ac-

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84. In those rare occasions where a consultation is conducted retroactively, the legal claim to FPIC is justified over the argument that, by the time a particular project was conceived, a right to a prior consultation already existed. For instance, when deciding a case brought by the Yaqui Tribe against a project to construct an aqueduct the Mexican Supreme Court decided that the duty to consult persists after a project's implementation insofar as a right to be consulted existed at the moment in which it began. Suprema Corte de Justicia de la Nación [SCJN], AD 631/2012, Judgement of May 8, 2013 (Mex.).

85. See Angel Gabriel Cabrera Silva, *Timeful Strategies for Indigenous Self-Determination: Lessons from the Purhépecha*, OPENGLOBALRIGHTS.ORG (Oct. 22, 2021) (explaining how human rights law prevents indigenous communities to be consulted about the way the national fiscal system has been operating on the day by day, even if it has continuously affected them), <https://www.openglobalrights.org/timeful-strategies-for-indigenous-self-determination-lessons-from-the-purhepecha/> [<https://perma.cc/K4JX-5GYN>].

tivities to infrastructure projects,<sup>86</sup> and from policy decisions to legislative bills.<sup>87</sup>

Nevertheless, the way in which these normative standards are applied implicitly suggests that a consultation must revolve around the initiative of an external (and typically non-indigenous) actor. Even if there is no norm explicitly excluding the possibility of organizing an indigenous consultation about an indigenous-driven project, this prospect seems moot when the right to FPIC is invoked as a protective strategy. After all, if a community is trying to implement a project of their own, why would they need a consultation to move forward with it?

In other words, this assumption suggests that the right to FPIC can only be invoked in reaction to a third party's initiative. To challenge this assumption, a proactive use of FPIC would have to revolve around a project conceived by an indigenous community.

### C. *The Centrifugal Flows of Legitimacy*

As a procedural mechanism, the right to FPIC is geared towards producing a legally valid and politically legitimate expression (or withholding) of indigenous consent. This is why, under international human rights law, the general duty to consult is only satisfied when a consultation is implemented in good faith or, in certain situations, when an indigenous community consents.<sup>88</sup>

This norm has an important legitimizing purpose. In practice, the objective of a consultation is to leverage the expression of indigenous consent (or lack thereof) in order to legitimize (or delegitimize) the project being consulted. The strategic value of FPIC derives primarily from its widespread acceptance as the legally valid mechanism to determine the political will of an indigenous community.

In this way, the right to FPIC is assumed to generate a centrifugal flow of legitimacy—which originates in the indigenous community that consents and moves to legitimize an outsider's project. Correspondingly, the absence of an appropriate consultation—or the withholding of indigenous

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86. G.A. Res. 61/295, United Nations Declaration on Indigenous Peoples Rights, *supra* note 1, art. 32.2.

87. *Id.* art. 19.

88. The issue of whether or not FPIC requires indigenous consent fuels the debate about indigenous “veto power.” This discussion remains highly contested and perpetuates a grey area where lawyers struggle to determine which situations require indigenous consent, and which ones do not. For a couple of examples that reveal the ambiguity of the norm of indigenous consent, see Mauro Barelli, *Free, Prior, and Informed Consent in the UNDRIP*, in *THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY* EDITED 247, 268–69 (Jessie Hohmann & Marc Weller eds., 2018) (arguing that the UNDRIP does not create an overarching obligation of states to obtain indigenous consent, but that FPIC demands different degrees of participation depending on the implications of a project). Human rights bodies have sought to sidestep this debate by suggesting that an indigenous community's decision to withhold consent implies the need to engage in further consultations. See Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 14, ¶ 20–30.

consent—legally legitimizes indigenous opposition against an external actor.

However, this centrifugal flow assumes that all FPIC offers to indigenous struggles is the power to consent (or withhold consent) to (de)legitimize an external project. This effect is directly intertwined with the protective function of FPIC as a way to resist a threat through judicial actions and the support of advocacy networks. Using FPIC proactively would create an inverse (centripetal) flow of legitimacy—one that generates legitimacy in non-indigenous actors, and then uses a consultation to legitimize an indigenous-conceived project.

Taken together, these three assumptions operate to give FPIC its protective shape. They indicate that a consultation concerns a present or future project promoted by an external actor and has the purpose of giving an indigenous community the opportunity to (de)legitimize its implementation through granting (or withholding) consent.

This understanding of FPIC is reinforced by the sheer number of cases in which the right to FPIC serves a protective purpose as well as the doctrinal development that emphasizes the protective aspect of FPIC norms. The naturalization of these three beliefs about FPIC is the self-fulfilling result of every routine deployment of legal expertise that conceives of (and thus reinforces) FPIC as a predominantly protective strategy.<sup>89</sup>

Despite their stickiness, it is still possible to break free from these assumptions by looking into grounded examples that reveal their “false necessity.”<sup>90</sup> After all, the practical performance of legal norms is constantly shaped by ongoing and cumulative processes of interpretation and reinterpretation. Drawing inspiration from authors who have already explored the possibility of creatively repurposing human rights norms,<sup>91</sup> the following pages introduce a case study that provides empirical evidence of how the right to FPIC can challenge these limitations and perform a proactive function.

89. David Kennedy has theorized, at a broader scale, the capacity of experts to construct the legal commonsense through struggle. See DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 137 (2016) (“the shared imaginary of undisputed facts and common sense sets the terrain for [expert] articulation, and yet both undisputed facts and common sense are themselves performative assertions that have settled back into knowledge”).

90. I borrow this concept from Roberto Unger who uses it as a way to escape the perceived necessity to affiliate oneself to either positivist social science or deep-structure social analysis. See ROBERTO UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 17 (2004). Similarly, in the context of international law, the concept of false necessity has also been used to describe the moments in which legal experts become momentarily “free of their expertise.” See KENNEDY, *supra* note 89, at 166.

91. See Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, in 9 *GLOB. NETWORKS* 441, 446 (2009) (describing vernacularization as a process through which “women’s human rights ideas connect with a locality, [and] take on some of the ideological and social attributes of the place, but also retain some of their original formulation”); see also SPEED, *supra* note 10, at 53–56 (explaining how indigenous communities in Chiapas appropriated human rights to ground their own project of indigenous autonomy beyond the state).

### III. THE RIGHT TO CONSULT OURSELVES

This Part takes a leap from abstract discussion and plunges into the tangible experience of the people of San Francisco Pichátaro, a Purhépecha indigenous community that used their right to FPIC to secure the means of financing their own institutions of self-government. As we will see, this case is not proactive in the colloquial sense of the word. Pichátaro did not request to be consulted. In fact, the FPIC process was triggered by a judicial order. However, once immersed in the process, Pichátaro appropriated their right to FPIC and reshaped it to serve a proactive function. Unlike the archetypal FPIC scenarios,<sup>92</sup> the consultation legitimized an indigenous project that aimed to reform the pre-existing Mexican fiscal system against the opposition of a municipal government.

This case will demonstrate the possibility of expanding the temporal boundaries of FPIC, shifting the source of initiative and reversing the flow of legitimacy created by an indigenous consultation. The Part is structured as follows: the opening section narrates the story of how Pichátaro engaged with FPIC norms. The second section analyzes how their strategies managed to appropriate FPIC norms and escape the three protective-function assumptions. Finally, the third section reflects on the implications of this experience for the understanding of FPIC.

#### A. *The Case of Pichátaro*

Let me begin this ethnographic dive with a vignette narrating my own involvement with the case of Pichátaro. Since 2019, I have been working as an indigenous rights activist in the Purhépecha region of Michocacán, Mexico. That year, I joined the “Colectivo Emancipaciones” (Colectivo) a local group of scholars and legal professionals which had already established a national reputation for its pro-bono legal work with indigenous communities.<sup>93</sup> When I began working with the Colectivo,<sup>94</sup> our team was pushing for a legal reform that would codify an innovative model of indigenous autonomy locally known as “direct indigenous budgeting” (DIB).

Simply put, DIB is a legal mechanism that allows sub-municipal indigenous communities to assume direct control over a part of the public budget

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92. *Supra* Chapter II.

93. For an academic description of the origins and work of the Colectivo Emancipaciones, see Orlando Aragón Andrade, *Otro Derecho es Posible: Una Biografía (Intelectual y Militante) del Colectivo Emancipaciones*, 8(5) *ONATI SOCIO-LEGAL SERIES* 703, 707 (2018) (describing the Colectivo Emancipaciones as “perhaps, the only group of critical legal academics in Mexico that has been relatively successful at transcending academic spaces in order to bring those reflections into practice”).

94. At that moment, I worked as a legal fellow appointed to the Colectivo Emancipaciones through the Summer Public Interest Fund/Summer Human Rights Fellowship program at Harvard Law School. For a brief reflection of my work through that program, see Harvard Human Rights Program, *2019 HRP Summer Fellow Reflection: Angel Gabriel Cabrera Silva, SJD Candidate* (Jan. 14, 2020), <https://hrp.law.harvard.edu/2019-hrp-summer-fellow-reflection-angel-gabriel-cabrera-silva-sjd-candidate/> [<https://perma.cc/J958-NDHT>].

that is normally assigned to municipal governments, in order to assume local government functions (such as providing potable water, police services, and trash collection).<sup>95</sup> The introduction of DIB in Mexico was a ground-breaking development, because the Mexican system of fiscal federalism historically denied any budgetary power to indigenous villages—thus putting them under the jurisdiction of non-indigenous municipalities.<sup>96</sup> The first DIB initiative emerged in the community of Pichátaro in 2016 as an exceptional arrangement attained by means of social mobilization, strategic litigation, and an indigenous consultation. As is common with such bottom-up experimentation, the DIB system lacked any formal legal recognition.<sup>97</sup> This is why the Colectivo sought to codify DIB into state laws.

As part of my work with the Colectivo, I was invited to attend a meeting at which indigenous authorities, lawyers, and Congressional personnel were to discuss the political process to pass a bill regarding DIB. The first—and longest—part of the meeting focused on how to put the issue on Congress' agenda. Someone talked about launching the bill as a citizen initiative, while others suggested organizing a demonstration, and lawyers spoke about going to court.

Surprisingly for me, the technicalities of legislative work were left to the very end of the conversation. Members were already preparing to part ways when one of the attendants raised a key question: Since the bill would legislate on indigenous rights, wouldn't Congress need to organize an FPIC process? His concern was that, if the legislative process violated FPIC standards, political opponents could potentially challenge the recognition of DIB in Court. This was a serious question; if that were to happen, all of their efforts would be in vain. However, the point was swiftly resolved when an indigenous leader responded: "Well, if that's the case, we can just consult ourselves."

95. This is why some Mexican lawyers have described DIB as the right of indigenous communities to establish a fourth level of government. See Orlando Aragón Andrade, *La Emergencia del Cuarto Nivel de Gobierno y la Lucha por el Autogobierno Indígena en Michoacán, México*, 94 CAHIER DES AMERIQUES LATINES 57, 77 (2020) (Fr.); Humberto Urquiza Martínez, *Arantepacua y la Evolución de los Derechos de los Pueblos Originarios*, in CONSULTAS EN PUEBLOS Y COMUNIDADES INDÍGENAS: EXPERIENCIAS DEL INSTITUTO ELECTORAL DE MICHOACÁN 2011-2019 141, 147 (2020) (Sp.); Víctor Alfonso Zertuche Cobos, *¡Arriba Pichátaro! Resistencia y Lucha de una Comunidad Indígena en Michoacán, México*, 2 REV. MEX. ESTUD. LOS MOVIMIENTOS SOC. 74, 92 (2018) (Sp.).

96. The Mexican constitution establishes that the state powers are divided among the Federation, States, and Municipalities. Then it establishes that municipalities should be allowed to freely administer their budget to autonomously decide how to provide municipal services. Constitución Política de los Estados Unidos Mexicanos [CPEUM], arts. 40, 115, 115-IV, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 11-03-2021 (Mex.).

97. The lack of formal legislation complicated several aspects involved in exercising budgetary autonomy. Through my work in Michoacán, I could notice that some of the most common issues were the following: 1) Banks did not want to open an account under the name of indigenous councils; 2) the Mexican Revenue Service did not have a process to assign a fiscal identification number to indigenous councils; 3) the Secretary of Public Security did not recognize indigenous policing systems; 4) the software used by the Ministry of Wellbeing was not able to generate codes for indigenous councils to report spending of public funds.



That response was quite intriguing, not only because of the ease with which it tackled a complex legal concern, but also due to its underlying strategic connotations. After that meeting ended, it became clear to me that the leader's statement implied that, not only could indigenous communities passively accept being consulted, but some communities could self-organize a consultation to push the bill forward (which they eventually did through a forum held in 2020).<sup>98</sup>

From that moment, I became interested in how Purhépecha leaders had come to understand indigenous consultations in those terms. As I became better acquainted with the local context, I realized that the Purhépecha were quite accustomed to "consulting themselves." As it turned out, the very origin of DIB was tied to one such consultation organized by Pichátaro in 2016.

### 1. *The Political Landscape of the Purhépecha Plateau*

The Purhépecha are one of the numerous indigenous peoples that inhabit modern-day Mexico. Historically speaking, their territory is located in the northwestern part of the State of Michoacán, a mountainous region that expands from the lake of Patzcuaro to the border with Jalisco. However, the contemporary political landscape of the Purhépecha plateau can hardly be understood in those terms. Throughout the region, more than a hundred villages still identify as Purhépecha communities, however, they now coexist among a similar number of towns that do not consider themselves indigenous.<sup>99</sup> Even if Purhépecha villages share several cultural traits, participate in similar political networks, and experience similar forms of violence, they lack a cohesive form of inter-community political organization. In fact, it has been through the recent struggles for DIB that some groups of communities have begun coalescing to support each other.<sup>100</sup>

This socio-political layout is not accidental. As local scholars have highlighted, it is the result of centuries of colonial policies.<sup>101</sup> To a large extent,

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98. Congreso del Estado de Michoacán, *Dictamen Relativo al Proyecto de Decreto Mediante el cual se Expide la Ley Orgánica Municipal del Estado de Michoacán de Ocampo*, LXXIV Legislatura, 9-12-2020, Antecedente Primero (Mex.).

99. The decision to politicize an indigenous identity is often a contested aspect of the internal politics of a community. While not within the purview of this paper, an interesting study on how indigeneity has sparked various kinds of social conflict among Latin-American rural populations can be found in LORENZA FONTANA, *IN THE SHADOW OF RECOGNITION: INDIGENOUS RIGHTS AND ETHNIC CONFLICT IN THE ANDES* (2023). For an analysis of how these conflicts appear in relation to the right to FPIC, see Fontana & Grugel, *supra* note 30.

100. Today, there are two main inter-community organizations in the Purhépecha region: the *Frente por la Autonomía de Consejos y Comunidades Indígenas*, who works very closely with the *Colectivo Emancipaciones*, and the *Consejo Supremo Indígena de Michoacán*, who works with another group of lawyers called *Colectivo Juchari Uinápekua*.

101. See Luis Fernando Jerónimo Juárez, *La Investigación Crítica y los Pueblos Indígenas: La Visibilización de los Procesos de Autodeterminación de la Comunidad Purhépecha de Santo Tomás Tumasíu, en Michoacán, México*, GAVAGAI, ERECHIM 12, 18–22 (July–Dec. 2020) (explaining how the policies implemented since the Mexican Revolution have had the effect of disarticulating indigenous communities to trans-

the contemporary politics of rural Mexico are the result of two political projects that were key to the formation of the Mexican nation-state. First, the agrarian reforms adopted after the Mexican revolution gave each community control over their own plot of communal lands, or *ejidos*, which they managed according to a set of rules established in the federal agrarian laws.<sup>102</sup> Second, the adoption of a federal structure created a political geography based on municipal governments that were given complete administrative authority over any human settlement within their territory.<sup>103</sup>

These key political projects produced different effects in the Purhépecha region. At an intra-community level, they allowed indigenous communities to create and maintain their forms of political organization by hybridizing agrarian, municipal, and indigenous structures.<sup>104</sup> Today, most Purhépecha communities have an internal system of political authorities that includes a “Commissary of Communal Lands,” a municipal “Town Chief,” and traditional indigenous authorities like a “Council” or a “Cabildo.”<sup>105</sup> Each community gives these authorities different sets of responsibilities and powers, but they all keep their community assembly as the highest decision-making authority.<sup>106</sup>

However, when it comes to extra-community politics, the mix of municipal, agrarian, and indigenous law has atomized the struggles of Purhépecha

form them into agrarian communities); Jonathan Fox, *Rural Democratization and Decentralization at the State/Society Interface: What Counts as “Local” Government in the Mexican Countryside?*, 34 J. PEASANT STUD. 527, 529–34 (2007) (describing how the municipal structure of Mexico has influenced rural politics by changing the meaning of what counts as local politics); Maria del Carmen Ventura-Patino, *Tierras Comunales, Regulación Agraria y el Costumbre en La Cañada de los Once Pueblos en Michoacán a Principios del Siglo XXI*, 17 LIMINAR: ESTUDIOS SOCIALES Y HUMANÍSTICOS 67, 71–73 (July–Dec. 2019) (describing how a specific Purhépecha community has negotiated the relation between their own forms of land regulation and the agrarian project of the Mexican State).

