

# Oh! The Places You'll Go

**AQ** CHARTICLE



## **Want to complete a *consulta previa*?**

In most countries the process isn't always clear or direct. Who does it, how to do it and how long it can take varies from country to country—a reflection of the vagueness of ILO 169 and the uneven development of government regulations across the hemisphere. To compare, here are the steps you would need to take in Chile, Colombia, Guatemala, and Peru.

# CHILE

While decrees and regulations have been approved in Chile, they are still being tested, especially as they involve the role of the government as mediator and guarantor. There has also been some confusion between the narrower process of community consultation on environmental impacts—and the *estudio de impacto ambiental* (environmental impact study—EIA)—as well as the scope of the consultation within the community.

## 2. Education and Information Dissemination



**What is done:** Petitioner provides information to Indigenous community on: measure to be consulted; objectives of investment or project; and expected area of impact of measure. If necessary, information must be given in the Indigenous language, using culturally appropriate methods.

**Who does it:** Company or organization proposing project. Ministry of Social Development and National Corporation of Indigenous Development maintain information for project and its proposed implementation.

**What's produced:** Information on the project and its expected impact.



## 1. Planning

**What is done:** 1) Company or organization proposing project must turn in information to the *Servicio de Evaluación Ambiental* (SEA) on measure to be consulted with Indigenous populations; 2) Indigenous community and petitioning organization jointly determine methods, agreements to be decided, how to distribute information, and logistics.

**Who does it:** Company or organization proposing project submits application to SEA, which then coordinates with affected communities.

**What's produced:** A description of methods used. If there is no agreement, petitioning party must record what occurred and methods it will use to protect principles of consultation.



(THE PETITIONING PARTY CAN MODIFY THE DEADLINES DURING THE PLANNING STAGE.)



## 3. Internal Deliberation by Indigenous Communities

**What is done:** Designated Indigenous communities analyze, study and determine their position on measure to develop consensus for dialogue that follows.

**Who does it:** Indigenous communities, though the government can assist communities in understanding the matter being consulted.

**What's produced:** Consensus among the community for dialogue that follows.



## 4. Dialogue

**What is done:** Discussion of measure to be consulted between affected parties—petitioning organization and Indigenous community—using culture, language and tradition of the community.

**Who does it:** Petitioning organization and community, with SEA serving as mediator and directing process of consultation.

**What's produced:** Agreements and disagreements are recorded, as well as mechanisms and methods to follow up, monitor and, if necessary, continue process over points of disagreement.



## 5. Communication of Results and Terms of Consultation



**What is done:** Develop a detailed account of the consultation process, evaluate the consultation, the agreements reached and the disagreements. If a legislative measure is required, the president of Chile must initiate the process.

**Who does it:** Petitioning party, with the government.

**What's produced:** Final report detailing process, agreements and disagreements. Petitioning party can modify deadlines during planning stage, with agreement of the Indigenous communities.



# COLOMBIA

The government assumes a more central role in the process in Colombia, with the specially created *Dirección de Consulta Previa* (Office of Prior Consultation—DCP) in the Interior Ministry making the determination of when the norm and process should be applied, convening the communities, conducting the consultations, and guaranteeing that the agreements will be upheld.

## 1. Request

**What is done:** Investor or organization proposing a project that may require *consulta previa* presents request to *Dirección de Consulta Previa* (DCP) in Interior Ministry.

**Who does it:** The investor or organization proposing project. DCP receives and verifies the request.

**What's produced:** DCP verifies whether request contains all relevant information to identify location of the project or activity (coordinates). Should this not be enough, DCP, within three days, should request further information from investor to fulfill this duty.



## 2. Review

**What is done:** Government studies request a determination whether project requires *consulta previa*, including if there are ethnic communities in project area. If necessary, government conducts field visit.

**Who does it:** DCP.

**What's produced:** An administrative act that includes: when certification was submitted; brief description of activity; identification of affected areas; information-gathering methods; identification of certified communities and legal representatives; and the decision on whether *consulta previa* is required.



## 3. Preparing for Consultations

**What is done:** When community groups cooperate, DCP provides assistance to initiate consultation. If they do not cooperate, the DCP sends three notifications during *preconsulta* stage and then two more during *consulta* stage. If communities still do not attend, consultation concludes, and DCP notifies *Defensoría del Pueblo*, *Procuraduría General de la Nación*, *Instituto Colombiano de Antropología e Historia* and others to discuss if activity should proceed.

**Who does it:** DCP, community representatives, petitioner, *procuraduría*, and ombudsman.

**What's produced:** Notifications and strategies for consultation process.



## 4. Preconsultation

**What is done:** DCP defines team, convenes communities in a series of preconsultations in which they determine how consultation will be carried out. DCP presents information regarding rights of *consulta previa* and details of the project to be discussed.

**Who does it:** DCP

**What's produced:** The methodology and protocol to guide the actual consultation process.



## 5. Consultation

**What is done:** Meetings held to identify and analyze impact of proposed project, develop means to address or mitigate them, and reach agreement on how to resolve potential conflicts.

**Who does it:** DCP convenes meetings and oversees consensus-building process.

**What's produced:** A set of written, formal agreements between community and petitioner; in absence of agreement, a document detailing disagreements.



## 6. Guaranteeing Agreements

**What is done:** Consultation is closed, and parties agree on follow-up and monitoring.

**Who does it:** DCP with petitioner and community, as well as environmental authority, *procuraduría*, and *defensoría*.

**What's produced:** Requirements for periodic follow-up on agreements reached.



## 1. Request

**What is done:** At least 10 percent of registered voters or Indigenous authorities request consultation.

**Who does it:** Community members who consider their interests are being affected by a project request consultation and present it to municipal council.

