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AQ FEATURE

Country Study: Colombia

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In Colombia's 2010–2014 National Development Plan, President Juan Manuel Santos listed the mining sector as one of the five engines of the country's economic growth, alongside infrastructure, housing, agriculture, and innovation. At the same time, the government recognized the need for regulatory, legal and policy instruments to make Colombia a regional powerhouse for mining and infrastructure.

Yet the legal and policy framework that was intended to be adopted in the reform of the 2010 Mining Code was struck down by Colombia's Constitutional Court in early 2011. According to the Court, the 2010 code should have been discussed with Colombia's ethnic minorities (Indigenous peoples, Afrodescendants, *Raizales*, *Palenqueros* and *Rom* communities),[1] in accordance with the 1991 Colombian Constitution and International Labour Organization Convention 169 (ILO 169) ratified in 1991.

In Colombia, according to the latest official population census (2005), 3.4 percent of the population is Indigenous and 10.6 percent is Afrodescendant. Together, these two ethnic groups occupy nearly 30 percent of Colombia's total landmass.

Article 7 of Colombia's 1991 Constitution establishes respect for, and protection of, an ethnically and culturally diverse population as a fundamental principle. Accordingly, the Constitution recognizes Indigenous lands as collective "territorial entities," to be governed by Indigenous communities according to their own customs and by their own representatives. These lands are inalienable, meaning they cannot be taken away from the original owners. Following the same rationale, black ancestral communities were also recognized as entitled to collective property ownership under Law 70 in 1993.

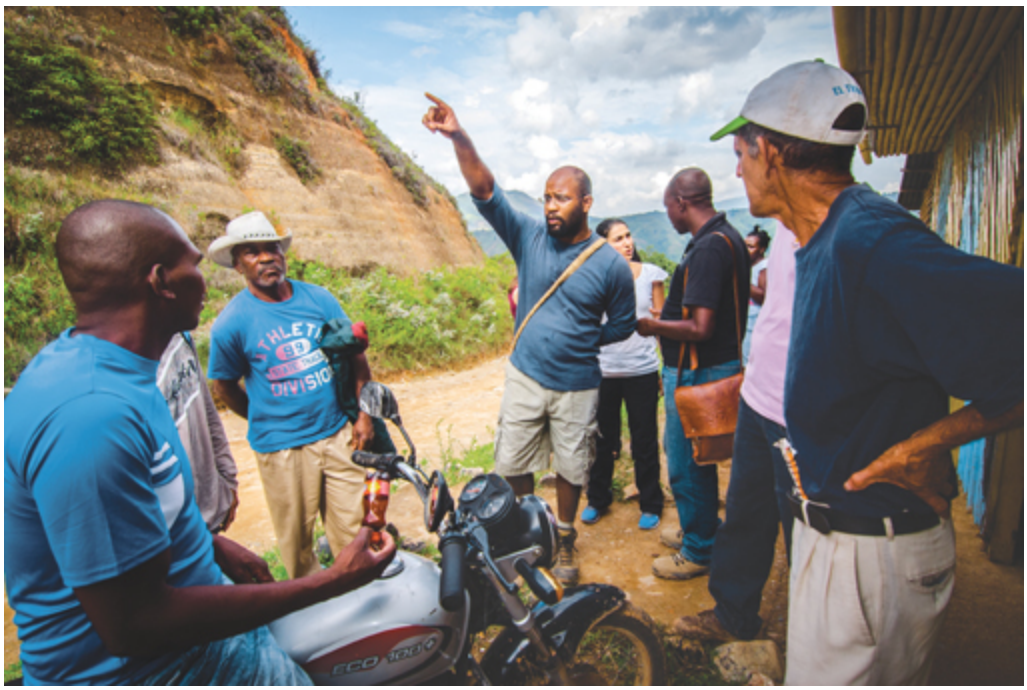
The 1991 Constitution also laid the normative groundwork for *consulta previa* (prior consultation). Article 330 mandates that the exploitation of natural resources on lands recognized as ancestral territories should be conducted without harming ethnic communities' cultural, social and economic integrity. Article 330 also stipulates that the government should guarantee the participation of community representatives in all decisions about any eventual intervention on their land.

In addition, Colombia's ratification of ILO 169 and its adoption into Law 21/1991 established special measures designed to safeguard the integrity and survival of the people, institutions, goods, work, cultures, and natural habitats of recognized Indigenous and ethnic communities. *Consulta previa* is the fundamental tool that enables these pledges to be fulfilled.

There is no procedural agreement on how to interpret ILO 169, in part because the Convention's main objective is to be interpreted broadly in its allocation of rights. As a result, Colombia has relied on trial and error to close this procedural gap. To date, there is no statutory law to regulate issues of

consulta previa.

In large part the reason is that any statutory law on *consulta previa* would itself have to undergo a process of consultation with Colombia's ethnic communities, something previous governments, the current Santos administration and even ethnic communities have been unwilling—or incapable—of doing.