102. See GABRIELA TORRES-MAZUERA ET AL., INFORME SOBRE LA JURISDICCION AGRARIA Y LOS DERECHOS HUMANOS DE LOS PUEBLOS INDÍGENAS Y CAMPESINOS EN MÉXICO 8, 10 (2018) [https://dplf.org/sites/default/files/informe\\_jurisdiccion\\_agraria\\_version\\_final.pdf](https://dplf.org/sites/default/files/informe_jurisdiccion_agraria_version_final.pdf) [<https://perma.cc/6MYZ-B6MT>] (explaining how the Mexican agrarian reform during the 1910s created communal lands and *ejidos* as two legal regimes to manage rural lands and that indigenous communities were allocated both types).

103. Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 115, Diario Oficial de la Federación [DOF] 05-02-1917 (Mex.). For a brief academic description of the process of municipalization in Mexico, see EDGAR NOÉ BLANCAS MARTÍNEZ, DIS-POSICIONES NEOLIBERALES 31–38 (2013).

104. See GUNTHER DIETZ, LA COMUNIDAD PURÉPECHA ES NUESTRA FUERZA: ETNICIDAD, CULTURA Y REGIÓN EN UN MOVIMIENTO INDÍGENA EN MICHOACÁN, MÉXICO 228–32 (1999) (explaining the historical origins of the hybrid system of community authorities that prevails in the Purhépecha region).

105. See Maria del Carmen Ventura-Patino et al., *supra* note 101, at 71–72 (describing the system of authorities that exist within Purhépecha villages, which includes agrarian “Comisariados de Bienes Ejidales,” municipal “Jefes de Tenencia,” and traditional “Cabildo” or “Consejo”).

106. For an explanation and graph representing the internal structure of Pichátaro, see Miguel Ángel Gutiérrez Nicolás, *Entendiendo Las Autonomías de Michoacán: Proceso de Autonomía de Pichátaro*, BIBLIOTECA COMUNITARIA AMBULANTE, YOUTUBE, (Sept. 30, 2020) at 5:00–5:15, [https://www.youtube.com/watch?v=\\_28cRw9EXbo&ab\\_channel=BibliotecaComunitariaAmbulante](https://www.youtube.com/watch?v=_28cRw9EXbo&ab_channel=BibliotecaComunitariaAmbulante). [<https://perma.cc/69BG-PVTZ>]. For another example of how a Purhépecha indigenous community is internally organized, see Leticia Mayorga Sánchez, *Conflictos y Sistemas de Cargos en una Comunidad Purhépecha de Michoacán*, 12 CUIICUILCO 63, 67 (2005).

communities. Since each village is governed by a different municipality, a large part of their political mobilization tends to revolve around their quarrels with their own municipal governments.<sup>107</sup> Naturally, some communities are on better terms with their municipal authorities than others, and some are in a better position to exert political pressure.<sup>108</sup> This means that the political claims and tactics that each community deploys vary depending on the relation that community leaders have with the mayor holding the municipal office at any given moment in time.<sup>109</sup>

Despite this atomization of indigenous struggles, patterns exist in the way Purhépecha communities experience injustices and articulate their claims. Most recently, the issue of self-governance has become a common concern, and DIB is a shared solution.<sup>110</sup> Since municipalities have administrative authority over small indigenous villages, this creates a constant source of tension. Oftentimes, this tension translates into the distribution of public funds. Unfortunately, these funds are commonly spent on non-indigenous villages, with indigenous communities receiving the smaller share.<sup>111</sup>

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107. See Orlando Aragón Andrade, *supra* note 95, at 61 (arguing that the political-administrative structure of the state instigated conflict between communities that were sub-municipal villages, and those that were seats of a municipality”); see also Maria del Carmen Ventura Patiño, *Indigenous emergence in Michoacán. Practice of de facto and de jure rights*, 25 *ESPIRAL* 161, 164 (2018) (arguing that by the end of the twentieth century, indigenous struggles in Michoacán revolved around the election of the Mayor, the establishment of new municipalities, or the creation of indigenous municipalities).

108. For instance, communities with links to the Zapatista insurrection were able to establish a *de facto* form autonomy before Pichátaro and other communities established an autonomy *de jure*. del Carmen Ventura Patiño, *supra* note 107, at 164.

109. These differences exist among communities that have recently raised claims for budgetary autonomy.

For instance, the struggle of the Purhépecha community of *San Felipe de los Herreros* mobilized a grievance related to the Mayor’s failure to provide access to a housing program, and then was able to obtain their autonomy by pressuring the Mayor into signing an agreement and then filing a judicial claim to enforce the agreement. See Bianca Montes Serrato, *El Autogobierno en la Comunidad Purhépecha de San Felipe de los Herreros*, ICHAN TECOLOTL (2019) [https://perma.cc/R35H-VFBH]; *Judicio para la Protección de los Derechos Político-electorales del Ciudadano, Tribunal Electoral del Estado de Michoacán [TEEM], TEEM-JDC-005/2017, Judgment*, at 4, 27-04-2017 (Mex.).

In contrast, the struggle of the community of *Santa Fe de la Laguna* mobilized grievances based on long-lasting discrimination and a history of community rebellions and then promoted both judicial actions and contentious tactics (like blocking roads and detaining municipal officers) to pressure the Mayor into accepting to surrender a part of the budget. See Irepan Cortés Máximo, *La Lucha de Santa Fe de la Laguna por el Presupuesto Directo. Resistencia y Esperanza*, HUELLAS DEL AUTOGOBIERNO (Apr. 6, 2021), <https://www.huellasdelautogobierno.org/post/la-lucha-de-santa-fe-de-la-laguna-por-el-presupuesto-directo-resistencia-y-esperanza> [https://perma.cc/QT4K-DBSB]; Ernesto Martínez Elorriaga, *Autoridades Purhépechas Bloquean Carreteras en Michoacán*, LA JORNADA (Apr. 10, 2021), <https://www.jornada.com.mx/notas/2021/04/10/estados/autoridades-purepechas-bloquean-carreteras-en-michoacan/> [https://perma.cc/CZ9B-M6J6].

110. See generally Orlando Aragón Andrade, *Los Paisajes del Autogobierno Indígena en Michoacán. Luchas, Experiencias, Paradojas y Desafíos*, in *AUTONOMÍAS Y AUTOGOBIERNO EN LA AMÉRICA DIVERSA* 627 (Miguel Gonzalez et al. eds., 2021) (explaining the emergence of contemporary claims for autonomy and direct indigenous budgeting in the Purhépecha region).

111. See Andrade, *supra* note 95, at 63–64 (explaining that discriminatory distribution of public funds is part of contemporary Purhépecha claims, and elaborating on how this issue appeared in Pichátaro); see also Leovigildo Bartolo Lopez, *La Isla de Janitzio y su Lucha por el Autogobierno*, HUELLAS DEL AUTOGOBIERNO.ORG (May 29, 2021), <https://www.huellasdelautogobierno.org/post/la-isla-de->

The struggle of Pichátaro began as an instance of this type of conflict, against the Mayor of the municipality of Tingambato.

## 2. *The Struggle of Pichátaro*

In 2014, the tension between the indigenous community Pichátaro and the Municipal government of Tingambato reached a peak. The year prior, the Mayor had promised to finance a couple of infrastructure projects in the community, but ultimately failed to deliver. At first, the community leaders of Pichátaro denounced these broken promises. However, the conflict swiftly escalated as people began to realize just how inequitable the budget distribution was. That year, the Mayor of Tingambato had allocated only 6% of the municipal funds to Pichátaro, even though the community made up almost a third of the entire municipal population.<sup>112</sup>

Triggered by the articulation of the problem as a financial injustice, the community mobilized to demand that the Mayor allocate a proportional share (33%) of the budget to their village.<sup>113</sup> Pichátaro also invoked their right to self-determination to request that those funds should be under the direct control of indigenous authorities. Rather than simply asking the Mayor to comply with his original promises, or to increase the number of public investments in their village, the community demanded direct control over a third of the ordinary flow of municipal money.<sup>114</sup>

The mobilization of Pichátaro lasted for several months, during which the community organized road blockages, took over the municipal hall, and ultimately boycotted the municipal elections of 2015.<sup>115</sup> These actions created enough pressure that the Mayor of Tingambato signed an agreement whereby he committed himself to surrender 33% of the budget, as long as the State Congress validated the terms of the transfer.<sup>116</sup> Unfortunately, this Mayor's term concluded before Congress took action, and the new municipal government abandoned that commitment.<sup>117</sup>

janitzio-y-su-lucha-por-el-autogobierno [https://perma.cc/84PR-DNH2] (a firsthand testimony of how inequities in the distribution of public funds mobilized the community of Janitzio); Efraín Ruiz, *Inauguración de Puente “El Vainillo”: Símbolo del Autogobierno de San Angel Zurumucapio*, HUELLAS DEL AUTOGOBIERNO.ORG (June 28, 2021), <https://www.huellasdelautogobierno.org/post/inauguraci%C3%B3n-de-puente-el-vainillo-s%C3%ADmbolo-del-autogobierno-de-san-angel-zurumucapio> [https://perma.cc/8VLL-F6V9] (a testimony of how inequality in the distribution of public funds mobilized the community of San Angel Zurumucapio).