**What's produced:** Request for consultation.



## 2. Review

**What is done:** Municipal council decides whether to accept or reject request to carry out consultation.

**Who does it:** Two-thirds of council members must vote to accept request for a consultation.

**What's produced:** A decision to go forward or not, and the procedure for consultation.



## 3. Information Dissemination

**What is done:** Inform community that process will take place.

**Who does it:** Community.

**What's produced:** Community receives information about event.



## 4. Consultation

**What is done:** Voting in ballot designed specifically for the purpose, with date, place and issue to be decided. If in an Indigenous community, process is done using traditional methods.

**Who does it:** Municipal government organizes the event and municipal electoral tribunal oversees voting.

**What's produced:** A community decision.



## 5. Vote Counting and Decision

**What is done:** Vote is counted. Decision is official if at least 20% of registered voters in community participate.

**Who does it:** Municipal electoral authorities tabulate vote and notify Ministry of Energy and Mines (MEM) of outcome.

**What's produced:** An act sent to MEM. However, the Guatemalan Supreme Court ruled in 2009 that community consultations are not binding.



# GUATEMALA

In the absence of defined national regulations governing *consulta previa* in Guatemala, the existing processes have taken place under the municipal code with the local government, raising the complication of national coordination on the topic.

The Guatemalan Supreme Court ruled in 2009 that community consultations are not binding, even when 90% of voters rejected a project.



# PERU

Of all the countries in the study, Peru has made the most advances in defining the steps to request and conduct a *consulta previa*, what qualifies as a potential reason for *consulta previa*, and the state agencies responsible for defining, convening and negotiating the consultation with the communities. That has not meant, though, that the process is free of questions, concerns and even conflict.

## 1. Identification of the Need for a Consultation



**What is done:** Identification of legislative or administrative issues that require consultation based on collective rights, for example of language, land, water, or culture.

**Who does it:** Relevant government agency (for example, Ministry of Mining and Energy, Infrastructure, or Environment) consults with Vice Ministry of Intercultural Affairs (VCIM) to see if *consulta previa* is necessary. If determined that people affected are Indigenous and/or entitled to *consulta previa*, relevant government office carries out next steps of the consultation process with community or group, with technical assistance from VCIM.

**What's produced:** A decision on whether measure requires consultation.



NO TIME LIMIT



## 2. Planning

**What is done:** Relevant government office meets with representatives of Indigenous groups to inform them of measure for *consulta previa* and determine methods, rules and responsibilities, how to distribute information, and logistics.

**Who does it:** Relevant government office with assistance from VCIM.

**What's produced:** Consultation plan, including obligations and responsibilities of all parties in process, deadlines, method, access, transparency and publicity, and places and languages in which meetings will take place.



NO TIME LIMIT



## Information about the Measure



**What is done:** Information is provided to affected community about measure: motives, implications, impact, and consequences of project— if necessary, using local language and customs.

**Who does it:** Relevant government agency with technical assistance of VCIM.

**What's produced:** Community understanding of proposal to be consulted.



(OR AS IS ESTABLISHED BY THE RELEVANT GOVERNMENT AGENCY. ALSO FROM THIS POINT TO DIALOGUE STAGE CANNOT TAKE LONGER THAN 120 DAYS.)

## 3. Information Dissemination



**What is done:** Indigenous people receive proposal of measure to be consulted from the government in a culturally respectful manner and in appropriate languages.

**Who does it:** Relevant government office or agency.

**What's produced:** Documents are published on website of government agency responsible for consultation and disseminated through radio, TV and word of mouth.



NO TIME LIMIT

## 5. Evaluation by Indigenous Communities

**What is done:** Communities analyze, measure, study, and determine their position and impact project will have on their collective rights.

**If they come to a consensus:**

- 1) Decision is documented and signed with signature or fingerprint;
- 2) Decision is given to relevant government agency;
- 3) Process ends and certificate of consultation is produced.

**If they have modifications or questions:** Dialogue stage begins.

**Who does it:** Indigenous communities.

**What's produced:** Consensus among community in favor of consulted measure OR consensus to go into dialogue stage.

If the Indigenous community does not respond within allotted time, the government begins dialogue stage. However, the community must present results of deliberation stage or organization will skip dialogue stage and go directly to the decision-making stage.



**If the Indigenous community does not respond within the allotted time, the government begins dialogue stage.**

## 6. Dialogue

**What is done:**

- 1) Dialogue between Indigenous community and relevant government office to reach agreement and consensus;
- 2) Disagreements that result from internal deliberation stage are presented;
- 3) Additional Indigenous communities can be added to process during this stage. It is understood that parties are negotiating in good faith toward finding points of consensus.

**Who does it:** Relevant government office and Indigenous community.

**What's produced:**

- 1) Petitioning organization can finalize dialogue process if it feels dialogue is not being conducted "in good faith," but it cannot finalize a decision;
- 2) Indigenous groups can refuse to participate, but petitioning organization must exhaust other possibilities for dialogue with Indigenous communities.



(CAN BE EXTENDED UPON AGREEMENT OF BOTH PARTIES)



## 7. Decision

**What is done:** Analysis of suggestions and recommendations of community and verification that collective rights of Indigenous communities and environment are ensured. If consensus was reached during dialogue stage, it is binding for both parties. If consensus was not reached, it is the responsibility of relevant government agency to ensure protection of the Indigenous community's rights.

**Who does it:** Relevant government agency.

**What's produced:** Final report published on websites of petitioning organization. Report must include measure consulted, consultation methodology, process, and final decision and agreements.



NO TIME LIMIT

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\*Relevant laws and regulations: Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT), y el Reglamento de la Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT).