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From issue: **Consulta Previa and Investment** (Spring 2014)

### ■ AQ FEATURE

# Ask the Experts: Consulta Previa

BY [Sonia Meza-Cuadra](#), [Katya Salazar](#), [César Rodríguez-Garavito](#) and [Roberto Junguito Pombo](#)

## What have been the benefits of countries adopting consulta

# previa?

## Sonia Meza-Cuadra answers:

Governments aim to make decisions that will improve the economic and social development and welfare of their citizens. But historically, decisions affecting Indigenous and tribal people's culture, ancestral lands and habitats have too often been made without their participation. ilo 169 and the UN Declaration on the Rights of Indigenous Peoples seek to redress this situation.

The processes of free, informed prior consent, or *consulta previa*, have faced several challenges, most of which are rooted in the historical mistrust between governments and Indigenous peoples. Rebuilding this trust and reaching a consensus is complicated by the long absence of the state and, consequently, minimal public services in remote areas where most Indigenous people live.

Progress in the implementation of ilo 169 has already benefited countries. First, the convention has improved awareness and understanding of Indigenous peoples' rights among the general population and the Indigenous community itself. Second, the laws, regulations and court decisions that have followed have laid the groundwork for more responsible and socially, economically and environmentally sustainable public and private investment. Third, in seeking to meet their commitments under the convention, governments and public officials have improved their capacity to seek popular consultation and consensus. Fourth, already the dialogues that have been established among governments, companies and communities have improved discussions among these stakeholders and lowered the long-term legal risks of these investments.



Moreover, adoption of ilo 169 has increased stakeholders' commitment and changed their perspective on how to ensure that—whether or not they are extractive projects—all investments benefit neighboring communities, while also respecting those communities' culture and way of life and minimizing negative impacts. This effort requires government, companies and communities to work as partners.

## Katya Salazar answers:

To assess and understand the benefits of ilo 169 and *consulta previa* you have to first understand how complex this right actually is. Unlike rights that trigger concrete and clear obligations on the part of state, the right to *consulta previa* is fulfilled through an intercultural dialogue between the government and the affected Indigenous peoples. Although exercise of this right is usually seen as a single activity (“the consultation”), it should be regarded instead as an opening for the state to approach important sectors of the population usually excluded from national discussions and engage them in a transparent and participatory process. At the very least, it is a great opportunity to build confidence in state institutions, which is one of the main challenges facing Latin America.

Over the past decade, most of the social conflicts related to the extraction of natural resources in Latin America have stemmed from the lack of prior consultation with affected populations. As a result, from Mexico to Chile, judicial and administrative decisions have halted and even cancelled projects approved without *consulta previa*. Is it the right to *consulta previa* that has brought on all these conflicts and complications? Certainly not. It is, rather, the lack of compliance by states in their obligations under ilo 169.

It's not an easy path, though. In many countries, there are several contradictory laws and norms that do

not comply with international standards, leading to more confusion. Implementing the right to *consulta previa* remains a work in progress and is the responsibility of the executive branch as well as the courts, which need to give it content. Nevertheless, there have been important advances, and the region needs to listen to what its domestic courts are saying and synchronize these decisions with measures taken by other state agencies.

Just having a real dialogue that puts all this information on the table would shed new light on the subject, and would benefit communities as well as the states and companies involved. States will benefit by building more effective and trusted institutions to better comply with the letter and spirit of *consulta previa*.

And companies will benefit when they see that their projects have a greater possibility of avoiding expensive and, too often, tragic delays.

### **César Rodríguez-Garavito answers:**

Since the ratification of ilo 169 in 1989, 15 countries in Latin America have legally committed themselves to consulting Indigenous and Afrodescendant peoples before approving laws, regulations or economic projects that may affect them. This step has brought on two fundamental advances in these countries' national legal systems.

Free, prior and informed consultations (fpic), or *consulta previa*, will strengthen national democracies by including the voices of populations historically discriminated against in debates about core issues, from economic policies (e.g. the rise and impact of extractive industries in Colombia, Mexico or Peru) to environmental policies (e.g. the preservation of the Ecuadorian or Brazilian Amazon).

Furthermore, since the 1980s, *consulta previa* has become the most important legal tool in fulfilling the promise of multiculturalism included in several national constitutions. When rigorously applied, *consulta previa* sets the path for transition from a tolerance-focused multiculturalism (which recognizes cultural diversity and nothing more) to one that enshrines empowerment and autonomy (which takes the initial recognition and derives from it the ability of Indigenous and Afrodescendant peoples to decide the course of their culture, their territory and their political organizations). This human rights-based interpretation of *consulta previa* is clear, for example, in the jurisprudence of the Inter-American system of human rights or the Constitutional Court of Colombia, among others, both of which have recognized states' obligation to obtain the consent of the peoples affected by policies or projects that place their physical or cultural survival in danger.

Nonetheless, there is still a considerable gap between the obligations countries assume as per ilo 169, on one hand, and legislation, judicial rulings and individual application of fpic, on the other. If the past 25 years have consisted of legal advances, the next 25 should see progress in their implementation.

### **Roberto Junguito Pombo answers:**

Due to the complexities of its implementation, *consulta previa* for Indigenous and tribal peoples has been a matter of public discussion in recent years. This mechanism that seeks to reconcile the social, cultural and economic integrity of ethnic communities with the implementation of development projects—often linked to natural resources—has been surrounded by a marked uncertainty from judicial and legislative institutions as well as from international law.

In the case of Colombia, progress is evident: there has been significant improvement in institutional, legislative and jurisprudence strengthening that strives to balance the fundamental rights of

Afrodescendants and Indigenous peoples with national interests and the multicultural vision established in the national constitution. However, in practice, the lack of certain definitions is worrisome: the concept of *consulta previa* as a right to veto without reasons, the length of time required for a consultation and the topics addressed, as well as the weight of technical arguments versus ideological positions.

These challenges must be addressed from different perspectives. First, it's important to strengthen the role of the state as a provider of basic services to Indigenous people, using the taxes and royalties from projects to ensure the well being of different ethnic groups.

Second, it's necessary to have clear and legitimate rules in which the common good is identifiable and the means to reach it are agreed upon by all.

Finally, the joint construction of an environment of trust is vital for communities to be able to see companies as their allies beyond consultation requirements. In our view, this is the way in which *consulta previa* adds value to investment and projects and satisfies the legitimate aspirations of the communities living close to business activities.

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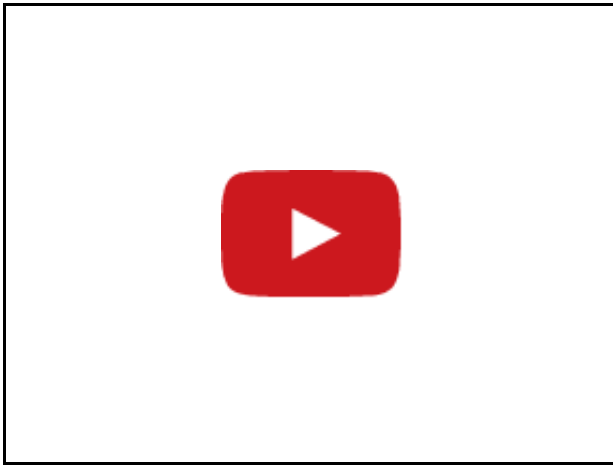


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