La Toma residents gather around the joint community center/discoteca high in the hills of the province of cauca. Photo: Seb Agudelo.

The result of this impasse is a scattered number of norms, guidelines, decrees, and presidential directives that, for the time being, must serve as a compass on how to fulfill the state's duty to consult ethnic minorities. However, they provide no legal security for the stakeholders.

A Piecemeal Approach

As early as 1993, the first attempt to regulate *consulta previa* in Colombia was the enactment of Law 99/1993, which created Colombia's national environmental authority. Along with the Ministry of the Environment and the National Environmental System, the law also established the responsibility to consult ethnic minorities as a prerequisite for granting environmental licenses whenever extractive projects—or, for that matter, any other development plans—were expected to have an impact on ethnic communities.

In accordance with the Colombian legal system, regulatory decrees are often enacted to implement new laws. With that in mind, Decree 1320/1998 was established in 1998 to provide guidelines for analyzing the economic, environmental, social, and cultural impacts of natural resource extraction on

Indigenous and Afro-descendant communities within their territories, and at the same time established a set of measures that would protect their integrity.

The critical new elements of Decree 1320/1998 included:

- Making the *Dirección de Etnias* (later Office of Prior Consultation—DCP), under the Ministry of the Interior, responsible for identifying and certifying the presence of any communities likely to be affected by any development project;
- Requiring the *Instituto Colombiano de Desarrollo Rural* (Colombian Institute of Rural Development—INCODER) to certify the existence of all territories that ethnic communities have legal title to; and

- Requiring any entity (public or private) interested in carrying out a development project or activity subject to *consulta previa* to complete an environmental impact assessment (EIA) with the participation of the affected communities—and, if necessary, describe the measures it will undertake to prevent, correct, mitigate, control, and/or compensate communities for any impacts that the entity carrying out the project identifies, in collaboration with affected communities.

But alas, Colombian lawmakers failed to consider a somewhat important detail while they developed the guidelines in Decree 1320/1998: *consulta previa* itself. Decree 1320/1998 never underwent a process of consultation with the communities it would directly affect.

As a result, the guardian of fundamental and constitutional rights in Colombia—the Constitutional Court—deemed Decree 1320/1998 unconstitutional, and thus, inapplicable. Confronted with the lack of a normative legal framework to regulate *consulta previa*, the Constitutional Court has stepped in to fill the void.

As early as 1993, in a case involving the Embera-Katio—an Indigenous community from Antioquia who said that logging and the incursion of heavy machinery into their ancestral territories had endangered their subsistence economy and culture—the Court determined that ethnic minorities possess fundamental rights as a collective entity. The Court observed that an ethnic community's right to subsistence is inherently linked to the right to life—and therefore, is worthy of special and differentiated constitutional protection. Based on this interpretation, the Constitutional Court has since held jurisdiction over cases involving the fundamental, inviolable rights of ethnic groups.

The Constitutional Court has produced a number of rulings that have recognized and expanded on the fundamental rights of ethnic groups to be consulted about resource extraction projects. The breakthrough came in 1997, when the Court reasoned in Ruling SU039/1997 that the right to ethnic groups' participation through *consulta previa* was a fundamental right, and thus essential to preserve the ethnic, social, economic, and cultural integrity of ethnic communities.

In 2008, this right was reinforced through another ruling (C030/2008), which clarified for the first time how administrative or legislative acts likely to affect ethnic communities were to be consulted. As a consequence, the Forestry Law of 2006, the Rural Development Statute of 2007 and the reform to the Mining Code of 2010 were all ruled unconstitutional because they, too, were created without consulting ethnic minorities.

Another Court decision, T129/2011, delineated parameters that, in the Court's judgment, would make it possible for ethnic communities to exercise their rights in line with the established principles of *consulta previa*. Here, the Court highlighted that, among other things, the state was responsible for establishing a dialogue between parties based on good faith and agreeing to a flexible methodology, based on the particular needs of each community.

It also mandated securing communities' free, prior and informed consent before community members are resettled or displaced, whenever proposed activities pose a risk of discharging toxic waste or involve storing waste on ancestral lands, and/or there is a substantial risk that a proposed activity could have a high social, cultural or environmental impact. Finally, it required ensuring the involvement of the *Defensoría del Pueblo* (National Ombudsman) and *Procuraduría General* (Inspector General's Office) during the *consulta previa* process.

Since then, the Colombian government has issued more detailed instructions about how to carry out *consulta previa*. In 2013, Santos issued Decree 2613/2013, with the aim of improving institutional coordination. The same year, he issued Presidential Directive 10/2013, which lays out five specific steps for carrying out *consulta previa* and expands the responsibilities of the DCP.

At This Point, No One is Benefiting

Despite the Constitutional Court's rulings and the various executive guidelines, the private sector still has a high level of uncertainty on how to budget and plan consultation processes. As a result, tension between all parties—the government, private sector and communities—remains.

