

Social Origins of Institutional Strength:
Prior Consultation over Extraction of Hydrocarbons in Bolivia

TULIA G. FALLETI *
University of Pennsylvania
falleti@sas.upenn.edu

Version: March 7, 2018

Paper prepared for the edited volume by:
Brinks, Daniel, Steven Levitsky and Maria Victoria Murillo
Weak Institutions in Latin America

*Working Draft: Please do not cite without author's permission.
Comments are welcomed.*

ABSTRACT:

Much has been written in the social sciences about why and how institutions come about and gradually change. Less attention, however, has been paid to the questions of why and how institutions strengthen. Prior consultation, when applied in the hydrocarbons sectors, is an institution that articulates the conflicting interests of states, extractive corporations, and indigenous communities. As such, it is a hard test for institutional strengthening. In this chapter, building upon the editors' understanding of weak institutions, I propose a conceptualization of institutional strength based on social actors' compliance (rooted in the legitimacy and efficacy of the institution) and on state's enforcement. I trace these dimensions in the institutionalization of prior consultation in Bolivia since that country's ratification of the International Labor Organization Convention 169 in 1991 until the present. I argue that prior consultation was adopted due to mobilization and political pressure from indigenous groups. However, the institution remained weak, a window dressing institution. Only when the indigenous movement was politically incorporated, they could activate the institution through their participation in the processes of regulation and implementation. Only then, prior consultation in hydrocarbons was systematically complied with and enforced. This chapter will show that the political incorporation of the mobilized groups who are behind institutional creation leads to institutional strengthening.

* This chapter draws from my collaborative research with Thea Riofrancos, which appeared in Falleti, Tulia G. and Thea N. Riofrancos. 2018. "Endogenous Participation. Strengthening Prior Consultation in Extractive Economies," *World Politics*, Vol. 70, No. 1, 86-121. For research assistance that was instrumental to the research on Bolivia, I thank Javier Revelo Rebolledo and Gabriel Salgado. I am also indebted to Alisha Holland, Belén Fernández Milmanda, Victor Hugo Quintinilla Coro, Oscar Vega Camacho, Maria Paula Saffon Sanin, and the three volume editors for their helpful comments on a previous version of this chapter.

INTRODUCTION

Why do some political institutions become strong, while others remain weak? Why do imported international legal norms remain aspirational rights in some countries, but are complied with and enforced in others?¹ Why do institutions born out of similar conditions subsequently diverge in their levels of institutional strength? Social scientists have amply demonstrated that strong institutions are essential to economic and political development. At the dawn of the twentieth century, Max Weber (1978 [1922]) famously argued that capitalist development required the development of a strong, rational, state bureaucracy. More recently, political scientists and economists alike have highlighted the importance of strong political institutions for economic growth and development (Haggard 1990; North 1990). In political science, scholars have developed theories of why and how institutions originate and change (Knight 1992; Steinmo et al. 1992; Thelen 2004). However, much less attention has been paid to the questions of why and how institutions strengthen or alternatively remain weak, which are at the center of this edited volume.

In the introduction, Brinks, Levitsky, and Murillo (this volume), propose a typology of weak institutions and, articulating the costs of institutional compliance with the costs of institutional violation and change, provide examples of institutional creation and design that are connected to different types of weak institutions. In this chapter, rather than analyzing a case of institutional weakness, my goal is to offer an explanation and example of institutional strengthening in Latin America. The domain of my argument is the subset of *state-sanctioned institutions that have been adopted due to demand from civil society*. Among these institutions, my main argument is that institutional strengthening not only requires that the costs of violation

¹ For a discussion of imported institutions and how they compare to domestic institutions, see the chapter by Shrank (this volume); and for a definition of “aspirational rights” and its application to the case of women’s rights in Mexico, see the chapter by Htun and Jensenius (this volume).

and change be lower than the cost of compliance for the actors with vested interests in the institution, but it also requires, at least from a sociological standpoint, the political incorporation of the social actors who initially mobilized for the creation or adoption of the institution. I argue that these social actors must be politically incorporated during the phases of regulation and implementation of the institution. Thus, social compliance with the institution is likely to be based on the institution's legitimacy in the eyes, hearts, and minds of the social actors who demanded it and were later part of the regulation and implementation processes that unrolled the institution. In such cases, the state is more likely to be compelled to enforce the institution due to societal pressure.² Moreover, as my case study shows, the state may be compelled to enforce even when the preferences of its leaders change (and they would prefer a weak or non-enforced institution).

Empirically, my analysis will be based on the study of prior consultation, which is part of the participatory institutions that were adopted and rolled out in many Latin American countries since the dawn of the 21st century.³ I follow the definition of institution proposed by Brinks, Levitsky, and Murillo (this volume, 7), i.e. “a set of formal rules structuring human behavior around a particular goal by (a) specifying actors' roles, (b) requiring, permitting, or prohibiting certain behaviors, and (d) defining the consequences of complying or not complying with the

² As the chapter by Amengual and Dargent (this volume) shows, when there is no societal pressure, state enforcement is weak or non-existent (stand-off). This is the case with labor law violations in the brick-making industry in the province of Córdoba, Argentina, a sector “whose union ... had limited resources and no leadership position in the provincial labor confederation” (Amengual and Dargent this volume, 22). Thus, the brick-making sector fell off the radar of the provincial labor secretary, who was in charge of enforcing labor laws, and did so in other sectors (such as restaurants, hotels, or hair salons), with stronger unions. Instead, when there are vested societal interests in the institution and pressure from below to enforce, enforcement is more likely, whether co-produced between state and civil society (as in the case of construction in Lima), more dependent on society (as in the case of environmental regulations in the municipality of Santa Clara, Santa Fe, Argentina), or more dependent on the state (as is the case in my study).

³ I am indebted to Thea N. Riofrancos for having first called my attention to the institution of prior consultation when she was returning from a fieldwork trip to Ecuador, in 2011.

remaining rules.” Participatory institutions, in turn, belong to what Graham Smith (2009, 1) has called “democratic innovations”—institutions “specifically designed to increase and deepen citizen participation in the political decision-making process.” Or, as previously defined in collaborative research (Davies and Falleti 2017; Falleti and Riofrancos 2018), participatory institutions are *formal, state-sanctioned institutions explicitly created to augment citizen involvement in decision making over public goods or social services*. These institutions provide citizens with a normal politics means of interacting with the state, and are potentially more substantive than sporadic electoral participation at the ballot box, while at the same time less disruptive than social protest (Cameron et al. 2012; Fung and Wright 2003). Examples of participatory institutions include, among others, participatory budgeting, local health councils, water committees, local oversight committees, and prior consultations, on which I focus my attention.

Latin America is the ideal setting to study participatory institutions as the region has led the world in their creation and implementation. Participatory budgeting, for instance, was first adopted in the late 1970s and 1980s in southern Brazilian cities, and from there soon diffused throughout the country and world (Avritzer 2009, 26; Baiocchi et al. 2011, 43-44; Souza 2001, 162; Tranjan 2016). By 2010, between 800 and 1500 local governments around the world had adopted participatory budgeting, but with 63% of the total, Latin America continued to be the region with the largest concentration of such institutional innovations (Sintomer et al. 2010, 10). Local health councils in Brazil, territorially based organizations and local oversight committees in Bolivia, and *comunas* in Venezuela, are other examples of participatory institutions that, while not exclusive to Latin America, have been abundant in the region in the recent past.⁴ Nonetheless, while some of these institutions have acquired strength, enabling citizens’

⁴ For a comprehensive survey of these institutions consult www.latinno.net.

meaningful participation in the decision-making process over the distribution or management of public goods or social services, others have remained weak—merely window dressing institutions that are not enforced.⁵ Why have participatory institutions with very similar institutional designs followed such different trajectories? What are the implications of these differing trajectories for explanations of institutional weakness and for the scholarship on institutional development more broadly?

In this chapter, I will focus my empirical analysis in a hard case for institutional strengthening: *consulta previa* or prior consultation. Prior consultation is the collective right of indigenous communities to be consulted prior to the realization of mega-infrastructure or extractive projects that could affect their environment. This institution originates in the International Labor Organization (ILO) Convention 169 on Indigenous and Tribal Peoples, of 1989. To date, twenty-two countries around the world have ratified the Convention, fifteen of them are in Latin America (see Map 1), which makes the study of prior consultation very relevant in the region. Moreover, the increase of extractive projects and industries in Latin America during the commodities boom (2000 to 2014) makes prior consultation not only highly relevant but also a site of conflict with high stakes. Indeed, in Latin American extractive economies, prior consultation is articulating conflicting (often incompatible) social actors' interests. The institution is applied in what César Rodríguez Garavito (2012) calls “mined social fields”: sites where the interests in favor of natural resource extraction of states that derive royalties and corporations (both private and public) that derive large profits are often directly opposed to the interests of indigenous communities who, at least in part, seek to preserve their natural environment and way of life. Moreover, given the asymmetry of power between

⁵ For a definition of “window dressing” institution, see Levitsky and Murillo (2009, 2014). For an explanation of non-compliance based on the intentional design of institutions as window dressing, see the introduction by Brinks, Levitsky, and Murillo (this volume).

extractive corporations (with high levels of resources, information, and access to state officials) and indigenous communities (who are amongst the poorest populations in the most isolated territories of the region), it is hard to think of a harder case for institutional strengthening due to societal pressure. In other words, if I can show that the institution of prior consultation has strengthened in mined social fields, with conflicting interests and high asymmetries of power among the actors articulated by the institution, then I would expect the theoretical implications derived from this single-case study to apply to other state-sanctioned and socially-demanded institutions.

In the next section, I will present alternative explanations of institutional strengthening of participatory institutions and argue for the need to scale up our analysis. In the third section, I will articulate my own argument. In doing so, I will provide a definitional and operational conceptualization of institutional strengthening and discuss the concept of political incorporation of indigenous movements. In the fourth section, I will justify the selection of the case of Bolivia and its hydrocarbons sector. I will then analyze the process of adoption, regulation, and implementation of prior consultation in the extraction of natural gas.⁶ In the final section, I will conclude.

ALTERNATIVE ARGUMENTS

The existing literature on participatory institutions in the developing world identifies several local-level variables and conditions to account for the institutional strength of participatory innovations, including a developed civil society (Baiocchi et al. 2011), a high degree of fiscal decentralization combined with weak opposition to leftists ruling local

⁶ The concepts of institutional adoption, regulation, and implementation aid the analysis of state-society relations in different phases of institutionalization, even if in reality, these phases are often intertwined.

governments (Goldfrank 2007), capable local leadership (Grindle 2007; Van Cott 2008), the technocratic agency of policymakers (McNulty 2011), among other local level variables. These invaluable studies provide subnational comparisons of participatory institutions, both within and across countries, to explain their varying degrees of success and institutional strengthening. However, as in previous collaborative research (Falleti and Riofrancos 2018), I propose to scale up the analysis, and study instead the national-level dynamics that lead to the creation and strengthening of participatory institutions. The fate of many of these institutions at the local level is heavily dependent on how they come about in the first place, which often takes place at the national level. Their fate is also dependent on the regulatory and enforcement institutional framework, which again is designed and negotiated at the national level.

Regarding alternative arguments of institutional strengthening at the national level, Levitsky and Murillo (2013, 97-100) point to political regime instability, electoral volatility, social inequality, institutional borrowing, and rapid institutional design as contributing causes to institutional weakness in Latin America. But while all these conditions have historically characterized the case of Bolivia, prior consultation has strengthened. Moreover, whereas Levitsky and Murillo (2009, 122) are most focused on the threat that elite actors—economic, military, or religious—pose to institutional enforcement and stability, I will show below that the relations between state and grassroots social movements can account for institutional compliance and enforcement.

INSTITUTIONAL STRENGTH AS SOCIETAL COMPLIANCE AND STATE ENFORCEMENT

In the introduction to this volume, Brinks, Levitsky, and Murillo conceptualize the strength of an institution as the distance between the outcome we would expect to see in the real

world absent the institution (*po*), and the outcome we actually see with the institution (*io*). As that distance between *po* and *io*, labeled *S*, gets larger, the institution gets stronger. If *po* and *io* can indeed be observed and measured, this definition provides an excellent operationalization of institutional strength. However, this conceptualization remains silent about the sources of that strength. Why does the institution in question systematically produce change in individuals' behaviors such that a dramatic change between *po* and *io* ensues? Do individuals' behaviors change due to fear of punishment or to avoid fines, hence weighing the costs of violations versus the cost of compliance, as the editors note? Or have those individuals' underlying preferences with regards to the institution changed and therefore they now comply with an institution (*io*) they would not have complied with in the past (*po*)? Are individuals complying with the institution due to fear of sanctions or because they now believe "it is the right thing to do"?

In order to dig deeper on what accounts for a larger *S* in any given institutional situation, I define *institutional strength*, my dependent variable of interest, as the degree to which institutions are complied with by society and enforced by the state. Moreover, I will claim that for the institution to be strong, civil society compliance must not be solely based on fear of punishment, but instead on legitimacy and efficacy.⁷

Observationally, it can be a thorny endeavor to distinguish between compliance due to fear of punishment and compliance due to legitimacy in any single behavioral case. However, as Weber (1978 [1922], 214) masterfully wrote:

⁷ In fact, it is not only individuals, but also the state that must comply with the institution. As nicely put by one of the interviewees, the former Secretary of Environment in the Province of Santa Fe (Argentina), in the chapter by Amengual and Dargent (this volume, 31): "the state...was not complying with its own rules to apply sanctions [i.e. enforce] and implement legislation." While the first part of non-compliance has to do directly with enforcement, which I discuss below, the lack of state compliance in implementing legislation is directly related to the problem of "window dressing" institutions or parchment institutions that only exist in paper but are not rolled out or implemented. Holland (2016) provides a powerful theory of state non-compliance or what she calls "forbearance." For the purpose of this chapter, I will center on compliance as it applies to civil society actors and on enforcement as it applies to the state.

“...the legitimacy of a system of domination may be treated sociologically only as the probability that to a relevant degree the appropriate attitudes will exist, and the corresponding practical conduct ensue.”

In other words, when observing compliance with a new institution (*io*), we cannot fully ascertain whether individuals' change in behavior is due to the legitimacy of the institution, self-interest, imitation, opportunism, or any other possible source of behavioral change. However, when analyzing compliance with an institution over time and as it applies to a social group, it might be possible for the social scientist to attach a probability to the possibility that legitimacy of the institution might be the leading cause of a group of individuals' change in behavior. For example, in her research on local institutions in the context of civil war in Colombia, Arjona (2015, 2016) observed that legitimate institutions are those “that most members of the community believe[d to be] rightful” or fair (2015, 183). In my view, if social actors demand the adoption of a new institution and the state's enforcement of it, such institution should enjoy a high level of legitimacy with that social group. For instance, if an organized indigenous movement demands its national state the adoption of an international norm such as the ILO Convention 169, I expect prior consultation—included in such convention—to enjoy a high level of legitimacy with the mobilized indigenous movement, particularly if subsequent to institutional adoption they continue to mobilize to demand the state enforcement of the institution. Similarly, if Brazil's *sanitarista* movement demands the recognition and enactment of the constitutional right to health care in the courts of Brazil, I expect the constitutional right to health to enjoy a high level of legitimacy among the *sanitarista* movement. The chapter by Amengual and Dargent (this volume), provides another example where environmental groups and citizens of the municipality of Santa Clara in the province of Santa Fe, Argentina, demanded

the municipal and provincial governments to enforce environmental laws that up to that point only existed in paper. My expectation is that those laws had a high level of legitimacy among the organized actors who were actively seeking to activate them--and thus prevent fires and public health problems created by an agro-business company in their community. In all these cases, mobilized social actors are demanding the state to adopt and activate institutions, which--I expect--enjoy a high level of legitimacy among such social groups.

Legitimacy is an essential component of institutional strength and compliance with the institution, but it is not enough. As Arjona noted, high-quality (or we can say strong) institutions must also be “obeyed.” For Arjona, the degree to which individuals obey or follow the rules (i.e. comply) is a function of institutional efficacy (2016, 130). In other words, an institution is efficacious when individuals see its value when complied with. Or as Weber (1978 [1922], 215) puts it:

“‘Obedience’ will be taken to mean that the action of the person obeying follows in essentials such a course that the content of the command may be taken to have become the basis of action for its own sake.”

This is to say, if the institution is efficacious, individuals will obey or comply with it without doubt or resistance, for its and their own sake.

In the case of prior consultation, the primary goal of the institution is to negotiate the differences between indigenous communities, corporations, and the state over extraction of natural resources. Thus, to me, prior consultation will be legitimate when individuals in the indigenous communities, in the extractive corporations, and in the state will approve of the rules that prior consultation puts in place to resolve conflicts, without disputing their validity. Moreover, prior consultation will be efficacious when the indigenous communities, the

extractive corporations, and the state will follow those prior consultation rules to negotiate their differences and resolve their conflicts. In other words, where prior consultation is strong we should observe extraction taking place via prior consultation and with comparatively lower levels of social conflict between indigenous communities and extractive corporations than it would have been the case had the institution not been in place, or as compared to similar contexts where the institution is absent or only weakly complied with or enforced.

This leads me to the second dimension of institutional strength: enforcement. As Brinks, Levitsky, and Murillo note in the introduction (this volume), enforcement is related to the likelihood of punishment for not following the rules.⁸ Because prior consultation must be implemented by the state (i.e., the state must convene and lead the process of the prior consultation between indigenous communities and extractive corporations, the state must write and validate all the agreements that are signed between the parts, and the state must ensure that all parties follow through with the resulting agreements), I operationalize enforcement as the degree to which the institution is enacted by the state. Enforcement is not solely a function of the state's institutional capacities, but also of its willingness to apply the law and enact the institution.

This definition of institutional strength—entailing high levels of state enforcement and societal compliance, which in turn is rooted in the institution's legitimacy and efficacy in the eyes of those social actors—brings together insights from various traditions of institutionalism in sociology, economics, and political science that are seldom combined. From the sociological tradition, I take the idea that individuals' internalization of routines or practices perceived as legitimate are at the core of institutional compliance that is stable in the long run.⁹ In other

⁸ For a more extensive definition of enforcement, see Levitsky and Murillo 2009, 117, and fn. 1.

⁹ E.g., Weber 1978 [1922]; see also Bourdieu 1984 (in particular, chap. 8), albeit not strictly an

words, legitimacy is what keeps an institution in place and complied with once the political interests or coalitions that existed at the moment of its creation are no longer there. From the economics tradition, I borrow the idea that institutions solve conflicts and generate stability by limiting the range of options actors confront (e.g., North 1990). Efficacious institutions are those that are obeyed by social actors, because they provide not only cognitive maps, but also practical shortcuts for social action. As Brinks, Levitsky, and Murillo note in the introduction (this volume), rational actors weigh the cost of institutional compliance against the costs of institutional violation or change. Efficacious institutions are those where the cost of compliance is consistently lower than the costs of violation or change, or at least this is the internalized perception of social actors who may not even care to change or violate the institution because it provides them with what appears to be an optimized strategy for individual and collective action. Finally, from political science's historical institutionalist tradition, I borrow the idea that a key source of institutional strength is the alignment between the interests of the political coalitions bringing about the institution, on the one hand, and the institution's goals and distributional effects, on the other (e.g., Pierson 2016). Moreover, due to positive feedback mechanisms, institutions continue to be enforced (and sometimes gradually evolve) after the political coalitions or circumstances in which they originate change. As long as the institution proves legitimate and efficacious, it could continue to be enforced and strengthened even as the originating coalition ages or collapses.¹⁰

institutionalist in his approach.

¹⁰ Thus, in the empirical analysis of prior consultation in the hydrocarbons sector of Bolivia, I study not only the emergence and design of the institution (which is the theoretical focus of the editors in the introduction to this volume), but also its evolution over time. I show that both the relevant economic context and the preferences of the state actors regarding prior consultation changed during the period under study. Nonetheless, the institution continued to be enforced by the state due to its high level of legitimacy and efficacy among the indigenous communities.

In my view, these dimensions of institutional strength are mutually reinforcing: legitimacy facilitates efficacy, both of these lead to societal compliance, and this in turn eases state enforcement. For social actors, it is easier to obey and not to challenge rules that are considered right and fair. If institutional legitimacy and efficacy are high, violations of the institution will be few (high societal compliance) and enforcement by the state will be easier (fewer transgressors) and more attainable (the state is more likely to have the will to enforce due to pressure from below). As the empirical study of the institution of prior consultation in the natural gas sector of Bolivia demonstrates, this multidisciplinary conceptualization of institutional strength provides analytical leverage for the study of institutional genesis and development.

Compliance by society and enforcement by the state may be also conceptualized in terms of a state-society dynamic process. Figures 1 and 2 schematically represent a series of logical steps we would expect to observe in the path to institutional strengthening. Figure 1 centers on compliance, or the societal side of institutional strengthening. Once an institution is adopted due to demand from civil society, the first question becomes: do the mobilized social actors involved in the creation of the institution seek to change individuals' behavior or the distribution of power among relevant actors with the adopted institution? If the answer is *no*, the resulting institution will be a *window dressing* weak institution or an *aspirational right*, for instance, as explained by Htun and Jensenius (this volume) (*Compliance Outcome 1*). If the answer is *yes*, as we would expect to be the case if the proposed institution enjoys high level of legitimacy among the social actors proposing it and if they conceive of the institution as highly efficacious to navigate the social order if complied with (i.e. not merely an aspirational right, but one that can be realized), then the question becomes: are the mobilized social actors politically incorporated (either within

the state or in other organizations of political or civil society)? If the answer is *no*, the likely outcome is a weak institution and a reactive sequence of events between state and social actors over the meaning and implementation of the institution, such as *social protests* or other *types of overt conflict (Compliance Outcome 2)*.¹¹ If the answer is *yes*, if the mobilized social actors have been politically incorporated during the process of institutional regulation and implementation, then we should expect a *strong institution (Compliance Outcome 3)*.¹²

Figure 1 about here

On the other hand, we can analyze this process from the standpoint of the state's behavior vis-à-vis the mobilized social actors, in order to assess institutional enforcement, as schematically represented in Figure 2. Once an institution is in place due to mobilization from below, the first question we should ask is, does the state seek to change individuals' behavior or the distribution of power with this institution? If the answer is *no*, the institution is likely to remain ambiguous, flexible, or intentionally flawed.¹³ It will be a *weak institution (Enforcement Outcome 1)*. If instead the state is actively seeking to change individuals' behavior or the distribution of power among the affected actors with this institution, then the next question becomes, is the institution enforceable? *Aspirational rights*, for instance, are largely not enforceable by design, at least at the time of their adoption, and thus are conceived as *weak institutions (Enforcement Outcome 2)*. If the institution is enforceable, then the question becomes: does the state have the will to enforce the institution? If the answer is *no*, the outcome

¹¹ For a description of reactive sequences of events, see Mahoney (2000) and Falleti and Mahoney (2015).

¹² As shown below, prior consultation in the hydrocarbons sector in Bolivia conformed to *Compliance Outcome 2* from the time of adoption of ILO Convention 169 in 1991 until the enactment of Law of Hydrocarbons in 2005, and aligned with *Compliance Outcome 3* starting in 2007 and until the present.

¹³ For an example, see the case of the territorial classification of native forests' law in the province of Salta, in Fernández Milmanda and Garay (this volume).

is weak institution due to *forbearance* (*Enforcement Outcome 3*).¹⁴ If the state has the will to enforce, then: does the state have the capacity to enforce the institution? A negative answer will yield a *weak institution* for lack of state capacity to enforce (*Enforcement Outcome 4*).¹⁵ If the state has the will and the capacity to enforce, the institution will acquire that important feature of institutional strength, which combined with societal compliance (which I largely interpret to be the result of the degree of legitimacy and efficacy of the institution) will result in a strong institution (*Enforcement Outcome 5*).

Figure 2 about here

My empirical analysis will show that prior consultation in the hydrocarbons sector in Bolivia transitioned from a weak window dressing institution (as it was during the period extending from 1991 to 2005) to a strong institution. This change started in 2005 (with the Law of Hydrocarbons) and became self-reinforcing once the Movement Towards Socialism (MAS) politically incorporated the indigenous movement and groups that had fought for the adoption of prior consultation into the institutions of the state and government. Furthermore, due to such incorporation, the institution remained strong even after the early 2010s, when the state's interest in accelerating extraction of natural gas increased and the its willingness to implement prior consultation decreased.

POLITICAL INCORPORATION OF MOBILIZED SOCIAL ACTORS

¹⁴ For examples of this outcome, see Holland (2016). The case of lack of state enforcement of labor and environmental violations in the gold mining sector in Bolivia is also an example of this type of outcome (Amengual and Dargent, this volume).

¹⁵ As the chapter by Amengual and Dargent shows, coproduction of enforcement with civil society could be an alternative to this outcome: "Support from groups in the process of enforcement itself can help otherwise imperfect states overcome limitations. And, conversely, resistance from social actors can trump enforcement actions" (this volume, 4). Moreover, as noted by several of the chapters in this volume, state capacity and will to enforce an institution may not be evenly distributed across the territory, or across sectors to which the institution may apply (as I explain is the case with prior consultation in Bolivia).

Between the stage of adoption of a participatory institution and its institutional strengthening, there is a fundamental intervening process: the political incorporation of the mobilized actors that brought about the institution. In a previous comparative analysis, Thea Riofrancos and I (2018) showed that without the mobilized actors' political incorporation during the stages of regulation and implementation, participatory institutions remain weak. In the case of prior consultation, indigenous movements are the key actors bringing about the demand for its adoption by the state. Beginning in the 1990s, when the corporatist citizenship regime was in crisis in Latin America and, largely due to the implementation of neoliberal reforms, indigenous identities were politicized, indigenous movements demanded the ratification of ILO Convention 169.

Ruth Berins Collier and David Collier's (1991) comparative historical analysis of the incorporation of the labor movement in eight Latin American countries offers a template to theorize indigenous movement incorporation in the region. As in the previous co-authored article, I define *indigenous political incorporation* as the sustained and at least partially *successful attempt by the state to legitimate and shape an institutionalized indigenous movement*.¹⁶ As in the case of labor incorporation, during the process of indigenous political incorporation, the state plays an innovative role in constructing new institutions of state-indigenous relations and new approaches to articulating the indigenous movement with the party system. Examples of new institutions of state-indigenous relations that evince a process of indigenous political incorporation include prior consultation, indigenous territorial autonomies, the recognition of indigenous languages, indigenous control of bilingual education and development agencies, legal pluralism that recognizes indigenous justice, the recognition of *ayllu* (in the Andes region of South America) or other forms of indigenous communal governance, and

¹⁶ Adapting from Collier and Collier 1991, 5, 161–68.

the definition of the state as plurinational so as to include the right of self-determination of originary peoples and tribes. In terms of new approaches to articulating the indigenous movement to the party system, examples of indigenous political incorporation include the principle of descriptive representation in the selection of political party candidates to national-level representative positions, and the creation of legislative seats reserved for representatives of ethnic groups.¹⁷

How does indigenous political incorporation take place? Indigenous political incorporation can occur through several routes. It can occur via the state (as appointments in the bureaucracy, for instance), via the political parties (whether in ruling or opposition parties, with voice and representation in the political institutions of the country, such as in Congress or Constitutional Assemblies), or via para-state institutions such as indigenous unions or lobbying groups with whom the state regularly negotiates.

Riofrancos and I (2018) have argued that participatory institutions' strength is dependent on two processes. First, it is the process of social mobilization that brings about the institution. Based on an extensive review of the literature, we have shown that participatory institutions brought about by social mobilization are more likely to develop into strong institutions than are participatory institutions imposed from above or by diffusion of best practices. In that regard, we have argued that social mobilization is endogenous to the process of participatory institutions' strengthening. Second, for the newly created institution to strengthen there must be a process of political incorporation of the mobilized social actors during the stages of regulation and implementation of the institution, whether via political parties or state institutions. Both of these processes, social mobilization prior to adoption of the institution and political incorporation

¹⁷ This is to say, legally and institutionally, incorporation entails more political transformations than does the process of inclusion understood as "the presence in decision making of members of historically excluded groups" (Htun 2016, 4).

during the process of regulation and implementation of the institution have been present in Bolivia.

METHODOLOGY AND CASE SELECTION

This chapter constitutes a case-study of institutional strengthening. I select Bolivia for several reasons. First, it was one of the first countries to ratify the convention (Mexico and Norway ratified the convention in 1990 and Bolivia and Colombia in 1991). Second, forty percent of the population self-identify as indigenous (Htun 2016, 26) and the indigenous movement was highly organized by the 1990s (Yashar 2005, Ch. 5). Third, the state heavily relies in extraction and exports of gas.¹⁸ Combined, these attributes make the institution of prior consultation in the hydrocarbons sector highly relevant. Moreover, Bolivia has historically had low levels of state capacity, making it a hard case for institutional enforcement.

Why prior consultation in the hydrocarbons sector? According to ILO Convention 169 prior consultation should take place in any instance of mega-infrastructure or extraction project that could potentially affect the land and environment of indigenous communities. However, while prior consultation has been strongly institutionalized in the hydrocarbons sector, it has not been applied in the mining sector and only applied after significant indigenous pressure and mobilization in infrastructure. The chapter by Amengual and Dargent (this volume) describes the political conditions that make enforcement of prior consultation in mining politically non-desirable for the MAS. In 2014, prompted by the indigenous movement, a framework law of prior consultation was debated in the Bolivian national congress. However, largely due to the opposition and pressure from the mining cooperatives, the law was not approved. Similarly, in

¹⁸ In 2011, commodities represented 86 percent of the total exports of Bolivia, and hydrocarbons over 50 percent of its exports (Campello and Zucco 2014, Appendix B, 5).

the year 2011, prior consultation was amply demanded by the indigenous communities who opposed the construction of a major highway programmed to run through the natural reserve territory known as Territorio Indígena y Parque Nacional Isiboro Sécore (or TIPNIS), in the lowlands of Bolivia. The Bolivian government delayed the implementation of the prior consultation until a year later and only rolled it out after increased pressure and mobilization of the indigenous movement.¹⁹ The indigenous communities of the TIPNIS were practically split in half in their approval or rejection of the highway. But because of the prior consultation process and all the controversy the construction project generated, the highway was suspended in 2013. However, the conflict is still ongoing between the government and indigenous and environmental groups as to whether the highway can be built in that park. In fact, both in infrastructure and mining the application of prior consultation has been either absent or less complied with and enforced by the state. In other words, in these other sectors prior consultation has remained a weak or window dressing institution.

In hydrocarbons, interestingly, the Law of Hydrocarbons of 2005 opened the possibility for enforcement with clear rules and mandates on what the state had to do and how. Once the MAS got in power, the Minister of Hydrocarbons, Omar Quiroga, had an interest in applying the institution, and started to do so systematically in 2007, thus strengthening the institution. In the next section, I employ the technique of process tracing to study the adoption, regulation, and implementation of prior consultation in Bolivia's hydrocarbons sectors, aiming to identify the

¹⁹ On September 25, 2011, government security forces heavily repressed an indigenous protest against the highway in Chaparina, Beni. Members of the indigenous movement and NGO's interpret this event as a critical juncture in the relationship between the MAS and the government of Evo Morales and the indigenous movement, which the government has sought to divide and control since then (Interview with Victor Hugo Quintinilla Coro, Sucre, July 23, 2015; "La crisis con indígenas se inicio en Chaparina," *El Tiempo*, September 26, 2017, <http://www.lostiempos.com/actualidad/economia/20170926/crisis-indigenas-se-inicio-chaparina>, last accessed on February 10, 2018).

events and evidence that point to different levels of legitimacy, efficacy, and enforcement of prior consultation. I draw on data collected from in-depth interviews conducted with state, sectoral, and social movement actors; archival research on the adoption, regulation, and implementation of prior consultation; and secondary literature on the history of indigenous mobilization, political party incorporation, and constitutional reforms.²⁰

PROCESS-TRACING OF PRIOR CONSULTATION IN BOLIVIA

THE CONTENTIOUS ADOPTION OF PRIOR CONSULTATION IN BOLIVIA

From 1990 to 2005, the process of adoption of prior consultation in Bolivia was reactive, characterized by reaction/counter-reaction dynamics between neoliberal administrations and indigenous organizations. Affected by neoliberal policies, lowlands indigenous groups, which had been excluded from the corporatist pact resulting from the 1952 revolution, demanded the recognition of international-level indigenous rights as well as political and economic inclusion.²¹ They were organized in the Confederación Indígena del Oriente, Chaco y Amazonía de Bolivia (CIDOB), and “demanded indigenous territory; organizational autonomy to decide the terms of political participation and development; the right to self-government; recognition of customary law and legal pluralism; and the right to cultural survival and development,” among other rights (Yashar 2005, 203). In response to the CIDOB’s 1990 March for Territory and Dignity, in 1991

²⁰ Fieldwork was conducted in March 2014 and in July of 2015.

²¹ The corporatist pact following the 1952 social revolution refers to the alliance between the victorious populist leadership of the Nationalist Revolutionary Movement (MNR) and part of the insurgent popular sectors, organized in worker and peasant unions. The post-1952 corporatist regime promoted universal suffrage, greater labor rights, nationalization of industry, and agrarian reform. It incorporated the popular sectors of the Andes and of the valleys of Cochabamba, but largely excluded those of the low-lands. Peasantry’s incorporation, in fact, was incomplete and imperfect, creating the conditions for the resurgence of ethnic grievances (Rivera Cusicanqui 1990, 104,107-109; 2004, 20).

President Jaime Paz Zamora ratified ILO Convention 169.²² While ratification of this international norm was important for the recognition of indigenous collective rights, Law 1,257 of July 11, 1991 consisted of merely 143 words in total. It amounted to one paragraph saying that the ILO Convention 169 was approved and would have the status of a national law. The ratification did not, however, include any clauses as to how or when the new Law was going to be regulated, implemented, or who, when, for how long, and with what resources was to carry out the consultations. Law 1,257 conformed exactly with the definition and characteristics of a window dressing institution: an institution designed to not be enforced or complied with (see introduction, this volume).

Lacking a regulatory framework, the few consultations that the employees of the Directorate for Environmental Management of the Ministry of Hydrocarbons and Energy sought to carry out in the late 1990s were guided by the ILO convention and Bolivia's 1992 Law 1,333 on the environment.²³ Despite being a quite extensive law (7,518 words in length, followed by three regulatory norms, amounting to 47,642 words), no article made reference to the institution of prior consultation, and only two articles made reference to public consultations with affected communities. These public consultations, however, had very restrictive features in terms of the procedures available to communities who wanted to raise concerns about projects affecting their environment.²⁴ During the 1990s, prior consultation remained a weak, window dressing, institution.

Further extensions and amendments to the right of prior consultation followed the heightened social mobilization that occurred during the gas wars of October 2003. As a result,

²² Interview with Oscar Vega Camacho, La Paz, Bolivia, March 20, 2014.

²³ Interview with Monica Castro, former employee of the Directorate for Environmental Management, Ministry of Hydrocarbons and Energy, La Paz, March 21, 2014.

²⁴ Bolivia, *Ley No. 1.333 Ley de Medio Ambiente*, Gaceta Oficial de Bolivia, June 15 1992, see Articles 162 and 164.

President Gonzalo (Goni) Sánchez de Lozada decreed that natural gas would only be exported with “consultations and debates.”²⁵ But protest over Goni’s neoliberal policies continued, leading to his resignation soon thereafter. When Vice President Carlos Mesa assumed the presidency, he called a national referendum on hydrocarbons, which contained five questions relating to their exploitation and administration by the state. Overwhelmingly, Bolivians favored state ownership of hydrocarbons (92 percent) and the refounding of the national oil company Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) (87 percent). In 2005, Mesa presented a bill on hydrocarbons to congress, but the political context was less than conducive to compromise.

The political left, led by Morales and the Movimiento al Socialismo (MAS), with overwhelming support from self-identified indigenous voters and groups, demanded more state participation in the ownership and administration of natural gas (Giusti-Rodríguez 2017). Previously separated indigenous organizations, of which the most salient were the CIDOB, grouping the indigenous communities of the low-lands, and the Consejo Nacional de Ayllus y Markas del Qullasuyu (CONAMAQ), grouping the indigenous communities of the highlands, among others, came together in a national indigenous movement which coordinated its political action vis-à-vis the neoliberal state. They formed the *Pacto de Unidad* (Unity Pact), which brought together the Conamaq, Cidob, the Confederación Nacional de Mujeres Campesinas Indígenas Originarias de Bolivia – Bartolina Sisa (CMCIOB “BS”), the Confederación Sindical de Comunidades Interculturales originarios de Bolivia (CSCIB), and the Confederación Sindical Única de Trabajadores Campesinos de Bolivia (CSUTCB), representing a wide array of indigenous peoples. Meanwhile, the political right, led by the Comité Cívico de Santa Cruz in the Eastern department, demanded more departmental autonomy as a counterbalance to the rising power of the indigenous movement and to safeguard their territorial and economic interests.

²⁵ Decree 27,210.

Amidst a new wave of popular protests, Mesa resigned to avoid having to either sign or veto the new hydrocarbons law.²⁶ Days later, President of Congress Hormando Vaca Diez, signed the law into effect.

Law No. 3,058 on hydrocarbons was paramount to the institutionalization of prior consultation in Bolivia and the direct result of these reactive/counter-reactive dynamics between the government and the indigenous movement. As anthropologist Denise Humphreys Bebbington (2012, 59) writes, “This law ... represented the culmination of years of mobilization, lobbying and negotiation with executive and legislative officials, bringing indigenous lowland groups closer to their goal of effective control over their territories.” One of the law’s ten titles was explicitly devoted to “the rights of the peasant indigenous and original peoples” (Title VII). The law directly invoked ILO Convention 169 and legislated that a mandatory process of consultation of indigenous communities must take place prior to the implementation of any hydrocarbons exploitation project. Not only was the process of prior consultation mandatory, but the “decisions resulting from this process of consultation ought to be respected.” (Article 115). The law also specified the Ministries of Hydrocarbons, Sustainable Development, and of Indigenous Affairs and Originary Peoples as jointly responsible for implementing the consultation with funding from the presidency (Article 117).²⁷

It is noteworthy that neither the MAS bill proposal nor President Mesa’s original bill included such a lengthy Title Section on prior consultation. Mesa’s proposal mentioned that in indigenous communal lands (Tierras Comunitarias de Origen or TCO’s), a process of consultation with indigenous communities would be mandatory prior to the study of environmental impact. It was a short one-sentence paragraph within the environmental

²⁶ Interviews with Carlos Mesa, in La Paz, March 21, 2014, and in Philadelphia, PA, September 12, 2014.

²⁷ This funding scheme changed in 2007.

monitoring article, toward the end of the bill.²⁸ Similarly, the MAS proposal included one sentence indicating that ILO Convention 169 would have to be complied with when hydrocarbons activities involved TCO's.²⁹

Instead, a proposal to legislate on the consultation of indigenous communities and peoples was elaborated by the Centro de Estudios Jurídicos e Investigación Social (CEJIS), a nongovernmental organization that worked closely with the five major national indigenous organizations grouped in the *Pacto de Unidad* (CEJIS 2014, 189-206), and such proposal was likely the template that found its way into Title VII of Law 3,058. In fact, ten days after Law No. 3,058 was approved, the *Pacto de Unidad* presented a letter to the president of congress requesting, among other changes, that the consultation process would be “binding.”³⁰ Although no such reform was made, the demands of the organized indigenous movement reflected its degree of political capacity and coordination just before the MAS assumed the presidency and during the legislative sessions and debates that led to Law 3,058. Between 1991 and 2005, prior consultation was a weak institution, practically not enforced by the state, and hence not complied with by either corporations or indigenous communities (despite the fact that it was a highly legitimate institution in the eyes of the Bolivian indigenous movements, who demanded it as one of their indigenous rights). Law 3,058 gave teeth to the weak institution. It provided very explicit rules on whom, when and how ought to be consulted in cases of extraction in the natural gas sector. Could this have been enough to strengthen the institution? My contention is that while the Law of Hydrocarbons provided the *opportunity* to strengthen prior consultation in the extraction

²⁸ Bolivia. Presidencia de la República, *Proyecto de Ley de Hidrocarburos*, Art. 107, 37, September 6, 2004.

²⁹ Bancada Parlamentaria MAS-IPSP, *Proyecto de Ley de Hidrocarburos*, Art. 62, transcribed in CEJIS (2004,139).

³⁰ Pacto de Unidad. Proyecto de Modificatoria a la Ley No. 3058, Ley de Hidrocarburos. May 27, 2005. Consulted in the Central Archive of Bolivia's National Congress.

of natural gas, the law was not enough. In order for the law and prior consultation to be implemented, it was required that the indigenous movement be politically incorporated.

INDIGENOUS POLITICAL INCORPORATION AND INSTITUTIONAL STRENGTHENING OF PRIOR CONSULTATION IN BOLIVIA

After the MAS assumed the presidency in 2006 and until 2009, the process of institutionalization of prior consultation became self-reinforcing, as the government largely supported the demands of the indigenous movement, which constituted the core of its social base and part of its leadership (Anria 2013; Madrid 2012, 50-58; Schavelzon 2012; Van Cott 2005, Ch. 3). The MAS is a “movement party” that emerged out of peasant and *cocalero* mobilization, and expanded in the wake of the water wars of 2000 and the gas wars of 2003 (Anria 2013, 23-28; Van Cott 2005, Ch. 3). It represented a primarily indigenous constituency but, as Anria (2013) and Van Cott (2005) argue, political success of the party rested on the formation of a broad coalition with multiple territorial, class, and ethnic bases. In contrast to Ecuador’s Pachakutik indigenous party, for instance, the MAS was not a strictly indigenous party, but rather incorporated and represented the demands of indigenous movements (Van Cott 2005, Ch. 3 and 4). But even if the MAS is a movement party, it facilitated indigenous political incorporation in (at least) four ways: “First, the MAS has established close ties with a vast number of indigenous organizations in the country. Second, the MAS has run numerous indigenous candidates, including for high-profile positions. Third, the MAS has made a variety of symbolic appeals to Bolivia’s indigenous population. Fourth and finally, the MAS has aggressively promoted traditional indigenous demands” (Madrid 2012, 53). Therefore, after 2006, the indigenous movement had been political incorporated in the state and in the political party system. The indigenous movement was meaningfully represented

in state institutions such as the national executive, the senate, the deputies' chamber, and the constitutional assembly.³¹

When the constitutional assembly was in session from 2006 to 2009, 137 of its 255 seats were controlled by the MAS (Madrid 2012, 52). The indigenous sectors of the party successfully pushed for the adoption of radical legal innovations, including the identification of a new social subject, the “indigenous original peasant peoples and nations”³²; the definition of Bolivia as a plurinational state; the adoption of living well; the recognition of Mother Earth's rights; and the right of indigenous peoples and nations to prior consultation with regard to the exploitation of nonrenewable natural resources in their territories.³³ Moreover, the resulting constitution recognizes the collective right of indigenous peoples and nations to self-government, listing their rights and responsibilities alongside those of the national and subnational governments.

Because the indigenous movement was included in the Morales government, in the MAS, and represented in the constitutional assembly, its demands were largely adopted and prior consultation continued to gain legitimacy among indigenous groups.

Starting in 2007, the Ministry of Energy and Hydrocarbons (MHE) conducted consultations in indigenous territories on a regular basis, in all cases of natural gas extraction projects. The hydrocarbons law and three regulatory decrees provided the legal framework that

³¹ In 2011, for instance, 25 percent of Bolivia's deputies and 16 percent of its senators were indigenous (Htun 2016, 35).

³² The introduction of this concept in the Constitution of 2009, without commas or hyphens, was a demand of the indigenous movement that took part in the Constitutional Convention. The term referred to a new political subject identity, one that recognized its roots in the 1952 social revolution (hence, the inclusion of the term peasant or *campesino*), but that also included the terms indigenous and original. (Conversation with Diego Pary Rodríguez, member of the Constituent Assembly and Bolivian Ambassador to the Organization of American States, in Philadelphia, March 7, 2018).

³³ Bolivian Constitution of 2009, Art. 11; Art. 30, II.15; Art. 304, I. 21; Art. 403; see also Schavelzon (2012).

was needed for it.³⁴

Since then, the process of prior consultation occurs in four stages: convocation, planning, execution, and validation. Each of these stages concludes with all parts signing a binding document or *acta*.³⁵ In this process, the extractive company agrees to pay indigenous communities for any damage that will be caused to their environment. Between 2007 and 2017, the MHE led fifty-eight consultations prior to the extraction of gas in territories of indigenous original nations and peasant communities.³⁶ The available information on these processes is incomplete, but government documents, news media, case studies, and interviews indicate they involved contracts with a handful of large corporations, including the nationalized YPFB and its subsidiaries.³⁷ In all cases, the communities approved the extraction of natural resources; only one case was brought before the constitutional tribunal.³⁸ The size of the projects, the amount of compensation that the communities receive, and the input they have on the extractive project and required environmental licenses vary from case to case. In some cases, such as in Charaguá Norte, where the indigenous community was well organized, had trained environmental observers, and was supported by environmental or legal NGOs (such as CEJIS), meaningful discussions and input were achieved through prior consultation (de la Riva Miranda 2011, 40-56). In other cases, the process consists of negotiations between the parts to arrive to

³⁴ Decrees 29,033 and 29,124 (2007), and 29,574 (2008) establish that consultations ought to be financed by the hydrocarbons corporations (instead of the national executive, as per the Law of Hydrocarbons) and cannot last longer than two months (with one extra month for compliance with the terms of the consultation).

³⁵ Conversation with Xavier Barriga, director of environmental management, MHE, La Paz, March 20, 2014; <https://www.slideshare.net/FTIERRA2010/omar-quirola>, accessed March 20, 2017.

³⁶ See Table 1 in supplementary material for Falleti and Riofrancos (2018), doi: 10.1017/S004388711700020X.

³⁷ For excellent case studies of consultation processes in the hydrocarbons sector, see Bascopé Sanjinés (2010); Flemmer and Schilling-Vacaflor (2016) on the limitations of indigenous participation; Humphreys Bebbington (2012); Pellegrini and Ribera Arismendi (2012); and Schilling-Vacaflor (2012).

³⁸ This was the case of the Asamblea del Pueblo Guaraní (APG) of Itika Guasu against the Argentine company, Repsol, in the fields of Margarita (Tarija), cited in Pérez Castellón (2013, 15-6).

agreeable compensations.

Whether the process is truly participatory and meaningful, or whether it consists of a series of routinized practices to arrive at an agreeable compensation, the difference in outcome for the communities the institution makes (*io*), compared to what their situation would be if the institution were not in place or were not enforced (*po*) is rather large (*S*). If information were available, such distance could be measured in the millions of Bolivian pesos paid by corporations to the indigenous communities as compensations for environmental degradation.³⁹ Or perhaps more tellingly, if information were available, such distance could be measured in the decline of social conflict surrounding extraction of natural gas in indigenous territories in Bolivia.⁴⁰ Despite gaps in information, and despite criticisms of prior consultation as ineffective to stop extraction, prior consultation as an institution is highly legitimate in the eyes of indigenous groups. This is the reason why in 2011 indigenous communities forcefully pressured the government to call a prior consultation over the construction of the TIPNIS highway—and they continue to do so to this day. Conflicts with the government have run so high over the TIPNIS highway, that the two main indigenous organizations, CIDOB and CONAMAQ, have been divided over this conflict between officialist factions (who support Evo Morales) and opposition factions (who oppose the government).⁴¹ High legitimacy of prior consultation in the eyes of the indigenous movement was also the reason why in 2014, the indigenous organizations of the

³⁹ Despite a formal request for information in the MHE, I did not have access to the signed agreements that result from prior consultations. News coverage of some agreements indicate that the amounts of compensation can be significant, particularly for highly impoverished communities.

⁴⁰ Following the news and based on interviews, this seems to be the case, with the exception of the region of the Gran Chaco where the APG is based, which is the most conflictive region and indigenous organization when it comes to extraction of natural gas.

⁴¹ These divisions even transpired at the local level during the 2015 departmental and local elections, when indigenous groups supported or led the local political opposition to the MAS. See *Associated Press*, “Revolt from Indigenous Base Challenges Bolivia’s Morales,” May 21, 2015. <https://www.usatoday.com/story/news/world/2015/05/21/indigenous-revolt-bolivia/27699325/>

Pacto de Unidad, worked on a national framework Law of Prior Consultation that would further extend its reach to non-indigenous communities, to sectors other than hydrocarbons, and to processes of extraction as well as exploration of natural resources. The bill was debated in congress in 2014, but due largely to opposition from the mining sector, was not approved.⁴²

In addition, a significant decline in the price of hydrocarbons led the national government in 2015 to pass four regulatory decrees aimed at circumventing prior consultation. Decrees 2,195; 2,298; 2,368 and 2,366 (all of 2015) limit the amount of time of the consultation process; set the maximum compensation for environmental damages (to be between 0.3 and 1.5 percent of total investment); declare hydrocarbon pipes to be of national interest; and allow for extraction in national parks without prior consultation. Indigenous organizations have mobilized against these decrees and demanded prior consultation in nationally protected areas, once again showing the high level of legitimacy that the institution enjoys with the indigenous groups in Bolivia. During these conflicts, President Morales asserted, “We shouldn’t be wasting so much time in the so-called consultations. This is the big weakness of our State.”⁴³

Interestingly, despite the president’s reluctance to enforce the institution and the seemingly crippling decrees, despite the political splits within the indigenous organizations, and despite the absence of a national framework law on prior consultation, prior consultations in the hydrocarbons sectors have been systematically complied with and enforced since 2007 and they continue to be carried out throughout the country. Between 2014 and early 2017, at least fifteen

⁴² The mining cooperatives also opposed the implementation of prior consultation in the mining sector when the Mining Law was discussed that same year. *Página Siete*, “Plantean que no haya consulta previa en la exploración minera,” March 19, 2014, page 8.

⁴³ “No es posible que en las llamadas consultas se pierda tanto tiempo, esa es la gran debilidad que tiene nuestro Estado.” My translation, quote from *Página Siete* (La Paz), “Nueve consultas a pueblos indígenas terminaron con la aprobación de proyectos petroleros,” July 26, 2016.

consultations were underway.⁴⁴ Furthermore, the compensation that gas corporations pay to communities has been invested in local social development projects, such as schools, health clinics, and infrastructure for the affected communities. Indigenous organizations such as CONAMAQ and the Asamblea del Pueblo Guaraní (APG) continue to press for the enactment of a national prior consultation law. In their eyes, the institution of prior consultation is a legitimate right of indigenous communities and all those whose environments are affected by extractive projects.⁴⁵

Despite the structural asymmetry between corporations and communities, prior consultation has provided indigenous communities in Bolivia with a normal politics means of interacting with the state and the extractive corporations. Even in occasions where indigenous communities felt deceived by extractive corporations or the government, their demand to the state has been to properly carry out prior consultations.⁴⁶ Prior consultation is therefore an impactful and recurrent institution for the participation of indigenous communities affected by the extraction of natural gas in that country. It has replaced the contentiousness that characterized the relationship between state and indigenous movements throughout the 1990s and early 2000s. It has become legitimate in the eyes of the indigenous communities that demand its extension to other communities and, after the 2015 decrees and laws, to protected natural areas (including TIPNIS). It is efficacious because the negotiating parties follow through on the resulting agreements-or otherwise they make public their grievances. And it is enforced by the state, which, with the reluctant support of high-level officials, does not allow gas extraction without prior consultation.

⁴⁴ See Table 1 in supplementary material for Falleti and Riofrancos (2018), doi: 10.1017/S004388711700020X.

⁴⁵ Interview with Renán Paco Granier, leader CONAMAQ, La Paz, March 19, 2014.

⁴⁶ *Página Siete*, “Tacanas, el pueblo engañado,” October 22, 2017. Accessible at <http://www.paginasiete.bo/revmiradas/2017/10/22/tacanas-pueblo-enganado-156451.html>.

CONCLUSION

Institutional strengthening is a multiphase, sequential process where the timing of its constitutive events, both in relation to each other and to their relevant political context, is highly consequential. In general, social mobilization in the process of adoption is necessary for an institution to gain strength (Falleti and Riofrancos 2018). Political contention between social movements and the state, in fact, may be necessary at the initial adoption phase of the participatory institution for it to gain institutional strength. But if political contention continues during the regulation and implementation phases of institutionalization, the interactions between social movements and states may significantly undermine institutional strengthening (see for example the case of Ecuador in Falleti and Riofrancos, 2018). The timing of the political incorporation of social movement actors vis-à-vis the type of state and governmental policies through which they are incorporated is also highly consequential.

Unlike participatory budgeting and other deliberative institutions studied in the participatory democracy literature, prior consultation directly involves the corporate sector. The fact that *consulta previa* could potentially disrupt strategic extractive projects has important implications for corporate profits, state revenues, and state-society dynamics. And yet, we see that through political incorporation of the indigenous movement in the context of the progressive state after the ascension of MAS to power in 2006, prior consultation gained institutional strength in Bolivia. Against the backdrop of a neoliberal state, the MAS was formed as a social movement organization of peasants and coca growers that later developed a national strategy and forged links with indigenous movement leaders. When the party won the presidency in 2006, the indigenous movement was incorporated in the national state and participated actively in the

process of regulating and implementing prior consultation. By building a coalition with multiple territorial, class, and ethnic bases, the MAS broadened its coalition and maintained its electoral strength. In terms of timing, the ascension of the MAS coincided with the crisis of the neoliberal state and the crystallization of the progressive state, which could organically incorporate indigenous movement demands. Such inclusion meant that the indigenous movement had a say over the regulation and implementation of prior consultation, in the hydrocarbons sector since 2007 and later in the new constitution of 2009. Prior consultation enjoys high levels of legitimacy among the indigenous in Bolivia. When applied in the hydrocarbons sector, it is efficacious and the state is societally pressured to enforce it.

What are the lessons that can be drawn from this chapter, as it relates to the rest of the volume? First, state enforcement of prior consultation did not require a high degree of state capacity. The amount of resources and personnel dedicated to prior consultation are relatively low. However, the state's will to roll out the institution was initially (as of 2006 or 2007) very important. Second, it appears that it is the high degree of legitimacy of the institution of prior consultation in the eyes of indigenous communities that has kept it a stable institution over time. It is very unlikely that without that constant pressure and demand for the implementation of the institution by the indigenous movement the Bolivian state would continue to enforce it. This leads to the third lesson: in order to stay strong, the institution must be continually enacted and defended. The indigenous movement has demonstrated the capacity to do so in their communities, asking the state to roll out and comply with prior consultation when necessary. But it has also shown the capacity to do so in the legislature, the constituent assembly, and more recently the courts. And if everything else fails, at least some sectors of the indigenous movement are ready to take their demands to the streets or the highways.

In fact, this important strengthening of prior consultation notwithstanding, it must be recognized that in Bolivia, as in other Latin American countries, prior consultation is set against the backdrop of the geographic expansion of natural resource extraction. In the 2000s, the commodity boom deepened economic dependency on the extraction of natural resources. In Bolivia, despite the economic and political pressures in favor of resource extraction, prior consultation has achieved such high degree of legitimacy among indigenous communities that it has proven very difficult for the Morales' government to reverse or roll back the institution.

The theoretical implication of this case-study is portable to other contexts. In democratic or political regimes with at least a moderate level of political accountability—an important scope condition of the argument—the expectation is that when the social sectors mobilized for the adoption of an institution are politically incorporated (either via state institutions or through a competitive political party system) in the regulatory process, the institution they help bring about will gain legitimacy, efficacy, thus will be complied with and enforced. Without political incorporation, participatory institutions at least, are likely to die either in the letter of the law, a mere window dressing or parchment institution, or to fuel conflict between state and mobilized social actors for its activation. The strength of prior consultation in the hydrocarbons sector in Bolivia has been inextricable from the actions of the mobilized indigenous movement that brought it about in the context of the neoliberal state in the early 1990s and through political incorporation into the state and the political party system was able activate what until then had been a window dressing institution. After 2007, prior consultation in hydrocarbons in Bolivia enjoys high levels of legitimacy with indigenous communities, who comply with the institution, as do corporate actors—some of who have substantially “upgraded” their social responsibility discourse. And the state, even if with a grudge as prices of commodities dropped, is being held

accountable to comply with and enforce the institution.

REFERENCES

- Amengual, Mathew, and Eduardo Dargent. this volume. "Enforcement: Integrating Politics with Limited State Capacity." In *Weak Institutions*, ed. D. Brinks, S. Levitsky and M. V. Murillo,
- Anria, Santiago. 2013. "Social Movements, Party Organization, and Populism: A Study fo the Bolivian MAS." *Latin American Politics and Society* 55 (3), 19-46.
- Arjona, Ana. 2015. "Civilian Resistance to Rebel Governance." In *Rebel Governance in Civil War*, ed. A. Arjona, N. Kasfir and Z. Mampilly. New York, NY: Cambridge University Press, 180-202.
- . 2016. *Rebelocracy. Social Order in the Colombian Civil War*. New York, NY: Cambridge University Press.
- Avritzer, Leonardo. 2009. *Participatory Institutions in Democratic Brazil*. Washington, D.C.: Woodrow Wilson Center Press and The Johns Hopkins University Press.
- Baiocchi, Gianpaolo, Patrick Heller, and Marcelo Silva. 2011. *Bootstrapping Democracy: Transforming Local Governance and Civil Society in Brazil*. Stanford, CA: Stanford University Press.
- Bascope Sanjinés, Iván. 2010. *Lecciones aprendidas sobre consulta previa*. La Paz, Bolivia: Centro de Estudios Juridicos e Investigación Social.
- Brinks, Daniel, Steven Levitsky, and M. Victoria Murillo. this volume. "Understanding Weak Institutions: Lessons from Latin America." In *Weak Institutions*, ed. D. Brinks, S. Levitsky and M. V. Murillo,
- Cameron, Maxwell A., Eric Hershberg, and Kenneth E. Sharpe. 2012. *New Institutions for Participatory Democracy in Latin America. Voice and Consequence*. New York: Palgrave Macmillan.
- Campello, Daniela, and Cesar Zucco. 2014. "Merit, Chance, and the International Determinants of Government Success."
- CEJIS. 2014. *El gas y el destino de Bolivia* Santa Cruz, Bolivia: Centro de Estudios Jurídicos e Investigación Social.
- Collier, Ruth Berins, and David Collier. 1991. *Shaping the Political Arena. Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America*. Princeton, NJ: Princeton University Press.
- Davies, Emmerich, and Tulia G. Falleti. 2017. "Poor People's Participation: Neoliberal Institutions or Left Turn?" *Comparative Political Studies* 50 (12), 1699-731.
- de la Riva Miranda, Polo. 2011. "Monitoreo Socioambiental en Territorio Indígena Guaraní." *Industrias Extractivas: Políticas y Derechos, Artículo Primero. Revista de Debate Social y Jurídico (CEJIS)* 14 (21), 35-56.
- Falleti, Tulia G., and James Mahoney. 2015. "The Comparative Sequential Method." In *Advances in Comparative-Historical Analysis*, ed. J. Mahoney and K. Thelen. Cambridge, UK: Cambridge University Press, 211-39.
- Falleti, Tulia G., and Thea N. Riofrancos. 2018. "Endogenous Participation: Strengthening Prior Consultation in Extractive Economies." *World Politics* 70 (1), 86-121.
- Fernández Milmanda, Belén, and Candelaria Garay. this volume. "Enforcement of Forest Laws in the Gran Chaco." In *Weak Institutions*, ed. D. Brinks, S. Levitsky and M. V. Murillo,
- Flemmer, Ricarda, and Almut Schilling-Vacaflor. 2016. "Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia's and

- Peru's extractive industries." *Third World Quarterly* 37 (1), 172-88.
- Fung, Archon, and Erik Olin Wright, eds. 2003. *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*. New York, NY: Verso Books.
- Giusti-Rodríguez, Mariana. 2017. "Going Beyond Co-Ethnicity: Assessing the Programmatic Reach of Ethnic Cleavages." ed. C. University.
- Goldfrank, Benjamin. 2007. "The Politics of Deepening Local Democracy. Decentralization, Party Institutionalization, and Participation." *Comparative Politics* 39 (2), 147-68.
- Grindle, Merilee. 2007. *Going Local. Decentralization, Democratization, and the Promise of Good Governance*. Princeton and Oxford: Princeton University Press.
- Haggard, Stephan. 1990. *Pathways from the Periphery: The Politics of Growth in the Newly Industrializing Countries*. Ithaca, NY: Cornell University Press.
- Holland, Alisha C. 2016. "Forbearance." *American Political Science Review* 110 (2), 232-46.
- Htun, Mala. 2016. *Inclusion without Representation in Latin America. Gender Quotas and Ethnic Reservations*. New York, NY: Cambridge University Press.
- Htun, Mala, and Francesca Jensenius. this volume. "Institutionalizing Gender Equality: Antidiscrimination Laws versus Social Norms in Mexico." In *Weak Institutions*, ed. D. Brinks, S. Levitsky and M. V. Murillo,
- Humphreys, Denise. 2012. "Consultation, Compensation and Conflict: Natural Gas Extraction in Weenhayek Territory, Bolivia." *Journal of Latin American Geography* 11 (2), 49-71.
- Knight, Jack. 1992. *Institutions and Social Conflict*. New York, NY: Cambridge U.P.
- Levitsky, Steven, and María Victoria Murillo. 2009. "Variation in Institutional Strength." *Annual Review of Political Science* 12 (1), 115-33.
- Levitsky, Steven, and María Victoria Murillo. 2013. "Building Institutions on Weak Foundations." *Journal of Democracy* 24 (2), 93-107.
- Madrid, Raúl L. 2012. *The Rise of Ethnic Politics in Latin America*. New York: Cambridge University Press.
- Mahoney, James. 2000. "Path dependence in historical sociology." *Theory and Society* 29 (4), 507-48.
- McNulty, Stephanie L. 2011. *Voice and Vote: Decentralization and Participation in post-Fujimori Peru*. Stanford, CA: Stanford University Press.
- North, Douglas C. 1990. *Institutions, Institutional Change and Economic Performance*. New York, NY: Cambridge U.P.
- Pellegrini, Lorenzo, and Marco Octavio Ribera Arismendi. 2012. "Consultation, compensation and extraction in Bolivia after the 'left turn': the case of oil exploration in the North of La Paz Department." *Journal of Latin American Geography* 11.
- Pérez Castellón, Ariel. 2013. "Justicia constitucional en Bolivia. Desafíos y oportunidades para la tutela de los derechos de los pueblos indígenas en conflictos socio-ambientales." *Revista Catalana de Dret Ambiental* 4 (2), 1-47.
- Pierson, Paul. 2016. "Power in Historical Institutionalism." In *The Oxford Handbook of Historical Institutionalism*, ed. O. Fioretos, T. G. Falletti and A. Sheingate. Oxford, UK: Oxford University Press, 124-41.
- Rivera Cusicanqui, Silvia. 1990. "Liberal Democracy and Ayllu Democracy in Bolivia: The Case of Northern Potosí." *Journal of Development Studies* 26 (4), 97-121.
- . 2004. "Reclaiming the Nation." *NACLA Report on Bolivia* (November-December), 19-23.
- Rodríguez Garavito, César. 2012. *Etnicidad.gov. Los recursos naturales, los pueblos indígenas y*

- el derecho a la consulta previa en los campos sociales minados*. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia.
- Schavelzon, Salvador. 2012. *El nacimiento del Estado Plurinacional de Bolivia: Etnografía de una Asambela Constituyente*. La Paz, Bolivia: CEJIS and Plural Editores.
- Schilling-Vacaflor, Almut. 2012. "Democratizing resource governance through prior consultations? Lessons from Bolivia's hydrocarbon sector." In *GIGA working papers*.
- Shrank, Andrew. this volume. "Imported Institutions: Boon or Bane in the Developing World?" In *Weak Institutions*, ed. D. Brinks, S. Levitsky and M. V. Murillo,
- Sintomer, Yves, Carsten Herzberg, and Anja Rocke. 2010. "Learning from the South: Participatory Budgeting Worldwide--an Invitation to Global Cooperation." *Dialog Global* 25.
- Smith, Graham. 2009. *Democratic Innovations. Designing institutions for citizen participation*. New York: Cambridge University Press.
- Souza, Celina. 2001. "Participatory budgeting in Brazilian cities: Limits and possibilities in building democratic institutions." *Environment and Urbanization* 13 (1), 159-84.
- Steinmo, Sven, Kathleen Thelen, and Frank Longstreth, eds. 1992. *Structuring politics: historical institutionalism in comparative analysis*. Cambridge (England) and New York: Cambridge University Press.
- Thelen, Kathleen. 2004. *How Institutions Evolve. The Political Economy of Skills in Germany, Britain, the United States, and Japan*. New York: Cambridge University Press.
- Tranjan, Ricardo J. 2016. *Participatory Democracy in Brazil. Socioeconomic and Political Origins*. Notre Dame, IN: University of Nother Dame Press.
- Van Cott, Donna Lee. 2005. *From movements to parties in Latin America: the evolution fo ethnic politics*. New York, NY: Cambridge University Press.
- . 2008. *Radical Democracy in the Andes*. New York, NY: Cambridge University Press.
- Weber, Max. 1978 [1922]. *Economy and society: an outline of interpretive sociology*. Berkeley: University of California Press.
- Yashar, Deborah J. 2005. *Contesting Citizenship in Latin America: the Rise of Indigenous Movements and the Postliberal Challenge*. New York: Cambridge University Press.



Countries that Ratified ILO
Convention 169



Figure 1. Compliance: Societal side of Institutional Strengthening

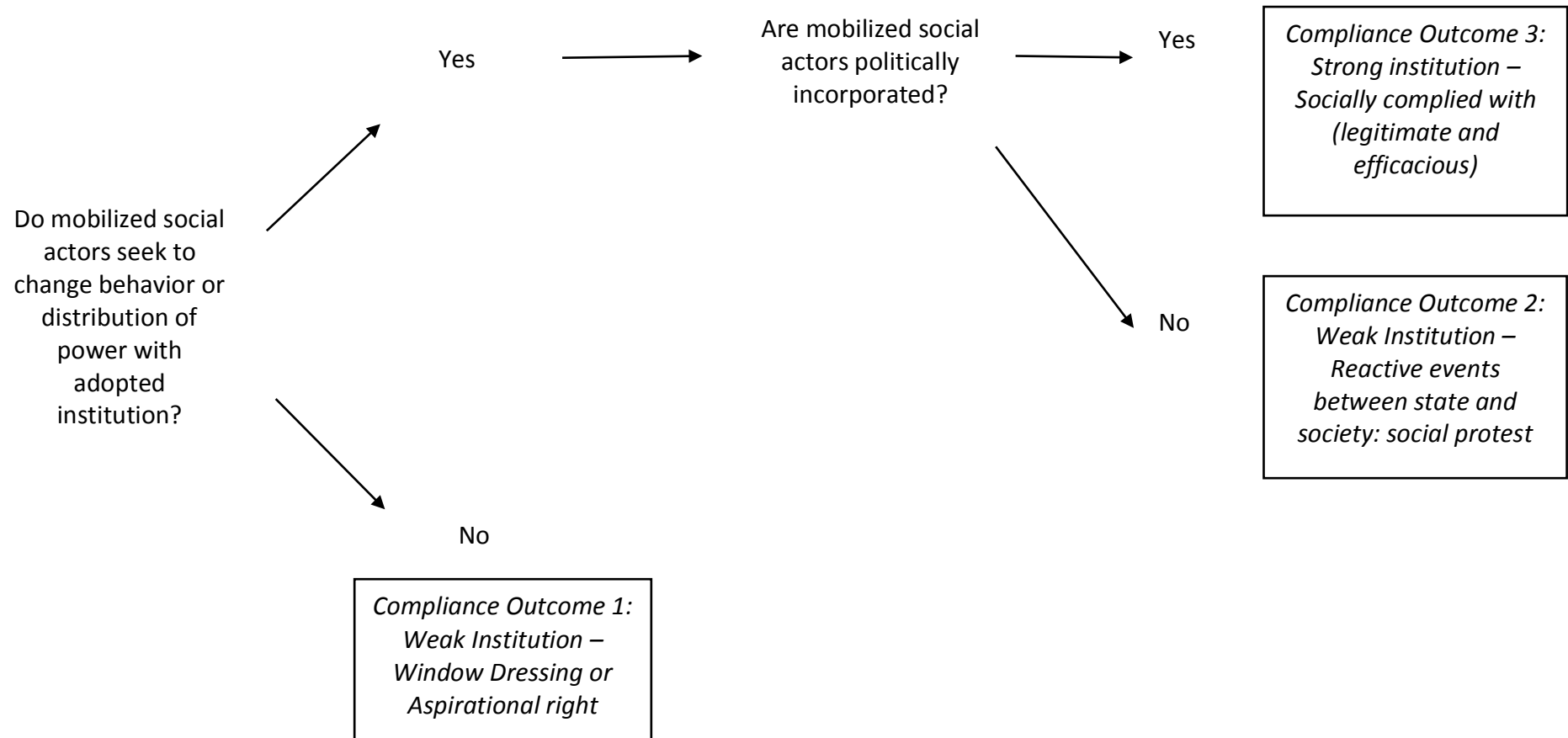


Figure 2. Enforcement: State side of Institutional Strengthening

