

Consultores Empresariales D. J. SAS

Contrato No. 6500003193

SUSCRITO CON TGI SA ESP

“Corporate guidelines for the adequate attention to citizen participation mechanisms, with emphasis on Prior Consultation processes, taking into account the processes that may arise within the framework of TGI's projects and operations, in the territories where there is a presence of ethnic communities ”.



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Presentation

The company TGI proposed to implement “Corporate guidelines for the adequate attention to citizen participation mechanisms, with emphasis on Prior Consultation, taking into account the processes that may arise within the framework of TGI's projects and operations, in the territories where there is presence of ethnic communities ”.

Following the 1991 Constitution and international human rights treaties, these guidelines are based on the possibility of helping to strengthen the ethnicity and culture of ethnic societies, whose government and jurisdictional authorities must act in the presence of the company in the different participation and relationship scenarios.

Prevention to avoid disagreements, judicial processes, stoppages of operations, among other matters, are closely linked, in many cases, to specialized knowledge that allows to act adequately at various times, taking into account the framework of human rights to distinctiveness, own, equality and a different treatment of these societies and honoring the respect for the diversity of visions, principles, procedures and beliefs that are lived in ethnic societies as an expression of multicultural Colombia.

These guidelines are the result, on the one hand, of a process of immersion in the Constitutionality block that represents the framework to be followed; and, on the other, the approach with professionals of the company who, via virtual meetings, have reported on their experience, marked by different ways of approaching the issues, by the way in which the problems are evaluated, which has generated knowledge that at the Being reflected in the same meetings has generated deducible knowledge about how they act in the different territories; in addition to the significant reflections regarding the production of documents in the company, applicable to the processes.

Colombia has valued the ethnic and cultural diversity of the Nation (Art 7 CP) and assumed national and international commitments for its protection. Self-recognition as members of an indigenous people or tribal community (self-proclamation) is reaffirmed by the State that formally certifies their existence.

Although the company has been having a relationship with indigenous peoples and tribal communities, as well as with mestizos, its objectives include strengthening a policy supported and developed based on standards, procedures and relationship protocols in order to strengthen intercultural understanding for the best performance of their activities under principles of respect and appreciation of these populations, and their authorities.

Intercultural relations between communities and companies have specific content, especially due to the socioeconomic asymmetries that exist, due to rights differentiated that protect ethnic groups, the different interests that are presented and the particular legal status.

The normative principles that managers, office and field professionals should know about what are the intercultural relations that support the practical procedures of a relationship policy based on high human rights standards expressed in the constitutionality block established mainly in the right of self-determination, territory and participation.

Although each indigenous people and each tribal community is different, procedures are presented that, endorsed by the company, must be followed, in accordance with specific protocols in front of the ethnic authorities and the community participants in the Prior Consultation processes.

Methodologically, the guidelines for intercultural relations with the communities located in the project's area of influence must generate intercultural, social and inter-legal encounters that, in relation to relations, that generate better living conditions for the communities and security for the project in the environment.

Recipients

These guidelines are aimed in the first place, at professionals who participate directly in the chain of scenarios in which they face situations related to authorities and communities of indigenous and tribal peoples; second, to legal and administrative professionals as a means of being well informed about a specialized field, so that they can contribute synergistically to the tasks of local teams in the field.

The content is also conceived so that it can serve in collaborative training processes for ethnic authorities and municipal authorities, with a view to ensuring that their actions correspond to the guidelines of both principles and guiding procedures to strengthen ethnic and cultural distinctiveness.

It is about contributing to the learning of numerous personnel who, through the dissemination of specialized knowledge, that guide the different treatment of indigenous peoples and tribal communities to build intercultural, intersocial, and interlegal understanding, in compliance with the highest standards of human rights. .

The document presents five parts in which guidelines to follow are exposed: the first summarizes the scope of the principles that sustain them. The second defines the constitutional principles and the block of constitutionality around human rights and guiding the policy of recognition of ethnic and cultural diversity. The third part presents in the first place, the right to participation as an express fundamental right in self-determination, consultation and prior, free and informed consent, showing how they embody in the “spirit” of the duty to be of these guidelines that lead to the knowledge of the highest standards for the protection of ethnic and cultural diversity, and which are a benchmark for measuring the good performance of the professionals who work in the company. The fourth part contains an explanation of free, prior and informed consent and Basic guidelines regarding the approach, measures and steps for the implementation of the main provisions. Part five sets out due diligence for the protection of human rights by the company.

Part 1. PRINCIPLES SUPPORTING THE GUIDELINES

For the company, it is a duty to make effective the 1991 Constitution and the human rights treaties signed by the Colombian state and jurisprudence, for the implementation of guidelines aimed at recognizing and valuing ethnic and cultural difference, as a basis to protect peoples and ethnic communities — collective subjects of law— and of special protection.

The company must take into account the constitutionality block that is applicable to indigenous and tribal communities to comply with the protection policy around the participation rights of ethnic communities. It is a unit made up of the Constitution, which is a norm of norms, which registers changes in the relationship between the State and the indigenous peoples through the recognition of their condition as “peoples”, collective subjects of law, bearers of diverse cultures that in their different Demonstrations are the basis of nationality and that article 70. section 2, Principle of equality of cultures, recognizes the equal dignity of all those who live together in the country”. The constitutionality block contains specific international provisions such as: ILO Convention No. 169 on indigenous and tribal peoples in independent countries, which is binding, and the International Convention on the elimination of all forms of racial discrimination.

El Estado colombiano es parte de tratados y convenios internacionales asociados a la protección de los pueblos indígenas y las comunidades afrodescendientes (especialmente el Convenio 169 de la OIT), y la Constitución Política de 1991 reconoce y valora el pluralismo y el multiculturalismo. Por lo tanto, el cumplimiento de las obligaciones internacionales contraídas por el Estado en esos tratados y la eficacia de las normas constitucionales concordantes requiere el seguimiento de sus disposiciones.

Sentencia T-376 de 2012

El Convenio 169 de la OIT Ley 121 de 1991 se aplica a “los pueblos en países independientes, considerados indígenas por el hecho de descender de poblaciones que habitaban en el país o en una región geográfica a la que pertenece el país en la época de la conquista o la colonización o del establecimiento de las actuales fronteras estatales y que, cualquiera que sea su situación jurídica, conservan todas sus propias instituciones sociales, económicas, culturales y políticas, o parte de ellas”. (Artículo 1.a)

The State ratified the Convention through Law 21 of 1991 and undertook to respect the individual and collective rights of the members of the tribal peoples and communities and to take the appropriate measures, in consultation with them, to guarantee their rights, respect and protection. to their ethnic and cultural integrity.

The United Nations Declaration on the Rights of Indigenous Peoples defines that States cannot forcibly apply policies of assimilation or integration to Western culture. Furthermore, they cannot impose a certain style of life on these societies, and neither dispose, as they did before, of the natural resources in indigenous territories and tribal communities in an inconsistent manner and without the participation of their authorities and community members; nor can they dispense with their participation in the definition of development policies and programs that may affect them.

Regarding the legal value of the United Nations Declaration on the Rights of Indigenous Peoples of 2007, the Constitutional Court, among others in ruling T-376 of 2012, concluded that it is directly applicable considering, on the one hand, that it does not contradict constitutional norms and, on the other hand, that it is a document that reflects the current will of the States that make up the United Nations system on the content and scope of the rights of indigenous peoples.

“(…) esta Corporación ha defendido su aplicación directa y, especialmente, la obligación de tomarla en consideración por el intérprete al momento de establecer el alcance de los derechos de los pueblos indígenas.

Precisa el contenido del Convenio 169 de la OIT, otras normas de derechos internacionales, y el orden constitucional colombiano, a la vez que **perfecciona** y **fortalece** los estándares de protección de sus derechos. Su aplicación contribuye a la **eficacia** de los derechos constitucionales y a la fuerza normativa de la Constitución Política” (...).

The Declaration takes an important step towards the recognition of the right of indigenous peoples to self-determination, a right that derives from the principles of freedom and equality, as it affirms that: “indigenous peoples are free and equal to all

other peoples”, consequently, the Declaration may be used to strengthen their right to self-determination, exercised in accordance with international law. By virtue of this right, they freely determine their political status and can freely pursue their economic, social and cultural development, (Art.3) which makes it possible to strengthen their cultural identities, control over their territories, land, natural resources, political and social institutions. and cultural and socioeconomic equality vis-à-vis the other members of the national community. Therefore, “self-determination” means that the Colombian State is committed to taking into account the aspirations and claims of indigenous peoples through public policies as a result of democratically sharing decisions.

ILO Convention 169 states that as indigenous peoples and tribal communities are societies with equal dignity and rights in relation to other human groups; Since they are neither minors, nor incapable as they are classified in moments of the past history of Colombia and therefore subject to guardianship, they will have to be recognized, all the capacities to establish relationships with various sectors that inhabit the country, tending to consider their perspectives on a number of issues that define, not only for them, real possibilities of continuing or not continuing to be indigenous peoples and tribal communities, but of contributing to implement a development model that takes into account their vision.

Guideline 1

Establish mechanisms that guarantee intercultural relations and participation with a differential approach with Indigenous or tribal communities, located throughout TGI's area of direct influence and within the framework of due diligence and protection of human rights.

Objectives

- Specify the differential approach in territories inhabited by indigenous and tribal communities.
- Strengthen the indigenous and tribal authorities and communities—inhabitants in the areas of direct impact—to participate in decisions on aspects that directly affect the interests and vision of the world in relation to the environment, culture and the economy.

¿For that?

- Build permanent relationships of intercultural understanding and cooperation between TGI and the indigenous and tribal communities under the principle of mutual respect.
- Make agreements concluded over time.
- Establish a process of consultation and agreement when required with the ethnic communities that allows knowing, analyzing and evaluating the environmental, social and environmental impacts.
- cultural generated by the project, and the respective management measures.
- Promote the strengthening of existing social organizations and traditional authorities, recognized by the different municipal and departmental authorities, in order to allow them to fulfill their own functions and carry out projects that in the short, medium and long term stimulate their own development under the cultural characteristics of indigenous and tribal peoples.

¿With who?

- With the proper authorities. They represent the interests of the community. Their participation must be taken into account and their arguments valued.

Generate Prevention measures

- Expectations that cannot be met
- Population displacement
- Increase in emigrants
- Loss of intangible and tangible heritage
- Changes in economic activities and in the traditional use of the territory

The Colombian Constitution of 1991 strengthens the guidelines of ILO Convention 169, which precedes the Constitution and is Law 21 of 91 by explicitly recognizing the obligation to value expressions other than cultural diversity, which includes a set of special rights for individuals, indigenous and tribal communities, being central the right to "control their own institutions, ways of life and development, within the States in which they live." This principle, both of international and domestic law, is an essential part of the Colombian legal order and this character must be reflected in the decisions of State institutions and companies.

1.1 New forms of state-business relationship ethnic groups

Indigenous peoples and tribal communities can preserve their differentiated character through the exercise of the powers they have in participatory decision-making, namely:

- Right to self-determination of development
- Participation in the entire cycle of the policies envisaged by the institutions of the States.
- Prior consultation.
- Prior, free and informed consent.

Thus, TGI finds itself today in a global context of evident evolution of the concept of human rights, as well as expansion of international and national protection systems for indigenous and tribal communities, aimed at establishing a new relationship between the State and indigenous peoples; ILO Convention 169 in its binding character and the United Nations Declaration will have to be taken into account.

1.1 Trato igual y trato distinto

For what reason are members of indigenous peoples and tribal communities the same as the rest of Colombians, but especially why they are different and should be treated in a special way.

The 1991 Constitution enshrined the right to equality for all Colombians; We all have the same human conditions to be treated as equals, regardless of economic, social, religious, ethnic or cultural conditions. But, people, peoples or tribal communities, carriers of another culture and in disadvantaged conditions — as a result of negative discrimination by despising their ways of life and by not making them participate in public goods— should be given special conditions to overcome the obvious disadvantage in which they find themselves.

The State as guarantor of human rights and companies, following the principles of Due Diligence, must promote the conditions for equality to be real and must adopt special and differential measures in favor of discriminated and marginalized ethnic groups. The valuation of ethnic and cultural diversity as a human right is the responsibility of companies.

1.3. What are the rights that should be granted to them as different subjects

First, the notion of "indigenous people" is based on the consideration that many descendants of the cultures that inhabited the conquered territories are today grouped into communities, experiencing a feeling of differentiated identity.

ILO Convention 169 defines indigenous and tribal peoples as those:

“(a)...cuyas condiciones sociales, culturales y económicas los distinguen de otras secciones de la comunidad nacional, y cuyo status está regulado por completo o parcialmente por sus propias costumbres o tradiciones o por leyes o regulaciones especiales”.

“(b)...que son considerados como indígenas por ser descendientes de poblaciones que habitaban el país, o una región geográfica a la que el país pertenece, en el momento de la conquista o colonización o del establecimiento de las actuales fronteras del Estado y que, sin importar su status legal, conservan algunas o todas sus instituciones sociales, económicas, culturales y políticas”. (Art. 1, numeral 1)¹.

The right of indigenous and tribal peoples to autonomy implies that the group can make the decisions that are vital to their permanence as a group; the State must offer conditions so that these decisions can be taken without intervention.

Approaches the principle of different treatment for the approach to indigenous peoples and tribal communities

Objectives

1. Guarantee due diligence that guarantees knowledge of the presence of indigenous peoples or tribal communities that are located in the area directly affected by TGI.
2. Investigate the sociocultural context of the GTI environment
 - a) Is the group or is it not an indigenous people or tribal community?
 - b) Who are its members?
 - c) In what territory do they settle?
 - d) How are their economic practices to guarantee subsistence
 - e) How are they governed?
 - f) What are the rules that govern

What?

1 Convención No. 169, “*Sobre pueblos indígenas y tribales en países independientes*”, adoptada por la Conferencia General de la Organización Internacional del Trabajo en 1989. Entró en vigor en septiembre de 1991 [citada en adelante como Convenio 169].

- Secondary information
- Through petition rights to national and local authorities
- Through visits to authorities and community members in the field

So that?

- Recognize and value its existence.
- Give them due constitutional treatment as collective subjects of law and special protection.
- Establish good neighborly relations with the authorities and community members of the business environment under the principles of trust, cooperation and mutual respect, in order to make TGI's operations possible.

Generate prevention measures

- Increase in population censuses.
- Increase in sacred places.
- Invention of tradition

1.4 Land ownership and autonomy

Judgment 770 of 2012 of the Constitutional Court, which refers to the State's obligation to take into account the different situation of indigenous peoples and tribal communities, states:

“Es deber del Estado abstenerse de concebir normas, diseñar, promover o ejecutar políticas, programas o medidas, o adoptar decisiones e interpretaciones del Derecho, que conduzcan a agravar o perpetuar la situación de exclusión, marginación o discriminación de grupos tradicionalmente desventajados en la sociedad. De ahí que surja la obligación del Estado de tomar medidas para conseguir que estas personas, que se encuentran en una situación distinta a las demás, estén en condiciones de igualdad en dignidad y derechos”.

Among the conditions for the development of rights are the recognition of the property of the indigenous people or tribal community over the land in which they are located and the non-intervention of outsiders in decision-making. This abstention from intervention must be examined, because indigenous peoples and tribal communities, as part of the nation, must accept limitations in their autonomy due to the fact to be part of the State. In addition, because this demand for non-intervention can become a paternalistic protection. It would not be reasonable to abide by the imperative of non-intervention, of not having drinking water or to be vaccinated.

If they are indigenous?

Insofar as they are human groups, indigenous peoples change, because they are children of the times, but also due to the action of factors that do not depend on their will, but others, because they themselves desire it. This desire for change cannot be ignored with the excuse that rights are granted because it is about communities that conserve and clone ancestral practices. Despite assuming other uses and customs, they are still indigenous.