112. Zertuche Cobos, *supra* note 95, at 82.

113. See Manuel Morales, *Permanecen Vehículos Retenidos en Pichátaro*, QUADRATIN (Sept. 18, 2015), <https://www.quadratin.com.mx/principal/Permanecen-vehiculos-retenidos-en-Pichataro/> [https://perma.cc/8FT7-EFKD].

114. Nicolás, *supra* note 106.

115. *Id.*

116. Agreement signed on June 30, 2015 (digital copy on file with the author).

117. On September 17, 2015, the new Mayor issued a document stating that he considered himself to be “legally barred from giving money directly to any community or individual.” (digital copy on file with the author).

As expected, the leaders of Pichátaro were frustrated and continued to pursue their claims. However, since their community had undergone almost a year of wearing mobilizations, they also sought the legal advice of the Colectivo to consider the possibility of suing the municipality for violating the terms of their agreement. Even if litigation was an unexplored territory, the socio-political conditions made them open to leveraging the courts.

When the Colectivo took up this case, they knew that the legal argument was risky and potentially inadmissible as a matter of strict law. Even if the Mayor had signed an agreement, it was not clear whether the arrangement was legally valid—much less enforceable. At that moment, Mexican case law had not determined whether indigenous peoples could administer public funds.<sup>118</sup> However, the Colectivo knew that Federal Electoral Courts<sup>119</sup> were sensitive to issues of indigenous self-determination and had developed a line of precedents linking political rights to material access to funds.<sup>120</sup> Accordingly, they framed the issue as a violation of Pichátaro's political right to maintain their own forms of political organization.<sup>121</sup> They argued that, if indigenous peoples were to enjoy such rights, the State should provide access to the means of financing their internal systems of government.<sup>122</sup>

The trial proceeded relatively quickly—it took just over eight months to reach a final judgment.<sup>123</sup> The Electoral Court ruled in favor of Pichátaro. It found that the right of indigenous peoples to self-determination implied that the Mexican State had a “duty to provide the means necessary for indigenous peoples to organize and provide services under their own responsi-

118. See Felipe de la Maza Pizaña, *Fases de la jurisprudencia electoral en la tutela de los derechos políticos de los pueblos y comunidades indígenas Del Proteccionismo a la Mínima Intervención*, 22 JUSTICIA ELECTORAL 49, 65–66 (2018) (making a chronological summary of how the case law on indigenous rights evolved in the jurisprudence of the Mexican Electoral Court).

119. In Mexico, the electoral judicial system is designed to adjudicate on all matters that pertain to elections and violations to the political rights of citizens. Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 99, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 11-03-2021 (Mex).

120. On this matter, the Superior Chamber of the Federal Electoral Court issued a jurisprudential thesis stating that citizens that have been elected to office have a political right to receive a salary. See *Cargos de Elección Popular: La Remuneración es un Derecho Inherente a su Ejercicio* (Legislación de Oaxaca), Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [TEPJF], Gaceta de Jurisprudencia y Tesis en Materia Electoral Cuarta Época, Tomo IX Febrero de 2011, Tesis 9/J.21/2011, at 13 (Mex.).

121. Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 2(A), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 11-03-2021 (Mex.).

122. Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-1865/2015, Plaintiff Legal Brief, 29-09-2015 (Mex.). This argument was partially grounded on the international recognition of indigenous communities to the means of financing their forms of organization. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 4.

123. The case was originally filed on September 29, 2015, and the judgment was delivered on May 26, 2016. See *Judicio para la Protección de los Derechos Político-electorales del Ciudadano*, Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-1865/2015, Judgment of May 18, 2016 (Mex.).

bility and control.”<sup>124</sup> Therefore, the court declared that the refusal of the Mayor of Tingambato to perform the budgetary transfer had created an “unconstitutional state of affairs.”<sup>125</sup>

However, the judgment did not lead to an immediate order to transfer the money. After declaring that Pichátaro had the abstract right to administer part of the public budget, the judges reasoned that if an indigenous community were to exercise that right, the State would have to decide several “quantitative and qualitative elements.”<sup>126</sup> These elements would determine how much money to transfer and the terms of such transfer. Even if the community’s original claim was for direct control over thirty three percent of the municipal public budget, the court considered that the proper way to settle these questions was through an FPIC process.<sup>127</sup> And so, Pichátaro was unexpectedly drawn into a consultation.

### 3. *The Process of Consulting Oneself*

When the court’s decision was announced, the concerned parties were uncertain precisely how to proceed. The judge’s only guidance was that the Electoral Institute of Michoacán (IEM), a state-level bureaucratic body charged with organizing local elections, should organize the consultation. The IEM had already organized similar processes regarding elections in a couple of indigenous communities but had never organized an FPIC about budgetary transfers.<sup>128</sup>

This meant that the IEM lacked any guidelines for conducting an indigenous consultation.<sup>129</sup> In fact, none of the parties involved had clarity about the steps of this process, nor did they have clarity regarding its legal implications. This uncertainty gave Pichátaro the opportunity to appropriate FPIC norms and create a de facto right to consult themselves.

124. *Id.* at 40.

125. *Id.* at 61.

126. *Id.*

127. This part of the holding was enshrined in a jurisprudential thesis issued by the Superior Chamber of the Electoral Court. Pueblos y Comunidades Indígenas. *See* El Derecho a la Consulta Previa, Informada y de Buena Fe es Procedente Para Definir los Elementos (Cuantitativos y Cualitativos), Necesarios Para la Transferencia de Responsabilidades Derivadas del Derecho al Autogobierno, Tribunal Electoral del Poder Judicial de la Federación [TEPJF], Gaceta de Jurisprudencia y Tesis en Materia Electoral, Tesis LXIV/2016, 22-06-2016 (Mex.).

128. *See* Araceli Gutiérrez Córtes, *Presentación*, in CONSULTAS EN PUEBLOS Y COMUNIDADES INDÍGENAS: EXPERIENCIAS DEL INSTITUTO ELECTORAL DE MICHOACÁN 2011-2019 25, 26 (Instituto Electoral de Michoacán ed., 2020) (enlisting all the nine consultations processes that the IEM organized between 2011 and 2019).

129. It was not until June 6, 2017 that the IEM adopted its internal regulations about FPIC. Instituto Electoral de Michoacán, *Acuerdo General No. IEM-CG-13/2017*, (Jun. 6, 2017), [https://www.iem.org.mx/documentos/marco\\_legal/reglamentacion\\_interna\\_del\\_iem/2021/Reglamento%20para%20la%20Consulta,%20Previa%20e%20Informada%20de%20los%20Pueblos%20y%20Comunidades%20Ind%C3%ADgenas%20\(Actualizado%20al%206%20de%20junio%20de%202017\).pdf](https://www.iem.org.mx/documentos/marco_legal/reglamentacion_interna_del_iem/2021/Reglamento%20para%20la%20Consulta,%20Previa%20e%20Informada%20de%20los%20Pueblos%20y%20Comunidades%20Ind%C3%ADgenas%20(Actualizado%20al%206%20de%20junio%20de%202017).pdf). [https://perma.cc/P9P9-4H4M].

To comply with the judgment, the IEM first organized a series of work meetings between indigenous leaders and municipal officers.<sup>130</sup> These meetings defined the proper way to initiate the compliance process that would lead to the consultation. Naturally, this process did not go smoothly. With clashing interests, both parties attempted to shape the procedural structure of the consultation in a way that was favorable to themselves.<sup>131</sup>

At this stage of the process, the most contested issue had to do with the basic structure of the consultation. The Mayor of Tingambato argued that the IEM should organize a consultation in which all the inhabitants of the village could participate and cast their individual votes over the “quantitative and qualitative” aspects of budgetary transfer.<sup>132</sup> In contrast, the community leaders asked the IEM to organize a consultation only with the representatives that the community had already appointed. Echoing scholarly concerns surrounding legal formalism,<sup>133</sup> the community leaders were concerned that if the IEM held an open consultation, the Mayor would bribe people or otherwise skew the results.<sup>134</sup>

The parties could not come to an agreement on this point. However, with the help of the Colectivo Emancipaciones,<sup>135</sup> the community harnessed international FPIC standards to force the IEM into organizing the consultation “through their own representative institutions”<sup>136</sup> rather than through a village-wide public assembly. Despite the Mayor’s resistance, the IEM sided with the community—as did the court when the question made its way back to the judicial arena.<sup>137</sup>

130. According to official records, the IEM organized several formal meetings on June 7, June 13, June 17, June 20, and June 22, 2016. Instituto Electoral de Michoacán, *Acuerdo General No. IEM-CG-14/2016*, (June 30, 2016), [http://www.iem.org.mx/documentos/acuerdos/2016/AcuerdoCG\\_14\\_2016.pdf](http://www.iem.org.mx/documentos/acuerdos/2016/AcuerdoCG_14_2016.pdf) [<https://perma.cc/B8T2-WM9E>].

131. For a firsthand reflection of this process, from the perspective of one of the IEM’s Councilwomen, see Elvia Higuera Pérez, *Proceso de Consulta en la Comunidad Originaria de San Francisco Pichátaro: Crónica de una Lucha por la Vida, la Dignidad y la Libertad*, in *CONSULTAS EN PUEBLOS Y COMUNIDADES INDÍGENAS: EXPERIENCIAS DEL INSTITUTO ELECTORAL DE MICHOACÁN 2011-2019* 81–110 (Instituto Electoral de Michoacán ed., 2020). For a shorter reflection from the perspective of one of the Colectivo’s lawyers, see Orlando Aragón Andrade, *supra* note 95, at 74–75.

132. The Mayor submitted a formal writ before the Court making this point. See Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-1865/2015, Incidental Judgement, at 5, 05-10-2016 (Mex.).

133. *Supra* Chapter I.A.1.

134. Andrade, *supra* note 95, at 74.

135. For a firsthand description of this process by one of the lawyers of the Colectivo Emancipaciones, see *id.* ¶ 70–74.

136. G.A. Res. 61/295, United Nations Declaration on Indigenous Peoples Rights, *supra* note 1, art. 19.

137. The conflict with the Mayor regarding whether the consultation required a public assembly or not triggered a second round of litigation through the court’s compliance monitoring procedures. In its new decision, the court sided with the leaders of Pichátaro and decided that “the decision to consult the representative authorities or institutions is in accordance with the precedents of this court, given that the democratic principle of an indigenous consultation is not limited to the universal participation of all members, but to the respect to the self-determination of the community as a collective right-bearer.” Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-1865/2015, Incidental Judgement, at 36, 05-10-2016 (Mex.).

After that issue was settled, the IEM continued its series of preparatory work meetings until a plan for the consultation was finalized.<sup>138</sup> Pursuant to international FPIC standards, the parties determined that the consultation should commence with an “informative phase” followed by a “consultative phase.”<sup>139</sup> They also agreed that a community member would serve as Spanish-Purhépecha translator,<sup>140</sup> and that the whole process would take place inside the community hall.<sup>141</sup> However, the most important aspect defined during these negotiations was the specific wording of the questions under consultation. The community leaders of Pichátaro and the Colectivo were deeply involved in this part of the process and managed to structure the consultation around two questions:

1) Do you agree with the transfer of legal powers, responsibilities and economic resources in a way that is proportional to the amount of population and the total budget of the Municipality of Tingamabato, so that it is spent and administered directly by the Purhépecha community of San Francisco Pichátaro?

2) Which traditional, communal and representative authority should receive and be responsible for the transfer and the fulfillment of the powers, responsibilities and administration of the budget?<sup>142</sup>

These questions repackaged the community’s original request into the legal frame of the consultation. The “quantitative and qualitative elements” that the court argued could affect the community were construed in a way that reflected exactly what the community had demanded from the beginning. Quantitatively, the transfer would include a population-based percentage of the total municipal resources (thirty three percent). Qualitatively, it would imply the acceptance of whatever “legal powers and responsibilities” were tied to that budget. For all practical purposes, the FPIC process became a legal ritual through which the community leaders consulted themselves about their own project for autonomy, in the presence of the IEM’s personnel.

The consultation took place on the evening of July 4, 2016, and was relatively swift. When the IEM’s personnel arrived at the village, they were welcomed by a crowd gathered in the plaza to celebrate even if they would

138. The final schedule and action plan for the consultation was approved by the Special Commission on Indigenous Affairs and then validated by the General Council of the IEM. Instituto Electoral de Michoacán, *Acuerdo General No. IEM-CG-14/2016*, (June 30, 2016).

139. The informative phase was carried out entirely on June 26, 2016. The consultative phase was held on July 4, 2016. The official records of both phases were certified simultaneously by the General Council of the IEM. Instituto Electoral de Michoacán, *Acuerdo General No. IEM-CG-19/2016* (July 22, 2016).

140. *Id.* at 32.

141. *Id.* at 33.

142. *Id.* at 61.



not technically be consulted.<sup>143</sup> The actual consultation was reduced to a mere formality, its results already anticipated by everyone. Once all the legal requirements were satisfied, the community leaders confirmed that Pichátaro wanted to be financially autonomous from their municipal government and voted in favor of establishing a Community Council to administer the money and assume all the corresponding legal powers, responsibilities, and economic resources.

After the consultation, the legal conflict between Pichátaro and Tingambato continued. At first, the municipal government attempted to transfer only thirty three percent of the funds allocated to social programs and infrastructure.<sup>144</sup> This amount corresponded to the percentage the community leaders had requested, but it left out the budget allocated for other purposes (such as security services, payroll, etc.). This triggered another round of litigation. Eventually, the Electoral Court ordered the Mayor to act in accordance with what the community had consented to in the FPIC process—namely, to transfer thirty three percent of the total budget.<sup>145</sup> Finally, beginning in November 2016,<sup>146</sup> the Community Council of Pichátaro began administering a third of the public funds allocated to Tingambato—a right they still enjoy to this day.

The victory of Pichátaro set a groundbreaking precedent both in judicial and social terms. As word spread, several other Purhépecha communities mobilized to adopt the same model of budgetary autonomy—which is now known as DIB.<sup>147</sup>

### B. *Conceptualizing FPIC's Proactive Function*

The story of Pichátaro lacks many of the elements of archetypal FPIC scenarios. There was no corporation involved, and the government was not threatening to encroach on Purhépecha territories or natural resources. However, even in the absence of these elements, the consultation of Pichátaro still had the procedural form of an FPIC mechanism as set by international human rights. The process was overseen by a state bureaucracy acting in good faith and in coordination with indigenous representatives, included an informative phase, and was conducted prior to the budget transfer.

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143. Pérez, *supra* note 131, at 106 (recalling that moment as a having a “festive environment”).

144. Ayuntamiento de Tingambato, *Acta de Sesión Extraordinaria del Ayuntamiento del Ejercicio Fiscal 2016*, punto IV (27 Julio de 2016), cited in Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-1865/2015, Incidental Judgement, at 50-51, 05-10-2016 (Mex.).

145. *Id.* at 55.

146. Cobos, *supra* note 95, at 76.

147. Additionally, a few other Purhépecha communities established a DIB without having to organize a consultation. This was generally possible by negotiating agreements with Mayors and the State Government. These communities include 1) San Felipe de los Herreros; 2) Comachuén; 3) Cherán-Azcucurín; and 4) Tarecuato. See Appendix 1.

The contextual differences and procedural similarities are important in realizing how this specific case study stands out from other creative uses of FPIC. Pichátaro was clearly not the first community to proactively demand a consultation, nor was it the first community to organize a self-consultation. For instance, back in the early 2000s, the Mam and Sipacapense peoples organized a community consultation to challenge the controversial Marlin Mine project in Guatemala.<sup>148</sup> That was an exceptional process, conceptualized also as an appropriation of the right to FPIC where indigenous communities “consulted themselves.”<sup>149</sup>

What distinguishes Pichátaro from those cases is the effects of the consultation and the way they escaped the three assumptions underlying FPIC’s protective function. Despite its indisputable strategic creativity, the self-consultation about the Marlin Mine was still structured within the boundaries set by the protective function. That consultation concerned a prospective project (the Marlin Mine) driven by a foreign corporation (Glamis/Goldcorp) that the community opposed and wanted to delegitimize.<sup>150</sup>

It is only by carefully appreciating the configuration of Pichátaro’s consultation, within its own socio-political context, that we can observe how it transcended the temporality, initiative, and legitimacy of FPIC’s protective function to fulfill a proactive purpose.

### 1. *Expanding the Temporality of Consultations*

The first assumption that ties FPIC to its protective facet is that it can only be invoked against recent or forthcoming projects. From a strictly legal perspective, these temporal boundaries were also enforced in the case of Pichátaro. Pursuant to the court’s reasoning, the consultation was organized *prior* to the transfer of public funds.

However, the socio-political context reveals how the substance of the consultation had an expanded temporal reach.<sup>151</sup> Pichátaro’s claim to administer a part of the public budget did not react to forthcoming administrative action. Rather, it directly challenged the routine functioning of a fiscal system that had placed indigenous communities under the tutelage of

148. Rachel Sieder, *El Derecho Indígena y la Globalización Legal en la Posguerra Guatemalteca*, 16 ALTERIDADES 23, 34–35 (2006) (summarizing the conflict between the Sipacapa people and the mining company in charge of the Marlin project).

149. Fulmer, *supra* note 40, at 72. (“Nothing in the law implies or contemplates that communities should stage their own consultation, in effect consulting themselves. But this is precisely what the people of Sipacapa elected to do.”)

150. For more details about the case, including an analysis of FPIC as part of “the myriad legal options [of poor communities] for protecting themselves from the threat of exploitation,” see Amanda M. Fulmer, Angelina Snodgrass Godoy & Philip Neff, *Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine*, 50 LAT. AM. POLIT. SOC. 91, 113 (2008).

151. Angel Gabriel Cabrera Silva, *Timeful strategies for Indigenous self-determination: lessons from the Purhépecha*, OPENGLOBALRIGHTS.ORG (Oct. 22, 2021), <https://www.openglobalrights.org/timeful-strategies-for-indigenous-self-determination-lessons-from-the-purhepecha/> [https://perma.cc/F27J-DAX3].

municipal governments. This system had its roots in the colony and was reaffirmed in Article 115 of the modern Mexican Constitution (which was adopted in 1917).<sup>152</sup> In other words, it was an institutional design established long before indigenous rights were codified in either the constitution or international law. Generally, the everyday operation of such an institutional structure would be considered outside the purview of an FPIC consultation.

Nevertheless, the consultation of Pichátaro created a legal opening to challenge the rules that structure the ordinary flow of public budgets in Mexico. In other words, the consultation process not only gave Pichátaro the opportunity to manage its share of public resources, but also gave the community an opportunity to retroactively influence the design of fiscal structures that had been put in place decades ago and still contributed to the marginalization of indigenous peoples.

## 2. *Changing the Third Party Actor FPIC Model*

The second assumption that characterizes FPIC's protective function is the implicit acceptance that the object of a consultation must originate from a third party. In the case of Pichátaro, the court ordered the IEM to consult with Pichátaro. However, a contextual analysis reveals that although the court ordered the consultation, the IEM implemented it, and the community conceived of the initiative to assume direct control over thirty three percent of the municipal budget. It is primarily in this sense—the fact that the consultation advanced an indigenous project—that the consultation of Pichátaro took on a proactive function.

However, it is important to highlight that the leaders of Pichátaro were also proactive in the classic sense of the word. The correspondence between what the community claimed and what was eventually consulted was not accidental. Once the FPIC was in motion, the Mayor of Tingambato attempted to influence the consultation to reduce the likelihood of surrendering a third of his budget.<sup>153</sup> However, the leaders of Pichátaro seized control of the process<sup>154</sup> and ensured that the consultation included the elements of their project for budgetary autonomy.

Pichátaro did not, however, have total control of the consultation. In part, the community was lucky that the IEM was receptive to indigenous rights arguments and that the court more or less supported them. However, the community leaders were very diligent in ensuring that the consultation revolved around the indigenous initiative, and thus that the FPIC process performed to their advantage.

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152. *Supra* note 96.

153. *See supra* Chapter III.A.3.

154. *Id.*

### 3. *Altering the Flow of Legitimacy*

The third assumption that fixes FPIC to its protective role concerns the direction of its legitimating effects. Generally, these effects perform in a unidirectional and centrifugal fashion. If a consultation manages to extract a community's consent, then the project is deemed legitimate. In contrast, if consent is withheld—or if a community is not consulted at all—then a project is illegitimate. In the case of Pichátaro, these legitimating effects are also present. The budget transfer had to wait until after the consultation to be legitimately implemented by the court's order.

However, when we analyze the Pichátaro consultation within its own particular context, we can easily perceive how its legitimating effects performed differently. Instead of legitimizing an external project from inside the community, the consultation legitimized the *community's* project by drawing legitimacy from the IEM. Without the consultation process, Pichátaro's claim for budgetary autonomy would have been difficult to implement. Certainly, the Mayor could be criticized for breaking his promises and people could sympathize with Pichátaro's struggle. However, the Mayor's refusal to give an indigenous authority control of the budget was hard to construe as blatantly illegal or illegitimate.<sup>155</sup> Even the Colectivo knew that, within the Mexican legal system, an indigenous claim to directly administer a part of the public budget was a longshot.<sup>156</sup>

Despite this pessimistic outlook, after the consultation, these doubts were dispelled and the community's claim to budgetary control not only became legitimate, but also legally binding. This strong legitimating effect acted centripetally. The budget transfer project was possible not only because the community consented, but also because the IEM organized the consultation and because the court enforced its results. Even if the outcome of the consultation was foreseeable from the beginning, having these institutions perform the legal ritual bestowed an aura of officiality and fairness to the whole process. In contrast, if the community had organized its own consultation, it is very unlikely the process would have had the same impact.

This particular configuration constitutes the third basis of FPIC's proactive function. In the case of Pichátaro, the consultation process was proactive in the sense that it drew legitimacy from two state institutions (the IEM and the Electoral Court) and funneled it into an indigenous community that was pursuing a project opposed by other governmental actors.

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155. Even after the case of Pichátaro was decided, a federal judge in the State of Oaxaca considered that even if indigenous communities could seek judicial redress for unfairness in budgetary distribution, the Mexican fiscal system does not legally allow them to claim direct budgetary allocations. Segundo Tribunal Colegiado en Materias Civil y Administrativa del XIII Circuito [TCC], AD 590/2019, Judgment, 21-09-2020 (Mex.).

156. Andrade, *supra* note 95, at 71 (explaining how the Colectivo crafted a legal argument grounded on the fact that even if the Mexican constitution did not allow municipalities to transfer funds to indigenous communities, it also did not prohibit it).

### C. *The Process of FPIC Appropriation*

Pichátaro's engagement with their right to FPIC managed to transform a shield into a sword. They utilized a legal strategy generally used for protective purposes and deployed it to proactively advance their own project for self-determination. This tactical shift was a notable feat, executed by crafting a *de facto* right to consult themselves from the raw material provided by the right to FPIC. This case study defies the three assumptions that tie FPIC to its protective facet. It is also important to briefly elucidate the mechanisms that made it possible for this social movement to repurpose and reinterpret legal standards in such a creative (and subversive) way. This Section provides this explanation.

#### 1. *Rights Vernacularization*

Scholars have tracked the cultural politics underlying pragmatic uses of international human rights law in a few ways. Sally Merry's theory of "vernacularization"<sup>157</sup> provides a particularly influential approach.<sup>158</sup> This concept explains how global languages (like human rights) are given new meanings—and thus have very different applications—when applied in local contexts. According to Merry and Levitt, human rights activists do not just import universal values: they perform as translators that redefine these values by braiding them together with their own cultures and political contexts.<sup>159</sup> Depending on who is doing the translation and what is being translated, these localized vernaculars can introduce subtle changes in the meaning of a norm or raise significant challenges to the global canon.<sup>160</sup>

Since Merry's introduction of the concept, scholars have studied examples in which local movements or activists harness global norms and employ them in local struggles. Some have directly engaged with Merry's concepts,<sup>161</sup> and others have complemented her intuition by explaining how the appropriation of human rights law transpires not only in the abstract

157. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 219-222 (2006).

158. *Id.*

159. Levitt & Merry, *supra* note 91, at 448-50.

160. *Id.* at 448 ("[f]raming human rights claims in local terms . . . may mean abandoning explicit references to human rights language altogether and, indeed, can mean highjacking these concepts for quite different purposes").

