Free, Prior and Informed Consultation in Colombia: the case of the expansion of the Cerrejón project

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Mining in indigenous and tribal areas in Colombia and prior consultation

Several large-scale mining projects and related activities in Colombia are currently being developed in or close to areas inhabited by indigenous peoples (and/or black or afro-Colombian communities). In 2010 mining concessions covered 267 thousand hectares within or overlapping indigenous territory. Among the more conspicuous projects are the Cerrejón and new MPX coalmines in La Guajira and the Drummond coal mine in César, including a related harbor project, and the exploration activities of the copper mining companies Muriel Mining and Glencore in Chocó and Antioquia. Many more indigenous communities will be affected by mining in the near future, since many of the hundreds of recently awarded concessions are situated in the areas they inhabit, which are often officially recognized collective territories. If all concession applications were to be approved, they would overlap 5.4 million hectares of indigenous territory (HREV 2011).[1]

One of the most important rights of indigenous and "tribal" peoples as enshrined in international legal instruments is the right to *Free, Prior and Informed Consultation/Consent* (FPIC), which allows indigenous peoples to participate in decision-making on all administrative and legal measures that may affect their way of life, and in particular their traditional lands, territories and resources (Anaya 2005). The Spanish term commonly used for FPIC is *Consulta Previa*.[2] The right of FPIC is intended to safeguard the physical and cultural survival of these groups, which politically and economically are among the most vulnerable in the context of economic globalization. The right to be consulted moreover serves the more comprehensive right of these peoples to "self-determination" (e.g. Anaya 1996 and 2005; DPLF 2011).[3]

In Colombia, which in Latin America in many respects is a frontrunner in the recognition of the rights of indigenous peoples, this means that the government is obliged to consult indigenous and afro-Colombian communities that may be affected by large-scale mining before important decisions on a given projects are taken. This would mean that communities are given an opportunity to participate in an open, timely and honest process in planning for future mineral resource development. In Colombia, however, the right of indigenous and tribal peoples to prior consultation is only very partially translated into secondary legislation and policy, which causes confusion among regional authorities and major companies about the content and scope of application of this right in practice. To avoid the confusion, companies have organized their own consultations, sometimes voluntarily, thereby relying on the standards of international financial institutions.

[1] Put differently: *"Sixteen of Colombia's thirty-three designated 'mining districts' overlap, sometimes fully, the habitat of indigenous peoples"*. (Observatorio Indígena de Seguimiento a Políticas Públicas y Derechos Étnicos, 2008: 357, translation by the author). The outlook with regard to mining is comparable for afro-Colombian communities, which like indigenous peoples enjoy special rights, although no precise statistics have been produced for their situation.

[2] Literally translated, FPIC in Spanish is: Consulta/Consentimiento Libre, Previa e Informada (CLPI).

[3] The United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP, 2007) provides: *"Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"* (Article 3). While ILO Convention 169 (ILO C169, 1989) does not make explicit reference to the right to self-determination, it does provide a pertinent definition of the concept: *"The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development"* (Article 7.1).

International standard for prior consultation (FPIC)

In the ongoing international debate about the standard of prior consultation of indigenous peoples in the context of extractive industries such as mining, the central question has been has been whether the granting or refusal of consent by the indigenous peoples should have decisive consequences for a development project. The collective right of indigenous peoples to prior consultation was first formulated in international law in ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO C169) of 1989. The Convention is legally binding for States that ratify it.[4] In these countries, it is then usual for the Convention to be incorporated in national legislation. Article 15 of the Convention refers to prior consultation in the context of mining:

"In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands,[5] *governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands"* (ILO C169, Article 15).

ILO C169 refers only to the right of indigenous peoples to consultation, and does not set down explicit and clear duty to obtain *consent* for development projects that affect indigenous or tribal communities. The Convention only explicitly requires consent in cases where the relocation of a community is inevitable. However, the government is able to circumvent this requirement by following national legislative procedures that allow for the effective representation of the affected communities. An important new legal development in 2007 was the adoption by the United Nations of the Declaration of the Rights of Indigenous Peoples (UN DRIP).[6] The principle of *Free, Prior and Informed Consent* (FPIC) was one of the most controversial aspects of the Declaration. Nonetheless, adoption of the Declaration is a sign of growing international acceptance of this right. Article 32 of the Declaration refers to prior consultation in connection with mining.

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (UN DRIP, Article 32.2).

In a number of cases, UN DRIP clearly articulates the right to consent (and not merely to consultation). However, unlike ILO C169, the Declaration is not legally binding. Nonetheless, it is expected that the Declaration on the Rights of Indigenous Peoples – like other non-binding international law instruments – over time "will start to 'harden', becoming more

[4] ILO C169 has been ratified to date by only 22 countries. However, this number includes most countries on the Latin-American continent. Colombia was the second country to ratify the Convention, by virtue of Act 21 of 1991.

[5] The term *"lands"* is usually used in the Convention synonymously with *"territories"* (territories or areas of habitation officially or otherwise recognized as collective property).

[6] The Declaration was not passed unanimously by the General Assembly but by majority voting: 143 for, 4 against (Australia, Canada, New Zealand and the United States), and 11 abstentions. The Netherlands voted in favour. Colombia was the only Latin-American country to abstain. Since adoption, Australia, New Zealand, Canada and the United States have all revised their positions and now endorse the Declaration. Colombia has also changed its position and says it now gives its support to the Declaration.

authoritative as it is used as the foundation for legal decisions and regulations in various States" (Lehr & Smith 2010: 12). With the Declaration, this process has only just started.

ILO C169 and UN DRIP correspond in the basic criteria required for a consultation process in practice. These criteria are confirmed by the interpretations of the Special Rapporteur on the Rights of Indigenous Peoples (e.g. Anaya 2009b). The consultation must:

- occur prior to the commencement of a project;
- be based on full and comprehensible information;
- be in good faith in accordance with procedures that are appropriate to the circumstances;
- be culturally appropriate and take place through the representative institutions of the indigenous people.

The above two international law instruments are oriented to the duties of States, and do not (directly) create legal obligations for companies. However, international financial institutions have embedded certain FPIC aspects in policy that is directly applicable to companies. For instance, in the recent (August 2011) revision of its Performance Standards, the International Finance Corporation (IFC, the private sector branch of the World Bank) explicitly acknowledges the right of indigenous peoples to consent in three specific circumstances. The new Performance Standard 7 concerning Indigenous Peoples (PS7), which will come into force on 1 January 2012, affirms that the consent of affected indigenous communities is required in the event of:

- impacts on lands and natural resources subject to traditional ownership or under customary use;
- relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use;
- significant project impacts on critical cultural heritage (Updated IFC PS7, pars. 13-17).[7]

The IFC Performance Standards do not constitute international law, but nevertheless have some regulatory force in that companies have to comply with them as a condition for acquiring loans from this financial institution. Despite sustained criticism from social organizations about the new IFC standards (e.g. FPP 2010), the change of terminology "from FPIConsultation to FPIConsent" reflects UN DRIP's acceptance of a strongly prescriptive interpretation of FPIC (consent).

The evolving nature of the concept of prior consultation (FPIC) leads companies, governments and institutions to assert that there is no generally accepted definition of the right to FPIC. This assertion is only partly true, because an international consensus about what the concept means has formed in recent years. The most recent and influential interpretations of the concept (as well as of the appropriate procedures) have been advanced by ILO's Committee of Experts, UN bodies and agencies (e.g. Expert Mechanism on the Rights of Indigenous Peoples, Special Rapporteur on the Rights of Indigenous Peoples) and the Inter-American Court of Human Rights (see also Oxfam Australia 2010). Nonetheless, governments still tend to be reluctant to recognize the duty to obtain consent, fearing that FPIC will act as a brake on national development (Rodríguez 2010; DPLF 2011).

[7] The previous version of PS7 concerning Indigenous Peoples (2006) referred to free, prior and informed *consultation* (rather than *consent*).

Legislation in Colombia concerned with prior consultation

Colombia in 1991 was one of the first countries in Latin America to ratify ILO Convention No. 169 concerning Indigenous and Tribal Peoples, which occurred through the enactment of Act 21 of 1991[8]. However, this measure still fell short of translating the right (principle) of prior consultation into specific legislation detailing its application. Although the first mention of the right to consultation was in environmental legislation of 1993, it was 1998 before the details of the application of prior consultation became embodied in a decree. This was Decree 1320 of 1998 *"which provides for consultation with indigenous and black communities, prior to the exploitation of renewable natural resources in the areas they inhabit"*. This legislation attracted much criticism from the outset, both from social organizations and the technical committee of the ILO that oversees implementation of the Convention by national States. At an early stage the Constitutional Court of Colombia also described Decree 1320 (in Ruling T-652/98 regarding consultation with the Emberá-Katío about the construction of the Urrá hydroelectric dam in the upper reaches of the Sinú river) as *"contrary to the Constitution and to the standards incorporated into national legislation through Act No. 21 of 1991"*.

Decree 1320 attracts two kinds of criticism: procedural and technical. Firstly, the government omitted to consult representatives of indigenous peoples about the wording prior to enactment, contrary to ILO C169. Secondly, the decree has no provision whatsoever for the participation or consultation of affected local communities in the preparation and execution of the environmental impact study and creation of the Environmental Management Plan. Furthermore, social and indigenous organizations have pointed out that the corresponding legislation takes insufficient account of indigenous customs, traditions and representative institutions. In two reports from 2001, the technical committee of the ILO found that *"Decree No. 1320 of 1998 [is] inconsistent with the Convention in terms both of the adoption process, which did not involve consultations, and of its content"* and requested the Colombian government *"to amend [the Decree] in order to align it with the Convention, in consultation with and with the active participation of the representatives of the indigenous peoples of Colombia"* (ILO 2010). Despite the legislation's lack of legitimacy, the government has continued to use Decree 1320 in prior consultations (see Anaya 2009a).

There are other important arguments for amending the legislation about prior consultation. (1) Decree 1320 regulates the consultation with indigenous and afro-Colombian communities concerning the exploitation of renewable natural resources, and does not refer specifically to consultation in the exploration and exploitation of non-renewable resources, such as minerals and fossil fuels. (2) The decree fails to comprehensively regulate the right to consultation as it is not concerned with decisions in other domains that affect the cultures and ways of life of indigenous and afrodescendant communities (e.g. education, health care and rural development). After all, the right to consultation applies without differentiation to all legislative and administrative measures that may affect them directly (ILO C169, Article 6.1).[9] (3) The wording of the decree is now outdated (it was drafted in 1998). Regarding the

[8] This law was promulgated in consequence of the recognition in Colombia's 1991 Constitution of the collective rights of indigenous peoples to territory and self-government (i.e., internal self-determination) – see constitutional articles 7, 10, 63, 68, 72, 96(2), 171, 176, 246, 286, 287, 321, 329, 330, 341, 356, 359.

[9] Neither does Decree 1320 provide for consultation with indigenous peoples and afro-Colombian communities about legislation that may affect them directly (i.e. that have a potential impact on their culture and lifestyle). The consultation with representatives of indigenous or afro-Colombian communities is covered in separate legislation, i.e. Decree 2248 of 1995, concerned with Consultative Committees for Black Communities (Sp.: *Comisiones Consultivas de diferentes niveles para las Comunidades Negras*), and Decree 1397 of 1996,

desired outcomes of the consultation process, the regulation refers to "agreements" between parties, without referring to the right of the indigenous and black population to FPIC (consent). The legislation therefore lags far behind the trends in international law on this topic, and recent rulings of the Constitutional Court of Colombia.

Finally, it is important to point out that Decree 1320 creates confusion about the right to consultation of indigenous and black communities that do not hold ownership title to their lands (i.e. that have no legally recognized communal territory). On the one hand, the decree obliges the government to consult with communities living in *"areas not registered as (collective) ownership, but that are inhabited on a regular and permanent basis"* (translation by the author), while on the other hand it makes this right dependent on the recognition of these communities and their ancestral territories by the Ministry of the Interior and Justice and the Colombian Institute for Rural Development (Articles 2 and 3). In this regard, the ILO technical committee has found repeatedly that *"consultations [as set out in the articles of the Convention] are required in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or otherwise use, whether or not they hold ownership title to those lands"* (e.g. ILO 2007). The Inter-American Court of Human rights (IACHR) in *Saramaka People v. Suriname* of November 2007 moreover ruled that such communities are entitled to their ancestral lands regardless of national legislation, and on these grounds must be consulted.

Colombian case law regarding prior consultation

Besides national legislation, the Colombian government is also bound by rulings on the right to consultation of indigenous peoples made by the Colombian Constitutional Court, which since 1997 (Ruling SU-039/97 regarding consultation on oil extraction in the habitat of the U'wa), has repeatedly upheld this fundamental right of indigenous peoples and afrodescendant communities, also in several recent judgments. It is no coincidence that some of these Constitutional Court rulings were concerned with large-scale mining projects.

- July 2010 (Ruling T-547/10) in which the Court ordered interruption of construction of the Puerto Brisa harbor because the consultation rights of the indigenous peoples of the nearby Sierra Nevada de Santa Marta had not been respected.
- March 2011 (Ruling T-129/11) in which the Court ordered the suspension of development of a road and mining concession in indigenous territory, again because the consultation rights of the affected indigenous peoples had not been respected.
- May 2011 (Decision C-366/11) in which the Court invalidated the recently amended Mining Act (Act 1382 of 2010) because the government had omitted to consult indigenous peoples prior to its enactment in parliament.

In another important judgment (Ruling T-769 of October 2009, in which, on grounds of inadequate consultation with affected Emberá and afro-Colombian communities, the Court ordered interruption of the exploration phase of the Mandé Norte mining project in Murindó, Antioquia) the Colombian Constitutional Court is citing international case law on the subject. The ruling referred to by the Colombian Court was that of the Inter-American Court of Human Rights (IACHR) in the above-mentioned *Saramaka case* (2007), which defines details of the obligation of prior consultation in the context of large-scale development projects. Besides establishing that consultation must occur in the earliest stages of a development

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concerned with the Standing Committee for Coordination with Indigenous Peoples and Organizations (Sp.: *Mesa Permanente de Concertación con los Pueblos y Organizaciones Indígenas*).

project, based on complete information and through culturally appropriate procedures (i.e. through representative indigenous institutions), the ruling also emphasized that the State has a duty not only to consult with the indigenous peoples and tribal communities that may be affected, but also to obtain their free, prior, and informed consent (paragraphs 133 and 134).

IAHCR case law is legally binding in Colombia, by virtue of the country's participation, alongside other Latin-American States, in the Inter-American System for Human Rights (IASHR). The national indigenous organization ONIC however accuses the Colombian government of a lack of political will to implement Ruling T-769/09, in the light of the Ministry of the Interior and Justice's recent appeal to the Constitutional Court to have the ruling overturned.