The lack of certainty has contributed to an escalation of costs and delays for investment projects, leaving some public officials, the private sector and members of the public to conclude that far too many projects of interest to the nation—mostly within the infrastructure and mining sectors—are being sacrificed to the convenience of ethnic groups.

However, *consulta previa*, classified as a fundamental right by the Constitutional Court, protects the survival of ethnic communities. To be sure, the clash of seemingly different development models is precisely what *consulta previa* aims to resolve. By consulting ethnic minorities on development projects or administrative acts that affect them, *consulta previa* allows an intercultural dialogue to take place to reconcile these different visions.

Indeed, the Constitutional Court deemed the protection of cultural values, social rights and economic interests of Indigenous peoples to be in the general interest of the nation. As a result, the stance taken by human rights groups and scholars has highlighted the necessity of embarking on a true and transparent intercultural dialogue that respects and safeguards ethnic rights. A key part of that process involves establishing clear rules to prod stakeholders toward a desperately needed consensus on how to promote economic growth and inclusive development.

Any trip around Colombia will reveal how the country's mining and infrastructure sectors, far from being the engines of economic growth, are now practically at a standstill, in part because of the current uncertainty and poor practices revolving around *consulta previa*. Furthermore, the government's weak intervention forces all actors to fend for themselves or to face long and costly litigation processes. In an interview with *El Colombiano* in January this year, Claudia Jiménez,

director of the *Sector de Minería a Gran Escala* (Large Scale Mining Sector), said that some $7.3 billion in mining investment has been held up because of *consulta previa* issues as well as issues regarding environmental licenses and low international commodity prices. The infrastructure sector does not fare much better. In late 2012, a report released by the *Comisión de Infraestructura* (Commission on Infrastructure), a high-level commission appointed by Santos to assess major deficiencies and opportunities across the sector, concluded that one of the major obstacles holding back the much-needed revitalization of infrastructure across the country was the issue of unregulated *consulta previa*.

Although the newly enacted Decree 2613/2013, and Presidential Directive 10/2013 seek to improve institutional coordination and provide more detailed steps on how to carry out *consulta previa*, they fall short in at least two ways: first, the presidential directive only mandates internal institutional action and is not binding on communities; and second, both the decree and directive delegate too many responsibilities to the weak and overburdened DCP, a sub-agency within the Ministry of the Interior that does not have the means, the manpower, the skills, or the budget to execute any of its basic duties as a facilitator and guarantor of the consultation process.

Thus, because of institutional incapacity, much of the consultation process that the state is required to guarantee has been delegated, de facto, to the private sector—in violation of the fundamental principle of state responsibility under *consulta previa*. This has converted what could be an opportunity to reconcile inherently different concepts of development through an intercultural dialogue into a corrupted battleground where, at best, "social licenses" are up for sale, and, at worst, where no opportunity for inclusive development can be found.

What Next?

In Colombia, as in many places, extractive projects tend to exist in remote areas that often overlap with the ancestral territories of the most vulnerable ethnic communities. A legacy of blatant discrimination dating back to colonial times, exacerbated by the complete absence of the state, has meant that most ethnic communities not only lack access to basic services, they also have endured the violence from Colombia's armed conflict.

These are the areas in which *consulta previa* has taken place or should. But in some cases, the precarious situation of ethnic communities has been misunderstood by some companies that have converted "consultation" into a highly transactional process, where communities consent to investment projects in exchange for money or basic goods and services.

Consulta previa was conceived as a way to fulfill the rights of ethnic communities—not to fill pockets. Nonetheless, in cases where *consulta previa* has actually taken place, too often the rights of those communities have been subsumed by more material, short-term interests. And when those interests are met, investors often become subject to lawsuits.

It's this cheapened process and the extortion-like threat behind it that adds to the current paralysis of both the mining and infrastructure sectors in Colombia, as well as the continued violation of the basic rights of ethnic communities. And if *consulta previa* goes unregulated in the country and mismanaged by either party for too much longer, the dollars for much-needed investments will find a better-prepared recipient elsewhere—or worse, there will be no more ethnic communities left to protect.

1 The *Raizales* are an English-Creole speaking Afro-Colombian community; *Palenqueros* are a community descended from free slaves who speak a Spanish-based Creole; and the *Rom* are a gypsy community who speak the Romani language.

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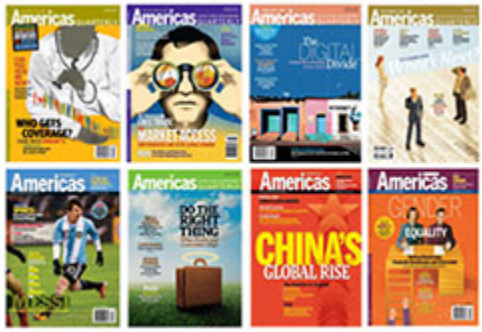

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