1.4 Acciones afirmativas. Trato distinto a los indígenas

It is a constitutional obligation within the framework of the Social State of Law to recognize real inequality and put into operation affirmative actions that allow overcoming disadvantages and discrimination (art. 13 CP).

Affirmative actions are a coherent set of temporary measures specifically aimed at remedying the situation of the members of the group to which they are destined in various aspects of their social life, in order to achieve effective equality.² Affirmative actions have preventive and protective functions. protection geared towards:

- Remedy or amend historical injustices.
- Correct social discrimination.
- Create groups of diverse and proportional representation.
- Provide communities with models that can offer the motivation and incentives necessary for the effective enjoyment of rights.
- Put an end to vicious and prejudiced stereotypes.
- Counteract intergroup and inter-ethnic conflicts and social disturbances.
- Ensure the efficiency and justice of the socioeconomic system³.

This constitutional framework for the human rights of indigenous peoples and tribal communities is consistent with what is established in international regulations.

² Organización de las Naciones Unidas, Comisión de Derechos Humanos, Informe de prevención de la discriminación, “El concepto y la práctica de la acción afirmativa”, Informe final presentado por el señor Marc Bossuyt, Relator Especial, de conformidad con la resolución 1998/5 de la Subcomisión, E/CN.4/2002/21 del 17 de junio de 2002.

³ El Taller regional para la adopción de políticas afirmativas para afrodescendientes de América Latina y El Caribe. Montevideo, Uruguay, 7-9 de mayo de 2003. En: <http://www.choike.org/nuevo/informes/1072.html>

Parte 2. THE RIGHTS OF INDIGENOUS PEOPLES IN THE COLOMBIAN CONSTITUTION OF 1991

The National Constitution of Colombia of 1991 consolidated a position of recognition in the face of cultural diversity and broke the vision of a single culture for all nationals, a change in the concept of equality as already expressed when recognizing that there were some more unequal nationals, culturally rejected or ignored, so that, in the Social State of Law, through affirmative actions, real and non-formal equality will have to be built. Also, plural principles are imposed that, among other aspects, touch on legal pluralism or coexistence in the Nation of different systems of law.

Constitutional articles

Article	Purpose of the regulation	Content of the article
7o.	Principle of cultural diversity	The State recognizes and protects the cultural diversity of the Colombian nation.
70°. inc.2	Principle of equality of cultures	“Culture in its various manifestations is the foundation of nationality. The State recognizes the equality and dignity of all those who live in the country (...)”.
10o.	Principle of officiality of indigenous languages in their territories	(...) The languages and dialects of the ethnic groups are also official in their territories (...).
96	Indigenous as Colombian nationals	“They are Colombian nationals: 1. By birth: a) The natives of Colombia (...) 2. By adoption: c) Members of indigenous peoples who share border territories, with application of the principle of reciprocity according to public treaties”.
10o.	Right to bilingual education	The teaching that is imparted in communities with their own linguistic traditions will be bilingual.
68	Right to education respectful of traditions	Members of ethnic groups will have the right to training that respects and develops their cultural integrity.
171	Right of choice in circ. Special	“The Senate of the Republic will be made up of one hundred members elected in a national constituency. There will be an additional number of two senators elected in a special national constituency by indigenous communities. The special circumscription for the election of senators of the indigenous communities will be governed by the electoral quotient system.

		Los representantes de las comunidades indígenas que aspiren a integrar el Senado de la República deberán haber ejercido un cargo de autoridad tradicional en su respectiva comunidad o haber sido líder de una organización indígena, calidad que se acreditará mediante un certificado de la respectiva organización, refrendado por el ministro de Gobierno”, hoy del interior.
176 inc. 3 y 4	Faculta al legislador para crear circunscripción especial adicional	“La ley podrá establecer una circunscripción especial para asegurar la participación en la Cámara de Representantes de los grupos étnicos y de las minorías políticas y de los colombianos residentes en el exterior. Mediante esta circunscripción se podrán elegir hasta cinco representantes”.
329 inc. 2	Derecho de grupo a la propiedad de la tierra	“Los resguardos son de propiedad colectiva y no enajenable”.
246	Derecho de grupo a administrar justicia	“Las autoridades de los pueblos indígenas podrán ejercer funciones jurisdiccionales dentro de su ámbito territorial, de conformidad con sus propias normas y procedimientos, siempre que no sean contrarios a la Constitución y las leyes de la República. La ley establecerá las formas de coordinación de esta jurisdicción especial con el sistema judicial nacional”.
330	Derecho de grupo a la autonomía política	“De conformidad con la Constitución y las leyes, los territorios indígenas estarán gobernados por consejos conformados y reglamentados según los usos y costumbres de sus comunidades y ejercerán las siguientes funciones: 1. Velar por la aplicación de las normas legales sobre usos del suelo y poblamiento de sus territorios. 2. Diseñar las políticas y los planes y programas de desarrollo económico y social dentro de su territorio, en armonía con el Plan Nacional de Desarrollo. 3. Promover las inversiones públicas en sus territorios y velar por su debida ejecución 4. Percibir y distribuir sus recursos 5. Velar por la preservación de los recursos naturales 6. Coordinar los programas y proyectos promovidos por las diferentes comunidades de su territorio 7. Colaborar con el mantenimiento del orden público dentro de su territorio de acuerdo con las instrucciones y disposiciones del Gobierno Nacional. 8. Representar a los territorios ante el Gobierno Nacional y las demás entidades a las cuales se integren. 9. Las demás que señalen la Constitución y la ley”.
330 par.	Derecho de grupo relativo a la explotación de recursos en territorio Indígena	“Parágrafo. La explotación de los recursos naturales en los territorios indígenas se hará sin desmedro de la integridad cultural, social y económica de las comunidades indígenas. En las decisiones que se adopten respecto de dicha explotación, el Gobierno propiciará la participación de los representantes de las respectivas comunidades”.
357	Derecho de grupo a la autonomía financiera	“Los municipios participarán de los ingresos corrientes de la Nación. (...) Para los efectos de esta participación, la Ley determinará los resguardos indígenas que serán considerados como municipios”.

329 inc. 1 y 3.	Entidades Territoriales Indígenas	“La conformación de las entidades territoriales indígenas se hará con sujeción a lo dispuesto en la Ley Orgánica de Ordenamiento Territorial, y su delimitación se hará por el Gobierno Nacional, con participación de los representantes de las comunidades indígenas, previo concepto de la Comisión de Ordenamiento Territorial. (...) La ley definirá las relaciones y coordinación de estas entidades con aquellas de las cuales formen parte.”
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Elaboración propia

2.1 The multicultural state

Article 7 of the Constitution recognizes some Colombians who have culturally different customs. This article establishes that: "The State recognizes and protects the cultural diversity of the Colombian nation." In this way, the 1991 Constitution eliminates the principle of the monocultural State, which was based on the idea that all Colombians should have the same culture and therefore it sought to eliminate other expressions of culture. The members of indigenous peoples and tribal communities were subjected to civilizing processes and with this they had to speak Spanish, live a single family model, be Catholic, seek economic development and a private property regime, among other aspects of the so-called Western culture.

It is the collective character of indigenous peoples and tribal communities as well as the ways of living — having as a reference a community, bearer of a differentiated culture; it is not important if it has appropriated elements from other companies or even if it has adopted impositions—. These are the two aspects that must be recognized and valued, following the mandate of the Constitutionality bloc.

2.2 Indigenous peoples and tribal communities are a collective subject of law.

Indigenous peoples and tribal communities are a collective subject; They are not the sum of individuals, they are a structural unit protected as a collective with fundamental rights. In Sentence T-380 of 1993 the Constitutional Court addresses the issue, as follows:

“Los derechos fundamentales de las comunidades indígenas no deben confundirse con los derechos colectivos de otros grupos humanos. La comunidad indígena es un sujeto colectivo y no una simple sumatoria de sujetos individuales que comparten los

mismos derechos o intereses difusos o colectivos (CP art. 88). En el primer evento es indiscutible la titularidad de los derechos fundamentales, mientras que en el segundo los afectados pueden proceder a la defensa de sus derechos o intereses colectivos mediante el ejercicio de las acciones populares correspondientes”.

The company in these different societies has the duty to treat them as collective subjects of law, because its members have a subjective sense of belonging to differentiated societies, from which they know how to descend.

As ethnically and culturally collective subjects, the indigenous and tribal communities in Colombia are justified in defining and executing actions to prevent their existence, in accordance with their cultural world and within the framework of their autonomy.

It is especially important to know and apply ILO Convention 169.

“El Convenio 169 de la OIT ha de tenerse en cuenta como canon de interpretación de los derechos Constitucionales fundamentales. Debe, por consiguiente, servir de punto de referencia para fijar el sentido y alcance del derecho Constitucional fundamental al reconocimiento y protección de la diversidad étnica y cultural”. Sentencia T-1105 de 2008.

The Preamble to this Convention recalls the need to take measures aimed at indigenous and tribal peoples assuming control of their own institutions and ways of life and strengthening their identities, languages and religions, within the framework of the States. in which they live ”.⁴

Lineamiento 3

It tends to activate responses from the company and defined with the participation of the authorities and community members to improve living conditions in accordance with cultural values.

Objectives

⁴ Organización Internacional del Trabajo. Convenio 169 sobre “Pueblos indígenas y tribales en países independientes”. Preámbulo, párrafo 5.

- Design special programs and activities with the participation of the authorities and the community.

So that?

- Build greater material equality in indigenous and tribal communities. In terms of ILO Convention 169 and the United Nations Declaration of Indigenous Peoples to improve socially and economically.

With whom?

- With the authorities and the community. Their participation must be taken into account and their arguments valued.

Generate prevention measures

- Expectations that cannot be met.
- Projects that generate internal divisions.
- Avoid extinguishing unjustified demands that alter fair relations and in accordance with the company-communities situation.

ILO Convention 169 records and values these differences. The Constitutional Court strengthens the multiculturalism of the nation and numerous rulings in terms of rights express this:

“deberán reconocerse y protegerse los valores y prácticas sociales, culturales, religiosas y espirituales propios de dichos pueblos... deberá respetarse la integridad de los valores, prácticas e instituciones de esos pueblos” (art. 5). Y las actividades tradicionales en el mantenimiento de la cultura de dichos pueblos (art. 23-1).

Lineament No 4.

The company checks the constitutionality of its responses within the framework of due diligence

Objective

- Understand the deep meaning of the valuable differences that are recognized in the constitutionality block for indigenous peoples and tribal communities.
- Design differential programs that strengthen the ethnicity and culture of indigenous and tribal communities.

So that?

- In order to give them the differential treatment that TGI requires.

- Build greater material equality in indigenous and tribal communities.

With whom?

- With the authorities and the community. Your participation must be taken into account.

How?

Examining whether the determinations that TGI makes within the framework of its activities respect, value and strengthen constitutional principles such as:

- Cultural survival. Group version of the right to life and not to be subjected as societies to disappearance, ignoring their ethnic and cultural particularities, treating them as mestizos, peasants.
- To ethnic and cultural integrity. It implies that its members as part of the collective subject of law can live and remain as members of the collective. Examine how proposals can individualize some of its members, breaking the collective.
- To define the entry or stay in its territory of unwanted persons (right of exclusion from the territory).
- To determine their own institutions.
- Participation in decision-making that may affect indigenous peoples and tribal communities in their territory.
- To be determined by their religious worldview and to enforce it before third parties. It implies beliefs, religious sites.

Prevention measures

- Expectations that cannot be met.
- Projects that generate damage such as internal divisions, changes in decision-making that affect their ethnicity and culture.
- Compliance with what has been agreed by the parties.

Parte 3. PARTICIPACIÓN Y CONSULTA PREVIA

In ILO Convention 169, ratified by Colombia through Law 21 of 1991, five meanings of participation of indigenous and tribal peoples are established.

- Decide autonomously on their own priorities in relation to the dynamics of development, to the extent that they may be affected. Article 6
- Participation at least to the same extent as other sectors of the population, in the adoption of program decisions that concern them. That is, participation in the formulation, application and evaluation of Programs and Projects that may affect them directly. Article 6b
- Prior consultation through adequate procedures, when legislative or administrative decisions are to be taken that could directly affect them. Article 7
- Participation in studies aimed at establishing the social, spiritual and cultural impact and on the environment that the planned development activities may have on themselves. Article 7.3
- Participation in the profits generated by the company. Article 15, paragraph 2

3.1 Obligation of the State to consult

Los Estados al adoptar medidas para proteger los derechos de los pueblos indígenas deben hacerlo “con la participación de los pueblos interesados” Convenio 169 OIT (Artículo 2.1)

Los Estados al aplicar las disposiciones del Convenio “Deben consultar a los pueblos interesados, mediante procedimientos apropiados y en particular a través de sus instituciones representativas, cada vez que se prevean medidas legislativas o administrativas susceptibles de afectarles directamente” Convenio 169 de la OIT (Artículo 6.1.a).

“Las consultas llevadas a cabo en aplicación de este Convenio deberán efectuarse de buena fe y de una manera apropiada a las circunstancias, con la finalidad de llegar a un acuerdo o lograr el consentimiento acerca de las medidas propuestas” (Artículo 6.2)

“Los pueblos indígenas tienen derecho a participar en la adopción de decisiones en las cuestiones que afecten a sus derechos, por conducto de representantes elegidos por ellos de conformidad con sus propios procedimientos, así como a mantener y desarrollar sus propias instituciones de adopción de decisiones “. Declaración (Artículo 18)

3.1 What is the Prior Consultation?

- It is a fundamental right, a collective axial principle, exclusive of ethnic communities to participate in those decisions or projects that may affect them for their ethnic and cultural preservation. It is part of the constitutionality block, due to its connection with the right to life, that is, to continue existing as indigenous peoples and tribal communities.
- As a process aimed at obtaining consent, a participation mechanism that seeks in each case to make national development compatible with the general interest of society to protect and safeguard indigenous peoples and tribal communities.
- It is a qualitative and concerted process under the authority of the state institutions for the anticipated identification of impacts or probable damages to the ethnic and cultural integrity of an indigenous people or tribal community.
- It implies incorporating social participation in the final design of the consulted project since a good consultation usually implies adjustments, technical and financial redefinitions.
- It allows, through the direct participation of the communities, to notice social and cultural realities, which, when protected, persuade them to modify the design and the very feasibility of the project.

3.2 Norms that establish and regulate the Prior Consultation in Colombia

3.3

The regulations that establish the obligation of the State to carry out consultations are found in ILO Convention 169 of 1989, Law 21 of 1991 that adopts it. The jurisprudence of the Constitutional Court generates principles and procedures that must be taken into account. Decree 2353 of 2019 defines the state entity responsible for Prior Consultation: Directorate of the National Prior Consultation Authority, the Technical Sub-direction of Prior Consultation and the Sub-direction of Prior Consultation Management

Lineamiento No 5

Intersocial, interinstitutional and interlegal provision.

Objectives

- Establish the factors to determine whether or not the Prior Consultation is appropriate.
- Define the ownership of the right to be consulted by an indigenous or tribal collective subject: Afro, Palenquero or Rom, resident in the company's environment.
- Determine which is the representative institution of the community subject to consultation and which are the competent authorities.
- Establish the territorial scope of the community in which it develops uses and customs and obtains the necessary means for its biological, social and cultural reproduction.
- Overlap the territorial scope of the community with the effective area of influence of the project to evaluate the different impacts on the life and integrity of the collective subject. As it is a fundamental right, it must be guaranteed regardless of the legal situation or property system.
- Establish different treatment of communities, groups or people that are not holders of this right. For example, peasant communities, community action boards, civil organizations.

