Possibilities and Perspectives of Indigenous Peoples with Regard to Consultations and Agreements within the Mining Sector in Latin America and the Caribbean: Thematic Exploration

Prepared by Gladys Jimeno Santoyo

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“The knowledge and millenary cultural memory of the Indigenous communities of the Sierra, the Ikja, the Kaggaba and the Wiwa all say that the Sierra Nevada was left to us from the beginning as our house, as our body which we have to inhabit, which we have to take care of as a sacred being. This is why we must live in balance and harmony with the water, the wind, the sun, and the earth, in peace with nature, which is our own nature.

If we do not live in peace with nature we cannot live in peace with ourselves.

We know how to take care of our territory; we know and respect the Law of Origins. When the Sierra is inhabited by people who do not know or respect our laws, by people who do not live the Indigenous tradition, then the sacred places are damaged, the Sierra is damaged and that takes away part of our force; thus, it is increasingly difficult to take care of the world which is our law and mandate of origin …

A hearth without firewood produces no fire, and firewood without fire does not burn, just like an Indigenous tradition without a place to live it is like a hearth without firewood or fire. This is why the Indigenous Peoples of the Sierra, the Ikja or Arhwacs, the Kaggaba or Kogi and the Wiwa or Arzaris, in the voice and words of our Mamos [high priests], demand the right to our land, to our body in which to develop our spirit, our tradition and law. Thus speak our wisdom and cultural memory, thus we think and say.”

– Kogui (cited in DGAI 1998b)
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1. Executive Summary

Indigenous Peoples are at several crossroads as a result of the development model that prevails in the market and Western models for state and democracy. One of those crossroads is the dichotomy and antagonism between the dynamics for affirming and reproducing their cultural identity, and the current national and international practices in the exploitation of natural resources, including mining. Policies for exploiting natural resources have placed Indigenous Peoples’ autonomy, territory and cultural identity under constant threat — these policies are threatening Indigenous Peoples’ integrity and survival because they affect the dynamics of ethnic and cultural reproduction.

The dynamics involved in developing and exploiting natural resources, and those involved in protecting the human rights of Indigenous Peoples, together with Colombia’s experience with consultation and agreement, create a critical juncture for reflecting on Indigenous perspectives with regard to processes of dialogue, agreement, consultation, negotiation, and free, informed and prior consent in situations that could have a negative impact on their future.

The main objective of this project is to contribute to the discussion on the perspectives of Indigenous Peoples in order to build effective intercultural instruments capable of recognizing ethnic rights and autonomies and ensuring the survival of cultural multiplicity.

For this purpose, the project analyzed Colombia’s changing mining policies, local Indigenous perspectives (focusing in particular on specific case studies) and the perspectives of representatives from national Indigenous organizations with regard to their experiences with agreements, negotiations and prior consultation. The researchers also studied the development of national norms and policies regarding prior consultation and its application. An international exchange among the project teams was critical in identifying the need for a national analysis of ILO Convention 169 with a particular focus on the issue of free, informed and prior consent.

In Colombia, the armed internal conflict is expanding and intensifying. This process determines the most critical issues that Indigenous Peoples have to face in their current forms of resistance, which include defending their territory, preventing forced displacement or relocation, protecting the lives of their leaders and traditional authorities and protecting the Peoples and communities collectively. In this context, the issue of prior consent to projects is not one of the current political priorities for the Indigenous Peoples or for the state. However, the lack of action in relation to this issue provides an opportunity to reflect on its importance for the future. This reflection is — and will be — very useful because, although prior consultation is in fact no longer being implemented by the Colombian state, mining projects in Indigenous territories and territories belonging to Black, farming and traditional communities are expanding and increasing in number. Not only are these projects and processes affected by the violence, but also, in different cases, mining activities are being encouraged by various factors related to the armed conflict, and are even protected by some of the illegal armed factions.
The first phase of this project involved a thematic exploration of Indigenous perspectives on these issues, based on Indigenous experiences with mining and other sectors. This exploration resulted in a deeper understanding of fundamental concepts related to consultations and agreements with Indigenous Peoples. However, it is still necessary to delve more deeply into other aspects of the issue, such as: what consultations and agreements mean from an Indigenous perspective; how they serve as legal and non-legal instruments for furthering inter-cultural contact; and what the possibilities are for influencing national policy.

During a joint workshop that took place in Jawalla, Guyana, involving project research teams from Canada, Guyana and Colombia, a new topic for reflection emerged for future consideration within the Colombian context. It became evident that international human rights organizations interpret ILO Convention 169 as an instrument that promotes the free, prior and informed consent of communities, rather than simply promoting prior consultation in which the topics of decision-making and autonomy are left unresolved. This new interpretation must be examined in the second phase of the research because it could redefine the scope of prior consultation. Such an examination could help fine-tune discussion on prior consultation, and lead to an exploration of the legal, development and policy implications for Colombia.

With regard to Indigenous experiences with negotiations, agreements and prior consultation, the project began with an analysis of cultural concepts from Indigenous perspectives — concepts such as “development”, “cultural identity” and “territory”. It also analyzed the criteria and procedures used and defined so far, the spheres for applying them, and their scope. Additionally, the project examined prior consultation as an instrument for protecting the human rights of Indigenous Peoples as collective subjects. It also examined the limitations of prior consultation as an instrument for pluralistic or democratic participation, for articulation among different systems with autonomous governments and for furthering relationships with the national level.

This document presents an initial thematic exploration of the issues. Without a doubt, the analysis in this document will be enriched through further analysis and research undertaken in future phases of this project.