Consultation with indigenous communities by Carbones del Cerrejón

Carbones del Cerrejón, the mining company and franchise holder of the Cerrejón coal mine in La Guajira that IKV Pax Christi visited in May 2011, in Colombia is, no doubt, a frontrunner in taking responsibility for the social impact of its mining operations. Cerrejón has documented an impressive plan for the consultation of the affected (Wayúu) indigenous population about its proposed Expansion Project (Cerrejón 2011). The mining company says the plan is based on relevant national and international standards (Decree 1320 of 1998 and IFC PS7). A considerable section of the indigenous (Wayúu) communities in the wider region (i.e. not only those in the "influence area" as determined by Cerrejón) have raised great concerns about the proposed modification of the Ranchería River. These concerns have been publicly expressed in a press release in November 2011[10].

As the procedure is currently still in the pre-consultation phase, several important questions about the future consultation process remain as yet unanswered. Critical questions of IKV Pax Christi can be divided over four main issues:

- the criteria set by the mining company for determining the "direct and indirect influence area" of the expansion project;
- the number of residents of the area and how many of them are to be consulted (representativeness);
- agreements about independent monitoring and verification of the consultation process;
- the responsibility and role of the Colombian government in the consultation process.

Related to the subject of prior consultation, there are also questions regarding:

- the mining company policy on socioeconomic development in the affected area.

Questions about Cerrejón's policy on human rights and safety will be covered in a separate document.

a. Determining the influence area of the expansion project

The area defined as the "direct influence area" includes the zones (and communities) that fall within the expansion project's concession area and the ecological corridor formed by the banks of the Ranchería River from the water dam (the Palomino reservoir) to the estuary in the Caribbean sea. The "indirect influence area" is defined as the zones (and communities) that lie in "the remaining catchment area of the Ranchería River".

[10] http://www.colectivodeabogados.org/Inteligencia-ilegal-de-la-fuerza

It appears that the influence area is determined mainly on the basis of physical and ecological criteria; factors such as social discord (between supporters and opponents), economic differentiation and the safety situation play a subordinate role. Moreover, it is unclear how in the planned consultation a distinction will be made between more and less affected sections of the population.

To do justice to the actual social situation of the affected population, IKV Pax Christi advises the use of a broader set of variables in determining the size of the expansion project's influence area, taking account of the mining project's direct and indirect socioeconomic effects. Furthermore, the mining company is advised to more specifically point out in its plan the way and extent to which specific sections of the affected population (indigenous and afro descendant groups and ordinary citizens/residents) will be potentially affected by the project.

b. Determining the size of the population to be consulted

The population that will be directly affected socially and environmentally by the project is estimated at 22,000. Of this group, 7,900 are members of communities adjoining the mining project, most of which (7,668) are Wayúu, and the rest (14,100) are indigenous and non-indigenous residents of the municipalities in the lower Ranchería River basin. Cerrejón says that eventually only 1,600 of these people are to be consulted.

Cerrejón justifies choosing a small group to be consulted with cultural arguments (see below under c), while informed outsiders as well as several Wayúu community leaders from outside the influence area point to the deterioration of traditional authority and decision-making institutions in the area. In this context, these people acknowledge that it must be considered problematic that the Wayúu people (nation) as a whole is lacking centralized leadership[11]. In view of these factors, there seems to be a strong need for wider consultation (more people of different ages and backgrounds).

In the interest of clarity, IKV Pax Christi proposes that Cerrejón states more clearly in its plan who is to be consulted, where, and to what extent. For instance, it would appear logical that, for example, the voices of indigenous people from the direct influence area weigh more heavily than that of non-indigenous people from the indirect influence area. Besides this, Cerrejón is advised to broaden the group of people to be consulted.

c. Monitoring and verification of the consultation process

Indigenous Cerrejón employees have reported that the affected Wayúu in the established influence area have decided against having independent observers attend the consultation process. The affected communities are to identify observers from within their own ranks (clan group), specifically community elders who will act as "witnesses". It is unclear from the available information about the planned process how the Wayúu involved in the Cerrejón consultation arrived at this decision, and the underlying motives remain a matter of speculation. Outside observers (also Wayúu) claim that, contrary to their intended purpose, these leaders take advantage of the consultations to negotiate short-term improvements to the living conditions in their communities. In other words, there are serious doubts among Wayúu leaders from outside the influence area about the legitimacy of this decision.

[11] This information was obtained during a special meeting with community and social organization leaders on the topic of "mining in indigenous territories and prior consultation", organized by IKV Pax Christi in Riohacha on November 18, 2011.

IKV Pax Christi and other local observers (both Wayúu and non-Wayúu) are convinced that monitoring and verification by an independent external party would greatly enhance the transparency and legitimacy of the consultation process towards the outside world[12], which is important for the sustainability of the ultimate agreement if consent is obtained, and are therefore in the interests of all project stakeholders (company, communities and government).

d. The role of the Colombian government in the consultation process

International law imposes a duty on the State to initiate, coordinate and monitor the process of consultation with indigenous peoples; governments, in principle, are not supposed to delegate this responsibility to companies.[13] Even so, experience, also in Colombia, has shown that matters often proceed differently in practice. While the coordination and supervision of the consultation with indigenous and black communities in Colombia is the responsibility of the Ministry of the Interior and Justice, it often appears that in practice at least some of these duties are delegated to companies, for logistical or budgetary reasons. In the case of the Cerrejón Expansion Project, the mining company appears to act as the main party managing and defining the consultation process.

It is insufficiently clear from the available information which agreements the Colombian government and the company have made about the distribution and coordination of specific tasks, in particular the supervision of the consultation process and the validation of the final results. It is equally unclear how representativeness and impartiality in the process is assured, or what guarantees the government has put in place for its own compliance with ILO C169.

According to IKV Pax Christi, regarding the Cerrejón Expansion Project more clarity is needed on the role of the government in the consultation process as well as about the agreements between the government and the company regarding the consultation process.

e. Policy on socioeconomic development

Cerrejón spent approximately USD 10 million in 2010 on socioeconomic projects for the population in the direct and indirect influence area and the region in general.[14] The mining company paid another USD 184 million in royalties and USD 418 million in taxes to the State in the same year (www.cerrejon.com). Of the royalties – under the old royalty system[15] – 70% was paid to regional and municipal authorities (administrative units of the producing region); a similar calculation for the distribution of tax income between central government and the producing regions is complicated by the many kinds of tax levied on the mining industry. However, much of the regional mining-related income is lost through inefficient management and corruption, and therefore does not benefit the development of the population.

[12] Some local social organizations, such as a student organization of the Maicao University in Guajira, have already volunteered to become involved in such independent monitoring of the consultation process.

[13] ILO C169 states *"the obligation to ensure appropriate consultation falls on governments and not on private persons or companies. Ensuring consultation and participation [of indigenous and tribal peoples] is the responsibility of the State"* (ILO 2009: 61).

[14] Of this USD 10 million, USD 5.5 million went on the "system of (4) fundaments", in the form of specific projects for communities in the influence area; the other USD 4.5 million went on: (1) health care; (2) education and young people; (3) community projects; and (d) art, culture and tradition. A source of confusion in this account of the distribution of social investment is the lack of clarity about which part of the population (influence area/region) benefited from the investment. Cerrejón says only that 'more than 300 thousand people' gained from the investment.

[15] A new royalty system that was given parliamentary approval in law in June 2011 will ensure that a larger proportion of this revenue will flow to the central government treasury in the near future; the share of royalties flowing to the regions will gradually reduce to 25%. This controversial amendment has a major potential impact on the socioeconomic development of oil and mineral-producing regions (Reuters, 9 June 2011).

The above figures clearly show that the size of Cerrejón's investment in its social development program – *Sistema de Fundaciones* (www.fundacionescerrejon.org) – is relatively modest in proportion to the financial value of the royalties and taxes the mining company pays to regional and municipal authorities. Cerrejón's *Sistema de Fundaciones* (System of Fundaments) claims to pursue sustainable local and regional development by supporting four programs: *(1) viable alternative economic activities and promoting an "entrepreneurial culture"; (2) water supply, sanitation and management; (3) improving the quality of life of these communities by reinforcing cultural heritage; (4) institutional strengthening of organizations in the public sector and of civil society*. Further scrutiny of this program reveals however that it mainly consists of separate socioeconomic and cultural projects that are fairly limited in scope and seem to be ill adapted to the specific cultural and social context of the target population, which in the influence area of the expansion project is largely indigenous (Wayúu).

According to IKV Pax Christi the payments of royalties and taxes could potentially produce a much larger development impact. For this to become reality, Cerrejón should produce a long-term development plan in collaboration with national, regional and local authorities as well as local communities, and monitor its execution. The central objective should be to guarantee the social and economic viability of the region after the future closure of the mine. Currently, Cerrejón appears to be reluctant to take a greater role in assuming responsibility for supporting local authorities in the transparent management of these financial revenues.

In this regard, IKV Pax Christi would finally like to point out that indigenous and black communities enjoy special rights regarding their participation in the management of municipal and regional resources obtained from mining royalties and taxes. The Mining Act (Act 685 of 2001, Article 129) states that *"municipalities that receive royalties or shares from mining operations in indigenous territories […] must expend the corresponding income on projects and services of direct benefit to the indigenous communities and groups that live in these territories"* (translation by the author).[16]

Recommendations for Colombian policymakers

In January 2009 the Special Rapporteur on the Rights of Indigenous Peoples wrote in his report on the situation in Colombia that *"the development of an effective procedure for consultation in accordance with international standards […] [is] one of the greatest challenges facing Colombia"* (Anaya 2009a: 22). Following the Colombian Constitutional Court and ILO, he also emphasized the fundamental importance of continuous participation and consultation of indigenous organizations and groups in a legislative process of this kind.

Already in December 2008, the Ministry of the Interior and Justice issued Resolution 3598, thereby setting up a special Working Party on Prior Consultation, which started drafting a statute (Sp.: *ley estatutaria*) to regulate the consultation process. However, organizations of indigenous and black communities were not involved in this process. Regarding the initial output of this Working Party – which is not publicly available – the ILO in 2010 concluded that: *"the content of the bill has not eliminated the problems of Decree No. 1320 and does not envisage consultation as a process of genuine negotiation between the parties involved"* (ILO

[16] See also Act 141 of 1994, concerning the *Fondo Nacional de Regalías* and the regulation of the distribution of royalties.

2010). The committee also encouraged the government to seek technical assistance from ILO in the follow-up process.

- The government must persist with current initiatives for the development of specific, general legislation for prior consultation, in which the effective participation of indigenous and tribal peoples is guaranteed.
- The law on consultation must set down clearly the responsibilities of the parties involved in the consultation process, in particular those of the government, without prescribing the specific form of consultation.
- The government and other involved parties must request technical assistance from the ILO, the Special Rapporteur on the Rights of Indigenous Peoples and the international community in this legislative process.
- The new, general Act for the prior consultation of indigenous peoples and black communities must be harmonized with sectoral legislation that directly affects their rights and interests (e.g. mining, the environment and rural development).
- In the meantime, the government must continue ongoing consultation processes and bring them into line with the requirements of international law and international case law (e.g. concerning the circumstances in which indigenous peoples have a right to consent).
- Regarding the coordination and supervision of consultative processes by the Ministry of the Interior and Justice, a special fund must be created with income from royalties and taxes.
- It is important that the Ministry of the Interior and Justice publicly announces the start date and procedures of the consultation process – well in advance (three months minimum) – to directly and indirectly affected indigenous peoples.
- A clear distinction should be made between, on the one hand, the pre-consultation process, including information disclosure, and, on the other, the formal consultation. The latter process in particular should be initiated by the State.

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