Specific objectives

- Establish with the authorities and the community a process for the communication of information related to: 1) the rights to consultation, agreement and consent; the economic, environmental, social and cultural impacts generated by the project; management measures, when the impacts affect community members or their territories.
- Promote the participation of the existing traditional authorities, recognized by the community, the municipal, departmental and national institutions in order to guarantee the fulfillment of the representativeness to agree on the institutionalized procedures to be followed.
- Strengthen indigenous and tribal authorities and communities so that their participation in decisions that may affect their environment, their cultural patterns, their economy and their forms of social organization lead to agreements in which the interests of the communities are effectively seen. reflected.
- Institutionally and financially support projects that, in the short, medium and long term improve social and economic conditions in accordance with the vision of the cultural world of the community and hopefully under community Life Plans or ethno-development projects.

Generate prevention measures

- Expectations that cannot be met.
- Meetings outside the institutionalized.
- Agreements with individual stakeholders.
- Disproportionate requests.

3.4 ¿Qué tipo de daños se buscan evitar para proteger a los pueblos indígenas y comunidades tribales étnicas?

In general, these are those negative impacts that threaten the ethnic and cultural integrity of an indigenous community or particular tribal community. However, several clarifications should be made:

- Given the prior nature of the Consultation, the damage to be analyzed is strictly probable or eventual damage. The ex ante exercise is therefore a risk analysis.
- There must be or presume a direct relationship between the damage or the affectation that is sought to be managed, with the project, work, activity or decision that is submitted to the consultation.

- It is assumed that said damage does not exist or that, if there is a pre-existing situation of vulnerability, it can be increased or worsened during the execution of the project.
- In one case or the other, the correct anticipation of eventual damage depends on the raising of a baseline or preliminary characterization of the community, in order to establish with the greatest rigor the hypothetical cause-effect relationship for community life.
- There must be or it must be presumed that there is a direct relationship between the tangible or intangible property susceptible to damage and one or more collective interests of the indigenous people or the tribal community consulted.

Lineamiento No 6.

The company develops voluntary protocols and guidelines around the participation of indigenous peoples because as a principle it generates social legitimacy, reduces reputational costs, minimizes some risks, and grants viability and social license to projects.

Objectives

- Establish mechanisms that guarantee the participation and prior, free and informed consultation with indigenous peoples and tribal communities in TGI's area of influence, following the provisions of the Constitutional Block.
- Advance participation processes in accordance with the requirements of the expansion plan, or infrastructure improvement.
- Build relationships of intercultural and interlegal understanding with the authorities and community members who inhabit or use territories directly affected by the TGI company.
- Promote a long-range intercultural and interlegal dialogue where the parties get to know each other, express their rights and duties, their purposes and requirements in an environment of trust.
- Achieve meetings for intercultural participation with different community instances.
- Support the strengthening of the institutionality of the society that is consulted.
- Establish information mechanisms, on consultation and consent with the authorities of indigenous peoples and tribal communities that allow analyzing the economic, environmental, social and cultural impacts generated by the project, and the respective management measures, when the impacts of new projects or adjustments require it.
- Promote the strengthening of traditional authorities, recognized in order to allow them to fulfill their own functions and carry out projects that, in the short, medium and long term, stimulate social and economic improvement under their own cultural aspirations.

- Strengthen effective participation in decisions that may affect their habitat, their cultural patterns, their economy and their forms of social organization.
- Participation must lead to agreements in which the positions and interests of the communities are effectively reflected.

¿How?

- Always in agreement with the representative authorities

¿For that?

- Recognize and value the forms of self-government.
- Give them due constitutional treatment as authorities of special protection, collective subjects of law and of special protection.
- Build relationships with the authorities, under principles of trust, cooperation and mutual respect.

Consent is an imperative and is undoubtedly the most robust indicator of social participation of indigenous peoples and tribal communities in the framework of consultations.

Lineamiento No 7.

Strengthen knowledge for due diligence in consultation as a fundamental right.

Objective

- Agree standards regarding the participation of indigenous peoples and tribal communities located in the surroundings of the TGI Project.
- Adoption of participatory mechanisms.
- Policies for the recognition and support of collective subjects of law, endowed with the capacity to claim and exercise their rights, as well as self-representation.
- Information and transparency, in the matters of the company that most concern them.
- Spaces for socialization, consultation and decision-making, on those issues that concern the company in its relationship with the communities.
- Methodologies for participation in conducting studies that are carried out.
- Support to the most vulnerable sectors for their inclusion (women, children, youth).
- Spaces for intercultural dialogue without a project, to establish perceptions, recommendations and proposals, make agreements, carry out training for jobs, etc.
- Design of a participatory, dynamic and culturally appropriate system for Petitions, Complaints, Claims, Requests and Congratulations, with several components.
- Social investment subject to social agreements, differential approach and community oversight.
- Follow-up of the management measures committed in the environmental licenses.

How?

- Preparation to act with knowledge of the fundamental right of indigenous peoples and tribal communities.
- Provision of an interdisciplinary team formed to act relationally with ethnic authorities.
- Always request the competent institutional presence.

¿For what?

- Recognize and value the forms of self-government.
- Give due treatment based on the constitutionality block to comply with due participation as a company.
- Build relationships with the authorities, under principles of trust, cooperation and mutual respect.

Medidas de prevención

- Monitoring and compliance with interparty agreements.

3.5 Lineamientos conceptuales, procedimentales y operativos.⁵

Acercamientos

Definition	Goof Practices	Conditions for Success
		1.

⁵ Estructura general autorizada por el sociólogo Carlos Ariel Ruiz Sánchez.

Preconsulta

Definition	Goof Practices	Conditions for Success
<p>Preliminary moment in which the parties, with the facilitation of the competent entity and other guarantors, agree on how the consultation will be carried out, under what conditions and according to the uniqueness of each case.</p>	<ol style="list-style-type: none"> 1.1. Take into account the community distinctiveness, the uniqueness of each one, its instances of government and authority, times and internal processes for the adoption of the course to be adopted. 2.2. Carry out pre-consultation activities in the community environment. 3.3. Instruct the communities in advance on the rigor necessary to carry out the Consultation by the national government, and the basic aspects to be consulted, so that the design of the process is adjusted to both aspects. 4.4. Give mutual messages of trust so that the Consultation passes in the middle of a calm and edifying environment. 5.5. Assess the relative degree of vulnerability of the group and adopt reinforced measures to counteract the asymmetries between the actors. 7. The logistics for the pre-consultation must be paid for by the company and also the payment of the professional team, community and technical experts. 	<ol style="list-style-type: none"> 1. Tiempo suficiente, en particular de la empresa. 2. Voluntad institucional de preparación y fortalecimiento a las comunidades, para que se aboquen a un proceso de Consulta implementado bajo los más altos estándares para su cumplimiento adecuado. 3. Comunidades cohesionadas, con instancias de representación y gobierno definidas.

Instalación y apertura

Definición	Lecciones aprendidas	Buenas prácticas	Condiciones de éxito
<p>Jornada formal con presencia de la institucionalidad estatal que es la garante de proteger el derecho a la participación de las comunidades, en la que las partes, de mutuo acuerdo y desprovistas de coacción,</p>	<ol style="list-style-type: none"> 1. La forma es tan importante como el contenido. 2. Las comunidades tienen sus propias nociones 	<ol style="list-style-type: none"> 1. Concertar las formalidades para la apertura de la Consulta Previa. 2. Refrendar las actas de buena fe de la preconsulta. 	<ol style="list-style-type: none"> 1. Un ambiente de mutua confianza sobre la base del conocimiento del sentido que tiene la consulta y el contenido de los temas a ser consultados.

acuerdan INICIAR un proceso de Consulta conforme a lo convenido en la preconsulta y bajo los principios de buena fe y transparencia.	de consulta y sus propias formalidades para darle plena validez a un documento.	<p>3. Prever tiempo suficiente y de calidad para la apertura e instalación.</p> <p>4. No delegar la representación del proyecto, y definirla de una buena vez para todo el proceso.</p>	
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Socialización

Definición	Lecciones aprendidas	Buenas prácticas	Condiciones de éxito
Presentación integral, del proyecto (de cada uno de los campos) a la comunidad titular del derecho a la Consulta de forma culturalmente adecuada.	<p>1. La sensatez de los análisis posteriores dependen del tipo y calidad de información disponible.</p> <p>2. El éxito de la socialización está en directa relación con la adecuación de los contenidos y la confianza entre las partes.</p>	<p>1. Preparar la socialización del proyecto, haciendo uso de pedagogías y didácticas adecuadas.</p> <p>2. Compartir toda la información en torno al proyecto, las actividades adicionales asociadas, el sustento jurídico y de política pública que lo respalda.</p> <p>4. Evaluar el grado de comprensión y asimilación del proyecto, y dejar constancia de ello.</p>	<p>1. Tomarse en serio la pedagogía como herramienta para la socialización del proyecto.</p> <p>2. Coordinación permanente entre el área técnica y el área social para garantizar coherencia de contenidos en la socialización.</p>

Identificación de impactos y medidas de manejo

Definición	Lecciones aprendidas	Buenas prácticas	Condiciones de éxito
Ejercicios participativos de identificación anticipada de impactos (<i>ex ante</i>), y consecuente concertación de medidas orientadas a prevenir, corregir, mitigar o compensar los impactos a la integridad étnica y cultural de la comunidad titular del derecho a la C	<p>1. Frente a los impactos culturales creer en el otro bajo el principio de la Buena Fe.</p> <p>2. El dinero no lo compensa todo.</p> <p>3. Afectaciones culturales y medidas proporcionadas</p>	<p>1. Ir despacio en la identificación de las afectaciones.</p> <p>2. Crear equipos especializados y mixtos para la identificación detallada de los impactos y las medidas de manejo.</p>	<p>1. Que las comunidades tengan buena apropiación del proyecto y puedan advertir afectaciones con principio de realidad.</p> <p>2. Que el ejercicio no sea un escenario contencioso.</p> <p>3. Que primen los principios de buena fe, respeto y entendimiento intercultural.</p>

	<p>por la misma cultura.</p> <p>4. Una medida de manejo solo es totalmente efectiva cuando se compruebe que lo es.</p> <p>5. La mejor medida de manejo es la que las partes conciertan, no genera impactos peores que los que busca corregir, es susceptible de verificar y no contradice las normas vigentes.</p> <p>7. En materia de protección más vale pecar por exceso que por defecto.</p>	<p>3. Identificar las afectaciones proyecto.</p> <p>4. No confundir los temas de responsabilidad social y de empleo, con las medidas de manejo derivadas de una Consulta Previa.</p> <p>5. Darle validez y respaldo a las medidas de manejo que provengan de su propia cultura tradicional.</p> <p>6. Adoptar medidas de manejo inocuas o con externalidades positivas.</p> <p>7. Adoptar medidas de manejo que sean compatibles con los modelos y planes de vida de las comunidades étnicas.</p>	
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Preacuerdos y protocolización de acuerdos

Definición	Lecciones aprendidas	Buenas prácticas	Condiciones de éxito
<p>Preacuerdos Compromisos parciales, susceptibles de modificación, que las partes adoptan para la mejor ejecución del proyecto sin afectar la integridad étnica de la comunidad titular del derecho a la Consulta.</p> <p>Protocolización de acuerdos o de no acuerdos Compromisos definitivos que las partes adoptan mediante las formalidades de rigor en el Acta, de modo que deben respetarse formalmente por parte de los implicados.</p>	<p>1. La principal garantía de un acuerdo es la Buena Fe.</p> <p>2. Los montos de las compensaciones en dinero deben ser los montos que realmente compensen afectaciones. El dinero empresarial introducido en las comunidades, sin las debidas precauciones, generan daños y conflictos internos.</p> <p>3. El mejor acuerdo es el que en estricto depende de las partes que lo contraen.</p>	<p>1. Ser preciso con el contenido de las palabras. No dejar ningún supuesto a la libre interpretación de las partes.</p> <p>2. Incorporar mecanismos de manejo de contingencias y resolución de conflictos.</p> <p>3. Adoptar acuerdos y compromisos recíprocos.</p> <p>4. Adoptar un cronograma preciso para el</p>	<p>1. La confianza y aceptación recíproca de lo pactado.</p> <p>2. Precisión y claridad en los acuerdos que se adoptan.</p>

		<p>cumplimiento de los compromisos y obligaciones, sujetos a indicadores de magnitud, tiempo, responsable.</p> <p>5. Transferir las obligaciones derivadas de la Consulta a los contratos con terceros.</p> <p>6. Suscribir los acuerdos en presencia de garantes que generen confianza a las partes.</p> <p>7. No adquirir compromisos que dependan de terceros</p>	
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Seguimiento

Definición	Situación dilemática	Lecciones aprendidas	Buenas prácticas	Condiciones de éxito
<p>Ejercicios participativos, en presencia preferiblemente de las entidades de gobierno competentes, para verificar el estado de cumplimiento de las obligaciones acordadas en la protocolización de las Consultas.</p>	<p>1. La capacidad de seguimiento del gobierno y de los garantes es limitada, especialmente de compromisos de mediano y largo plazo, por lo que en general corresponde a las partes hacer los seguimientos y balances</p>	<p>1. Ningún acuerdo es inferior a otro.</p> <p>2. Los cambios en cantidad o cualidad de las obligaciones no pueden ser resueltas por una de las partes de forma unilateral.</p> <p>3. El no cumplimiento de los acuerdos generan nuevos pasivos, porque se presumen que las afectaciones contra la integridad étnica continúan.</p>	<p>1. Crear equipos mixtos de seguimiento de los acuerdos en tiempo real e <i>in situ</i> y dejar evidencias de los cumplimientos parciales, o saldados.</p> <p>2. Garantizar ejercicios periódicos de balance de cumplimiento.</p>	<p>1. Organización conjunta para el seguimiento.</p> <p>2. Conciencia compartida que la consulta no termina con la protocolización.</p>

Post-consulta

Definición	Malas prácticas	Lecciones aprendidas	Buenas prácticas	Condiciones de éxito
Oportunidad que tienen las partes, en presencia de las entidades competentes, de valorar la pertinencia y suficiencia de las medidas de manejo acordadas, y de incorporar obligaciones nuevas o de actualizar las ya adoptadas.	<ol style="list-style-type: none"> 1. Presumir que la Consulta termina con el cumplimiento literal de los acuerdos y compromisos. 2. No evaluar cualitativamente si la Consulta cumplió o no su fin protector. 3. Suponer que todas las medidas de manejo, por el hecho de estar convenidas, son intrínsecamente convenientes y protectoras 	<ol style="list-style-type: none"> 1. Los acuerdos suscritos en el marco de una Consulta pueden tener efectos no deseados y no protectores. 2. Una Consulta puede ser permanente o periódica a lo largo de la operación del proyecto. 	<ol style="list-style-type: none"> 1. Hacer ejercicios participativos ex post de evaluación de impactos y actualizar las medidas de manejo a que haya lugar. 	<ol style="list-style-type: none"> 1. Conciencia de las partes y del gobierno sobre los tiempos post consultivos. 2. Organización conjunta para la actualización de las medidas de manejo

An appreciable result of the consultations is that they are a good way to participate in life plans, ethnodelopment programs and to achieve Free and Informed Prior Consent.

“Los pueblos indígenas tienen derecho a determinar y a elaborar prioridades y estrategias para el ejercicio de su derecho al desarrollo. Los pueblos indígenas tienen derecho a participar activamente en la elaboración y determinación de los programas de salud, vivienda y demás programas económicos y sociales que les conciernan y, en lo posible, a administrar esos programas mediante sus propias instituciones”. Conv 169 (Artículo 23).

In addition, obtaining the Consent that is the purpose of the consultations implies that good company-community agreements were achieved and in front of the state institutions as a guarantor of this right.

“Las consultas llevadas a cabo en aplicación de este Convenio deberán efectuarse de buena fe y de una manera apropiada a las circunstancias, con la finalidad de llegar a un acuerdo o lograr el consentimiento acerca de las medidas propuestas”. (Artículo 6.2)

Bad practices

- • Narrow parameters in the definition of the area of direct influence.
- • Failure to verify the presence of ethnic communities on their own initiative.
- • No certification of the presence of the communities.
- • Ambiguous definition of the project areas.
- • Reduction of existing asymmetries between the communities and the company.
- • Imposition of monetary logic in the agreement of management measures.
- • No implementation of Post-consultation.
- • Failure to update management measures after a reasonable time. Adversarial positions.
- • Transfer of obligations to third parties involved.
- • Poor socialization of projects and lack of intercultural pedagogies.

3.6 Sub-rules on the right to prior consultation⁶

- a. Prior consultation is a fundamental right and the processes of prior consultation of ethnic communities will be developed in accordance with this guiding criterion, both in its projection and in its implementation.
- b. No adversarial or confrontational positions are allowed during the prior consultation processes. It is a dialogue between equals in the midst of differences.
- c. Procedures that do not meet the essential requirements of prior consultation processes are not allowed, that is, assimilate prior consultation to mere administrative procedures, informational meetings or related actions.
- d. It is necessary to establish effective communication relationships based on the principle of good faith, in which the specific circumstances of each group and the importance for it of the territory and its resources are weighed.
- e. It is mandatory that a single term is not set to materialize the consultation process and the search for consent, but rather that said term be adopted under a differential approach strategy according to the particularities of the ethnic group and its customs. Especially in the feasibility or planning stage of the project and not in the moment prior to its execution.
 - (i) It is mandatory to define the procedure to be followed in each prior consultation process, in particular through a pre-consultative and / or post-consultative process to be carried out in agreement with the affected community and other participating groups. to be understood not only in the previous stage of the process, but also according to subsequent reviews in the short, medium and long term.

⁶ Sentencia T129 2011

(ii) It is mandatory to carry out a joint exercise of weighing the interests at stake and submitting the rights, proposed alternatives and interests of the ethnic groups affected only to those constitutionally imperative limitations.

(iii) The search for free, prior and informed consent is mandatory. The communities may determine the least harmful alternative in those cases in which the intervention: (a) involves the transfer or displacement of the communities due to the process, the work or the activity; (b) is related to the storage or dumping of toxic wastes on ethnic lands; and / or (c) represent a high social, cultural and environmental impact on an ethnic community, which leads to putting its existence at risk.

In any case, in the event that the least harmful alternatives for the ethnic communities are explored and it is proven from said process that all are harmful and that the intervention would lead to the annihilation or disappearance of the groups, the protection of the rights of the women will prevail. ethnic communities under the principle of pro homine interpretation. [71]

(iv) The control of the authorities in environmental and archaeological matters is mandatory, in the sense of not issuing licenses without the verification of prior consultation and approval of an Archaeological Management Plan in accordance with the law, under penalty of not to be able to start any type of work or in those that are being executed order its suspension.

(v) It is mandatory to guarantee that the benefits that the execution of the work or the exploitation of the resources entail are shared equitably. As well as compliance with mitigation measures and compensation for damages caused.

(vi) It is mandatory for ethnic communities to have the accompaniment of the Ombudsman's Office and the Office of the Attorney General of the Nation in the process of consultation and seeking consent. Even the possibility of having the support of international organizations whose mandates are aimed at preventing and protecting the rights of the nation's ethnic communities.

If the aforementioned assumptions and factors are taken into account, the process of prior consultation and participation of ethnic groups is expected to fully respect the rights at stake in these types of cases, such as subsistence and cultural integrity.

It is necessary to take into account that carrying out prior consultation and seeking informed consent does not justify the future material violation of the fundamental rights of the ethnic groups affected by an action or administrative authorization of entities of the

State or individuals; circumstance in which there will be place to the responsibility of the State or of the concessionaires according to the internal and international regulations.

This is the scope of a --- right ---, which necessarily requires the application of a set of principles and values and, on the other hand, to assume that communities as collective subjects of rights, are subjects of fundamental rights

Prior consultation is not a simple procedure, it is not a simple procedure, it does not end in a few months of consultation, but necessarily where the community is, wherever any project is carried out, an area of social life is being aligned, of cultural life, of the very development of the life of a group that require the simultaneous, systematic, permanent and continuous application of values, of the principles of constitutional norms, because the Constitutional Court itself has already accepted that in relation to precisely the This matter must have an exacerbated control of formal, material, abstract and concrete constitutionality.

3.6 Indicators of the right that initiates prior consultation

There are three indicators of a right principle of the highest protection and not necessarily all of them come together in a single moment.

- The value against majority of strong sense that is expressed in facts. It is observed that the constitution and the constitutional interpretation recognize the titular subjects a very strong capacity to advance against the claims of the majority.
- It implements inclusion imperatives in a strong sense, that is, it expands the frontier of equity and justice as an imperative mandate that cannot be reduced, which is always advancing more and more.
- Denotes differentiation as a preponderant interest, of mandates for identity, within society.

Prior consultation highlights the space in which the right to equality, different treatment, the right to cultural pluralism, freedom of expression, the preventive property rights, the most expensive values of nationality, the organic principles of the Constitution, among others; all these principles, those values, those rights become participants in the process of normative integration, so that we are facing an expanded relationship of principles.

The prior consultation is not a simple procedure, it is not simply a moment of a project, for example, the prior consultation is an area heavily intervened by a set of principles and therefore it will not be thought that once the prior consultation is concluded the constitutional aspects and the demands of the communities that exist there —because they precisely as holders of this set of principles—, which radiate a social problem, will also have, thanks to the constitutional exacerbation, many channels for permanent use.

Parte 4 FREE, PRIOR AND INFORMED CONSENT

Consent, as the Constitutional Court itself has reiterated, must be understood as the qualified and express approval that an indigenous people or tribal community — in this field— grants to “Works, Projects or Activities” (OPA), legislative measure or administrative act that, eventually, may affect them directly.

4.1 Consent and its relationship with the Consultation

Consultation and consent as fundamental rights exist to safeguard the rights of indigenous peoples and tribal communities to their alternate cultural existence as distinct collective subjects.

There are two situations regarding consent that are different; both seek to prevent damage to ethnic and cultural integrity.

Consent can never be given at the cost of compromising the existence of the ethnic group involved. It supposes a balance between the interests that the consulted decision entails and the survival of the ethnic group or the right to life, that is to say that it can continue to be a different community as a collective subject of law. 50 or 100 years. Although its individual members may continue to exist, what is protected is the alternative cultural existence of that group. The decision in the case of the Urra representative did not protect the Emberá people as a group, although it did give its members an economic resource for their adaptation by losing the possibility of continuing to be fishermen and hunters due to the flooding of their lands.

Consent is given when the project and its impacts have been known in good faith in a Consultation and there will be no damage to ethnic and cultural integrity; and, when situations arise that involve irreversible damage and damage and binding consent. Says the Court:

“La protección especial que la Constitución otorga a las minorías étnicas en aquellos proyectos cuya magnitud tiene la potencialidad de desfigurar o desaparecer sus modos de vida, motivo por el que la Corte encuentra necesario que la consulta previa y el consentimiento informado de las comunidades

étnicas pueda determinar la alternativa menos lesiva en aquellos eventos que: (i) impliquen el traslado o desplazamiento de las comunidades por la obra o el proyecto; (ii) estén relacionados con el almacenamiento o vertimiento de desechos tóxicos en las tierras étnicas; y/o (iii) representen un alto impacto social, cultural y ambiental en una comunidad étnica, que conlleve a poner en riesgo la existencia de la misma, entre otros”. Ahora, dice la Corte, en el evento en que se explore la alternativa menos lesiva con la participación de las comunidades étnicas en la construcción de esta, y de dicho proceso resulte probado que todas son perjudiciales y que la intervención conllevaría al aniquilamiento o desaparecimiento del grupo, prevalecerá la protección de los derechos de las comunidades étnicas bajo el principio de interpretación *pro homine*”⁷.

It concerns the state institutionality — as guarantor of the rights of indigenous and tribal peoples to demonstrate that the means and possible guarantees were used to obtain consent. Due Diligence on the part of the company implies adequately publicizing the project and the decision to be implemented by reporting in good faith the unavoidable effects and impacts.

One of these unavoidable impacts due to the need to carry out the project is the transfer of communities or communities. Free, prior and informed consent is required. In this case, an express definition of the company is required to inform about the possibility that best suits it the factors against their impact on the possibility of carrying out the project.

Lineament No 8

Resettlement plan.

Objectives

- Adequate legal, social and logistical preparation for differential treatment of the culture-bearing community within the framework of a process of information and advice --- in language, if applicable ---, to the owners of properties that would be affected by the expansion or maintenance of the project for the development of expansion or maintenance of the investment project.
- Guarantee to the community that they will be transferred equivalent or better conditions to the previous state

⁷ **Sentencia T-129 de 2011 Consulta y Consentimiento** En esta sentencia se hace referencia a los resguardos Chidima y Pescadito en Colombia. La Corte encuentra necesario que la Consulta previa y el Consentimiento informado de las comunidades étnicas en general pueda determinar la alternativa menos lesiva que conlleve a poner en riesgo la existencia étnica y cultural de la comunidad.

Management measures:

- Acquisition of land according to the requirements of the project.
- Acquisition of rural properties taking that allows sellers to give continuity to their productive activities. community based on the results of the socioeconomic study (asset inventory, and baseline).

How?

- It is applied throughout TGI's area of influence and specifically to areas where the purchase or negotiation of land is required.

So that?

- Establish resettlement plans with the stakeholders directly involved when appropriate.

Prevention measures

- If consent is not obtained, despite following due process in a Prior Consultation, the state institution may make the decision to carry out the project with the maximum strength of fair arguments to define the option to carry it out.
- The authorities and the community must be informed of how the rights are not absolute.

4.1 What does it mean for the State that indigenous peoples do not give consent?

As a starting point, it must be borne in mind that with or without the consent of an indigenous or tribal community, the State has an obligation under international law to respect and protect the rights of indigenous and tribal peoples, in accordance with established international standards.

It is suggested that, in many cases, the State decides despite not obtaining the consent of a community.

The regulations state that it is always the State that has the last word, as the guarantor of human rights. If your decision is demanded it will be necessary to amply justify your arguments or you will be condemned.

4.2 Poder de veto

The concept of veto is used to denote that an indigenous people or tribal community has the right to unilaterally suspend the implementation of a project. A veto, therefore, provides unlimited power to stop possible or safe changes, to stop a project for considering those changes as not suitable for adoption. The Court is explicit in stating that there is no right to veto.

The Court has also indicated that the consultation constitutes a process of intercultural dialogue between equals, in the understanding that this means that neither indigenous peoples have a right of veto that allows them to block state decisions, nor does the State have a right to impose on indigenous peoples to impose on them whimsically any decision⁸ but instead operates an exchange of reasons between cultures that has equal dignity and constitutional value (CP art 70). This does not mean that, from a factual point of view, indigenous peoples or tribal communities have equal power to individuals or the State in a consultation process, since they are usually at a disadvantage compared to them due to discrimination. to which they have been subjected. That is why the State has the duty to take the necessary compensatory measures to reinforce the position of these peoples in these consultation processes so that intercultural dialogue between equals can effectively operate.

There are decisions of peoples and tribal communities that propose no to a project, do not accept consultation and therefore it can be established that there is a veto. Given the implications of making a unilateral decision, without even knowing the impacts that the project implies and the mechanisms for their mitigation, we are facing the figure of the veto.

Part 5 FUNDAMENTAL RIGHTS GOVERN AGAINST INDIVIDUALS AND THERE IS THE DUTY OF DUE BUSINESS DILIGENCE.

Sentence U 123 of 2018 introduces in numeral 13 the duty of business due diligence as a means to protect the human rights of indigenous peoples and tribal communities. Says the Court:

13.1. “Although the essential responsibility for prior consultation lies with the State, that does not imply that individuals, and particularly companies, do not have duties in relation to this fundamental right. This conclusion derives not only from the effect on third parties that fundamental rights have in the Colombian constitutional system but also from the recognition by international human rights law that companies have certain obligations regarding human rights, which are not equivalent to those of the States but which are far from being minor and irrelevant”.

13.2. “The Declaration of Guiding Principles on Business and Human Rights (known as the “Ruggie Principles”), which were endorsed by the United Nations Human Rights Council⁹, confirm the well-established maxim of international law that (i) States have the duty to protect human rights, for example, against violations committed by commercial companies and other third parties, through appropriate measures, regulatory activities and submission to justice; but that (ii) companies must respect human rights, acting with due diligence so as not to violate human rights or contribute to violating them; and that there is (iii) the need for effective remedies to be established to repair violations when they occur. Principle 17 of this Declaration, relative to “due diligence in the area of human rights”, indicates that, regarding human rights, companies must proceed with due diligence in the area of human rights, in order to identify, prevent, mitigate and respond to the negative consequences of their activities”¹⁰.

⁹ Organización de las Naciones Unidas, Consejo de Derechos Humanos, Representante Especial del secretario general para la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, “*Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para ‘proteger, respetar y remediar’*”, resolución 17/4, de 16 de junio de 2011, A/HRC/17/31.

¹⁰ Según el Alto Comisionado de la Naciones Unidas para los Derechos Humanos, este proceso debe incluir una evaluación del impacto real y potencial de las actividades sobre los derechos humanos, la integración de las conclusiones, y la actuación al respecto; el seguimiento de las respuestas y la comunicación de la forma en que se hace frente a las consecuencias negativas. En criterio del Alto Comisionado para los Derechos Humanos de la ONU, la debida diligencia en materia de derechos humanos: a) Debe abarcar las consecuencias negativas sobre los derechos humanos que la empresa haya provocado o contribuido a provocar a través de sus propias actividades, o que guarden relación directa con sus operaciones, productos o servicios prestados por sus relaciones comerciales; b) Variará de complejidad en función del tamaño de la empresa, el riesgo de graves consecuencias negativas sobre los derechos humanos y la naturaleza y el contexto de sus operaciones; c) Debe ser un proceso continuo, ya que los riesgos para los derechos humanos pueden cambiar con el tiempo, en función

• “For its part, the Committee on Economic, Social and Cultural Rights, through General Comment number 24¹¹, indicated that States have certain obligations in the context of business activity. It noted that it should be ensured that, where appropriate, the effects of business activities on indigenous peoples (in particular the actual and potential adverse consequences on rights to land, resources, territories, cultural heritage, knowledge indigenous peoples' culture) are specifically incorporated into human rights impact assessments¹². Additionally, the General Observation indicated that companies must follow the standard of “due diligence” in matters of human rights, on the basis of which they must consult and cooperate in good faith with the indigenous peoples concerned through the representative institutions of the indigenous peoples in order to obtain their free, prior and informed consent before starting activities. These consultations should allow the identification of the possible negative effects of the activities and of the measures in order to mitigate and counteract them. They should also promote the creation of mechanisms for participation in the benefits derived from the activities ”.

Recomendations

1. Define basic training content and a continuous program.
2. Training of company personnel who, from a diversity of responsibilities, have a relationship with indigenous and tribal peoples.
3. Definition of an organizational structure that includes an interdisciplinary team that can plan, monitor and evaluate compliance with standards.
4. Selection of personnel with significant technical capacity to represent the company and with an edifying and committed attitude towards the community and their authorities.
5. Generate an institutionalized intercommunication system with authorities and community members.

de la evolución de las operaciones y el contexto operacional de las empresas. Al respecto consultar el documento “Principios Rectores Sobre las Empresas y los Derechos Humanos”, documento de la oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, disponible en versión digital en el link: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_sp.pdf

¹¹ Organización de las Naciones Unidas, Comité de Derechos Económicos, Sociales y Culturales, Observación General número 24, Distr. General 10 de agosto de 2017, E/C.12/GC/24.

¹² *Op. Cit.* Observación General número 24, párrafo 15.