161. Fulmer, *supra* note 40, at 79-80. See Daniel Huizenga, *The Right to Say No to Imposed Development: Human Rights Vernacularization in Reverse in South Africa*, 13 J. OF HUM. RTS. PRACTICE 205, 210 (2022) (relying on Merry's theory to argue that indigenous peoples in South Africa relied on litigation strategies to craft themselves a "right to say no"); Astrid Jamar & Laura Major, *Managing Mass Graves in Rwanda and Burundi: Vernaculars of the Right to Truth*, 30 SOCIAL ANTHROPOLOGY 56, 57 (2022) (using Merry's concept of vernacularization to analyze how the right to truth is localized in the exhumation of mass graves in Rwanda and Burundi and argue that localization of rights is not necessarily emancipatory); Stephen Hopgood, Jack Snyder & Leslie Vinjamuri, *Introduction: Human Rights, Past, Present, and Future*, in HUMAN RIGHTS FUTURES 19-21 (Hopgood et al. eds., 2017) (reviewing the research agenda initiated by Merry's theory of vernacularization and arguing that localization of rights is one of the challenges that human rights must face in the near future).

realm of culture and normative interpretation, but also through practical strategizing.<sup>162</sup>

Overall, vernacularization helps explain how the right of indigenous communities to self-consultation came into existence. The fact that scholars and human rights lawyers have mostly focused on the protective role of FPIC does not preclude local activists from reinterpreting and applying its normative components to transcend its original and doctrinally accepted function. The leaders of Pichátaro produced their own vernacular version of the right to FPIC through a process of pragmatic appropriation that shaped it into a mechanism that emboldened their ongoing strategy. After the Federal Electoral Court ordered Pichátaro to pursue a consultation, the community leaders and the Colectivo came into direct contact with global FPIC norms. At that moment, they had to gain some familiarity with what the right to FPIC meant, how it was regulated, and how it was supposed to apply. Most importantly, they had to consider how all these norms related to their struggle and could serve their substantive goals. Through this pragmatic interplay, the indigenous leaders of Pichátaro interpreted, appropriated, and eventually vernacularized the normative content of FPIC as a right to consult themselves.

In a matter of months, this heterodox vernacularization took hold across the Purhépecha plateau. As other communities learned about the experience of Pichátaro, they started to appreciate the value that the right to consult themselves could have in their struggles.

## 2. *Diffusion of the Right to Consult Ourselves*

By the time I found my way into that meeting about legislating DIB, Purhépecha leaders had effectively appropriated their right to FPIC and incorporated the right to consult themselves as part of their legal strategies. At that time, there were already five more communities in Michoacán that

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162. For examples of these studies, see McCANN, *supra* note 43, at 284 (arguing that pay equity activists in the U.S. “mobilized both legal discourses and institutions . . . [and] gave these inherited legal conventions radical new meanings and purposes”); SHAREEN HERTEL, UNEXPECTED POWER: CONFLICT AND CHANGE AMONG TRANSNATIONAL ACTIVISTS 83 (Cornell Univ. Press 2018) (describing how Mexican activists used “back-door moves” to inject their agendas into a campaign that Human Rights Watch had framed as a civil and political rights issue); Balakrishnan Rajagopal, *Markets, Gender and Identity: A Case Study of the Working Women’s Forum as a Social Movement*, in INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE, 272–287, 283 (2003) (arguing that the praxis of the Working Women’s Forum in South India relates to and resists the primarily liberal politics that underlie legal discourses of human rights); Jeremy Perelman & Lucie White, *Experience and Theory in African Economic and Social Rights Activism*, in STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 156–57 (Lucie White & Jeremy Perelman eds., 2010) (explaining how African activists push beyond liberal human rights practice and implement what they call a “critical liberal legalism”); ALICIA ELY YAMIN, WHEN MISFORTUNE BECOMES INJUSTICE: EVOLVING HUMAN RIGHTS STRUGGLES FOR HEALTH AND SOCIAL EQUALITY 13 (2020) (noting that “the ways in which human rights language has been appropriated and deployed over time in relation to health, and more broadly, underscoring that rights are not self-standing truths, but loci of contestation over power and evolving values”).

had established a DIB arrangement. Three of these communities consulted themselves,<sup>163</sup> two pursued a slightly different strategy,<sup>164</sup> and two communities were still implementing their consultations.<sup>165</sup> This first wave of communities grounded their claims in the precedent Pichátaro set. However, just as the diffusion of DIB was gaining momentum, it suddenly came to a halt in June 2020, when a new composition of the Superior Electoral Court overturned the Pichátaro decision.<sup>166</sup>

Fortunately, indigenous claims for DIB gained new traction a few months later thanks to the vernacularized version of the right to FPIC. The legislative bill mentioned at the start of this Part was finally adopted in March of 2021. This new law codified the right of indigenous communities to be consulted about adopting a DIB initiative without the need for a judicial order.<sup>167</sup> The State Government of Michoacán then enacted a Protocol formalizing the guidelines the IEM must follow to operationalize the request of any indigenous community seeking to consult itself about a DIB initiative.<sup>168</sup> Thanks to this new law, a second—and larger—wave of indigenous communities reclaimed their right to exercise their self-determination via the direct administration of public funds. By December 2022 at least twenty other communities in Michoacán had requested to consult themselves with the purpose of adopting DIB.<sup>169</sup> Today, the trend is accelerating.

Beyond the State of Michoacán, these types of claims have also gained traction in other regions of Mexico, although to a lesser extent. Indigenous communities in the States of Jalisco, Puebla, and Oaxaca have utilized the right to consult themselves.<sup>170</sup>

163. These were the communities of 1) Arantepacua 2) Nahuatzen and 3) Sevina. *See* Appendix I.

164. The communities of 1) San Felipe de los Herreros and 2) Comachuén established a DIB through a litigation strategy that avoided the need for a consultation because they reached an agreement with the Mayor. *See* TEEM-JDC-005/2017, *supra* note 109, at 72 (“The Municipality must surrender the monetary resources to the community of San Felipe de los Herreros . . . according to the terms established in the agreement signed on February twenty-third of two thousand sixteen.”); Tribunal Electoral del Estado de Michoacán [TEEM], TEEM-JDC-152/2018, Judgment, at 52, 21-08-2018 (Mex.) (“The Municipality must surrender the monetary resources to the community of Comachuén . . . according to the terms established in the agreement signed on May twenty-eight of two thousand eighteen.”).

165. These were the communities of 1) Santa Fe de la Laguna and 2) San Benito Palermo. *See* Appendix I.

166. Tribunal Electoral del Poder Judicial de la Federación [TEPJF] [Electoral Court of the Judiciary of the Federation], SUP-JDC-145/2020, Judgment, at 62-64, 30-06-2020 (Mex.).

167. Ley Orgánica Municipal del Estado de Michoacán de Ocampo art. 117 & 118, Periódico Oficial del Estado de Michoacán de Ocampo, 30-03-2021 (Mex.).

168. Gobierno de Michoacán, PROTOCOLO GENERAL DE ACTUACIÓN DEL GOBIERNO DEL ESTADO DE MICHOACÁN PARA LA TRANSICIÓN DE LAS COMUNIDADES INDÍGENAS HACIA EL AUTOGUBIERN Y EL EJERCICIO DEL PRESUPUESTO DIRECTO 3–18 (2022), [https://www.michoacan.gob.mx/wp-content/uploads/2022/03/Protocolo\\_digital.pdf](https://www.michoacan.gob.mx/wp-content/uploads/2022/03/Protocolo_digital.pdf) [perma.cc/R7T6-ARKV].

169. Appendix I.

170. *Id.*

## CONCLUSION: EXPANDING THE BOUNDARIES OF FPIC

This Article has advanced a twofold argument. First, it highlighted how the socio-legal literature on FPIC has sought to scrutinize the impact of the right of FPIC mostly through its *protective function*. Second, it argued that FPIC strategies can go beyond the limits imposed by this defensive stance and perform a *proactive function*.

For the most part, the right to FPIC has been interpreted exclusively as a protective tool, a shield indigenous communities can use to defend themselves from external threats. However, the case of Pichátaro demonstrates that FPIC can also proactively advance indigenous agendas. Since 2016, Purhépecha communities have used consultation processes to pursue their own projects for budgetary autonomy—a possibility that FPIC scholarship could have hardly predicted.

This local appropriation of the right to FPIC constructed a *de facto* right of indigenous communities to “consult themselves.” In contrast to archetypal FPIC scenarios, the proactive function of this legal strategy lies in extending the temporality of FPIC to challenge the routine operation of pre-existing institutional frameworks, organizing a consultation around an indigenous initiative, and relying on the participation of state bureaucracies to legitimize an indigenous-driven project.

In concluding this Article, it is important to reflect on the broader implications of the argument and our case study. Admittedly, Pichátaro represents just one experience against countless other instances in which the right to FPIC is used for strictly protective purposes. Even if the experience has since been replicated in many other communities in Mexico, one could rightly point out that they are all iterations of the same strategy to enact DIB. Under scholarly conventions, presenting such a sample would limit the scope of our possible conclusions. These cases could be seen merely as an exception to the overwhelming norm.

However, this Paper is not attempting to portray Pichátaro, nor the rest of Purhépecha communities, as a template for other indigenous peoples to follow. The objective of this Article is to demonstrate for scholars and activists that a proactive type of FPIC process can exist, and can be analyzed as a qualitatively different phenomenon.

For activists, Pichátaro brings empirical proof of a legal strategy contrary to how the right to FPIC is assumed to operate. This case study can open the door to a universe of strategic possibilities beyond normative borders once assumed to be impenetrable.

For academics, acknowledging that the right to FPIC can perform a proactive function also opens a door toward a new field of inquiry and imagination. This warrants a partial reevaluation of the academic understanding of indigenous consultations. While it is likely that many of the existing skeptical and optimistic arguments would still be applicable to a proactive



use of FPIC, some may warrant a reassessment, especially when it comes to its systemic aspects.

The strategic creativity of the Purhépecha revealed an underexplored facet of indigenous consultations. In speaking about their right to consult themselves, they have made a statement about the capacity of indigenous peoples to appropriate their right to FPIC in ways that can support their own agendas. In Mexico, the right of indigenous communities to consult themselves, as a vernacular form of the right to FPIC, has diffused alongside claims for DIB. However, their experience is an open invitation to expand the boundaries of what FPIC means and brings to indigenous struggles. Similar consultation strategy could be attempted to promote other indigenous initiatives.

## APPENDIX I

List of Indigenous Communities that have deployed their  
 “Right to Consult Themselves” to proactively seek financial autonomy in  
 Mexico (2016-2022)

State of Michoacán			
Community	Municipality	Date of Consultation	Records of Consultation <sup>171</sup>
San Francisco Pichátaro	Tingambato	July 4, 2016	IEM-CG-19-2016
Arantepacua	Nahuatzen	April 12, 2018	IEM-CG-187-2018
Nahuatzen Cabecera	Nahuatzen	August 28, 2018	IEM-CG-412-2018
Sevina	Nahuatzen	December 9, 2018	IEM-CG-03-2019
Santa Fe de la Laguna	Quiroga	March 19, 2019	IEM-CG-15-2019
San Benito Palermo	Los Reyes	July 10, 2019	IEM-CG-27-2019
San Angel Zurumucapio	Ziracuaretiro	May 21, 2021	IEM-CG-232-2021
La Cantera	Tangamandapio	May 30, 2021	IEM-CG-249-2021
Ocumicho	Charapan	June 1, 2021	IEM-CG-250-2021
Jarácuaro	Erongarícuaro	August 29, 2021	IEM-CG-265-2021
Turicuaro	Nahuatzen	September 26, 2021	IEM-CG-267-2021
Angahuan	Uruapan	October 24, 2021	IEM-CG-269-2021
Donaciano Ojeda	Zitácuaro	October 27, 2021	IEM-CG-277-2021
Crescencio Morales	Zitácuaro	October 28, 2021	IEM-CG-278-2021
Janitzio	Pátzcuaro	November 17, 2021	IEM-CG-274-2021
Carapan	Chilchota	March 13, 2022	IEM-CG-016-2022
Jesus Diaz Tsirio	Los Reyes	March 20, 2022	IEM-CG-017-2022
Zacan	Los Reyes	May 8, 2022	IEM-CG-027-2022
Nuevo Zirosto	Uruapan	June 19, 2022	IEM-CG-33-2022
San Francisco Periban	Periban	July 3, 2022	IEM-CG-35-2022
Santiago Azajo	Coeneo	October 23, 2022	IEM-CG-43-2022
Sicuicho	Los Reyes	November 6, 2022	IEM-CG-46-2022

171. The official records of indigenous consultations in the State of Michoacán are made public as Resolutions of the General Council of the local electoral institute and are accessible at: *Acuerdos de Consejo General*, INSTITUTO ELECTORAL DE MICHOACÁN (last accessed Jan. 16, 2022), <https://www.iem.org.mx/index.php/actas-acuerdos-e-informes2/consejo-general/acuerdos-de-consejo-general> [perma.cc/2KXQ-5F2J].

## State of Puebla

Community	Municipality	Date of Consultation	Records of Consultation <sup>172</sup>
San Pablito	Pahuatlan	February 9, 2019	CG/AC-001/2019
Tepeteno de Iturbide	Tlatlauquitepec	March 20, 2022	CG/AC-042/2022
Santa María la Alta	Tlacotepec	April 3, 2022	CG/AC-044/2022

## State of Jalisco

Community	Municipality	Date of Consultation	Record of Consultation
San Sebastian Teponahuaxtlan	Mezquitic	June 22, 2022	IEPC-ACG-035-2022 <sup>173</sup>
Tuxpan	Bolaños	Pending, ordered on April 26, 2019	TEEJ-JDC-005/2019 <sup>174</sup>

## State of Oaxaca

Community	Municipality	Date of Judgement	Judicial File <sup>175</sup>
San Marcos Zacatepec	Sta. Catarina Juquila	March 9, 2017	SUP-JDC-1966/2016 <sup>176</sup>
San Juan Sosola	San Jeronimo Sosola	May 4, 2017	JDCI/111/2017 <sup>177</sup>
Llano Grande	Santa Maria Jalapa del Marques	June 22, 2018	SX-JDC-479/2018 <sup>178</sup>
San Marcos Monte de Leon	Villa de Chilapa de Diaz	July 12, 2019	JDCI/25/2019 <sup>179</sup>

172. The official records of indigenous consultations in the State of Puebla are made public as Resolutions of the General Council of the local electoral institute and are accessible at: *Consejo General Acuerdos*, INSTITUTO ELECTORAL DEL ESTADO DE PUEBLA (last accessed Jan. 16, 2022), [https://www.iecpuebla.org.mx/categorias.php?que=acuerdos&quien=Consejo\\_General](https://www.iecpuebla.org.mx/categorias.php?que=acuerdos&quien=Consejo_General) [perma.cc/M4ZZ-2PEX].

173. INSTITUTO ELECTORAL Y DE PARTICIPACIÓN CIUDADANA DEL ESTADO DE JALISCO, ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO ELECTORAL Y DE PARTICIPACIÓN CIUDADANA QUE APRUEBA LAS PREGUNTAS, EL PROYECTO DE CONVOCATORIA Y LA METODOLOGÍA PARA EL DESARROLLO DE LA JORNADA CONSULTIVA A LA COMUNIDAD INDÍGENA WIXÁRIKA DE SAN SEBASTIÁN TEPONAHUAXTLÁN, UBICADA EN EL MUNICIPIO DE MEZQUITIC, JALISCO, CON RELACIÓN AL PROCEDIMIENTO DE SOLICITUD DE ADMINISTRACIÓN DIRECTA DE RECURSOS PÚBLICOS, IEPC-ACG-035-2022 (May 26, 2022), <https://www.iepcjalisco.org.mx/sites/default/files/sesiones-de-consejo/consejo%20general/2022-05-27/10-iepc-acg-035-2022-acu-apruebapregconsultasansebastian.pdf> [perma.cc/MW48-F5CT] (last visited Mar. 25, 2023).

174. Tribunal Electoral del Estado de Jalisco [TEEJ] [Electoral Court of the State of Jalisco], JDC-005/2019, Judgment, 26-01-2019 (Mex.), [https://www.triejal.gob.mx/jdc-005\\_2019/](https://www.triejal.gob.mx/jdc-005_2019/) [perma.cc/4ZVZ-N6YX] (last visited Mar. 25, 2023).

175. In the State of Oaxaca, the records of indigenous consultations issued by the local electoral institute are not made publicly available. Therefore, I refer to judicial decisions that have ordered the institute to organize indigenous self-consultations.

176. Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [TEPJF] [Electoral Court of the Judiciary of the Federation], SUP-JDC-1966/2016, Judgment, 09-03-2019 (Mex.), <https://>

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177. Tribunal Electoral del Estado de Oaxaca [TEEO] [Electoral Court of the State of Oaxaca], *JDCI/111/2017*, Judgment, 04-05-2017 (Mex.), <https://teoo.mx/images/sentencias/JDCI-111-2017.pdf> [perma.cc/PW7L-JDHD] (last visited Mar. 25, 2023).

178. Sala Regional del Tribunal Electoral del Poder Judicial de la Federación Tercera Circunscripción Plurinominal Electoral Federal [TEPJF] [Electoral Court of the Judiciary of the Federation], *SX-JDC-479/2018*, Judgment, 22-06-2018 (Mex.), <https://www.te.gob.mx/salasreg/ejecutoria/sentencias/xalapa/SX-JDC-0479-2018.pdf> [perma.cc/44JM-ZA4R] (last visited Mar. 25, 2023).

179. Tribunal Electoral del Estado de Oaxaca [TEEO] [Electoral Court of the State of Oaxaca], *JDCI/25/2019*, Judgment of July 12, 2019 (Mex.), <https://teoo.mx/images/sentencias/JDCI-25-2019.pdf> [perma.cc/E46L-UYC3] (last visited Mar. 25, 2023).