2. Introduction

Indigenous Peoples are presently facing multiple crossroads emerging from the model of development that prevails in the market and from Western-type state models. One of those crossroads is the dichotomy and antagonism between the dynamics for affirming and reproducing their cultural identity, and the current national and international practices in the exploitation of natural resources. Policies for exploiting natural resources threaten the autonomy, territory and cultural identity of Indigenous Peoples in Colombia and other parts of the world. These policies threaten the integrity and survival of Indigenous Peoples in that they affect the dynamics of their ethnic and cultural reproduction.
At the same time, nation states are compelled to approve and implement norms, treaties, directives and declarations about human rights and the protection of Indigenous Peoples and other ethnic groups, and to change from requiring homogeneity to embracing pluralism.

Different international inter-governmental organizations and social and/or political movements demand that national governments comply with and respect Indigenous rights. This pressure increases as it becomes more evident that groups that are culturally different from the dominant national society have historically been placed at a disadvantage or have been subjected to major discrimination, denial of the possibility to be and express themselves, violations of their rights, or slavery and servitude.

In Latin America, the current national development models are based on the following elements: exploitation of human resources; systems of democracy; “modernization of the state”; globalization of the market; and international tendencies toward privatization and individualization of things in the public sphere. These trends leave in their wake deep social, economic, political and cultural contradictions. In particular, they affect societies and cultures that have very different social, economic and political structures from those of the market and from the scheme of individual subjects defined by things private.

Some of the most serious conflicts between Indigenous Peoples and the state have occurred when the dynamics for development and exploitation of natural resources have clashed with the interests of Indigenous groups or other ethnic groups, thereby threatening the ethnic and cultural survival of these societies. These high-conflict situations have shown the rigidity of the state and the private sector — as well as their lack of political will to try to harmonize their development interests with the rights of Indigenous Peoples. The political stances taken by the state and the private sector have helped to polarize conflicts and have made it even more difficult for Indigenous Peoples’ organizations to establish policies to overcome that polarization.

These social, ethnic, cultural and environmental modalities of conflict have frequently taken place around large-scale mining projects, the exploitation of hydrocarbons, power generation projects such as the construction of large hydroelectric dams, land transportation and communication networks, or logging. In addition to the above, the internal armed conflict in Colombia places Indigenous Peoples and Black communities in the path of a war that seriously affects their territorial and cultural autonomy and life situations.

Where these factors come together within Indigenous territories, forced displacement — or, rather, exile — of Indigenous, Black, and peasant communities has taken place, together with the disappearance of their leaders, threats against their traditional authorities and members of their organizations, and massacres and sieges by armed groups which limit the communities’ freedom to circulate, express themselves, organize and live. In addition, it is in those areas with the highest levels of violence in Colombia that the exploitation of natural resources takes place, and where energy or mining projects are located.

Overall, the ‘balance’ or outcome of the effects of these projects in social, cultural or environmental terms is often negative. In many cases, these negative outcomes not only affect the interests of the communities, but also the interests of the state and private companies.
Consultations, agreements and dialogues have been the natural instruments available to ethnic groups in Colombia to help deal with the differences, eliminate antagonisms and reach a consensus that provides equal benefits to the various parties with different interests. However, these mechanisms have not always been applied, because the more powerful actors have sought to impose terms rather than negotiate.

Dialogue, consultation and agreements later came to be legally recognized as instruments to support the participation of societies that are disadvantaged or face discrimination, and to protect their self-governance. These instruments also serve as a method for helping the various parties recognize each other in a spirit of acceptance and respect for differences.

However, although the concepts of consultation, negotiation and free, prior and informed consent are included in international legal norms and, to a lesser degree, in Colombian laws, and despite various efforts to have these concepts culturally and legally accepted by state, national and multinational companies, there is still strong resistance to implementing these concepts. Nation states in Latin America, including Colombia, have been inclined to dismiss these instruments of intercultural dialogue and impose authoritarian and arbitrary government decisions that only take into consideration the point of view of one of the parties involved.

2.1 The project

In the context of Colombia’s current dynamics of development and exploitation of natural resources, its measures to protect Indigenous Peoples’ human rights, and its ample experience with consultation and negotiation, and in light of the ongoing pressures and negative impacts of developments on Indigenous land, it is critical reflect on the issues at stake from the perspective of Indigenous Peoples themselves, including their traditional authorities and organizations.

Considering the progress being made with current revisions to the country’s mining policies — in contrast to the law on prior consultation and its lack of implementation, and in light of the future analysis that will be undertaken with regard to free, informed and prior consent — it is necessary to renew dialogue and reflection on these topics, even though, because of the armed conflict, these issues are not the order of the day.

2.2 Methodology

This phase of the project was an exploratory phase to create a knowledge base about the practices of consultation and agreement. The following team was established:

- A lead researcher, Gladys Jimeno (psychologist, human rights), in charge of the literature review on human rights, workshop activities, data organization and analysis and preparation of the report.
- Two co-researchers, Claudia Puerta and Julio Barragan (anthropologists), in charge of fieldwork (working interactively with the participating communities to gather information on their experiences and expectations about the consultation processes).
One general coordinator, Omaira Mindiola, in charge of administrative and operational functions for the project and also in charge of following the handling of the issues in the performance of the activities.

**Local operating issues**

Because of the large number of cases of prior consultation (in contrast to the size of this initial phase of the project), the project team selected a sample of experiences. In addition, a National Indigenous Advisory Committee was established to guide the project. The Committee included members of Indigenous organizations involved in the case studies selected, as well as representatives from the two national Indigenous organizations (in order to provide a national perspective and expand on the knowledge gained from experiences covered in the study). The Committee also ensured that it had the participation of a female Indigenous leader.

A participatory methodology was used throughout the project, starting with the establishment of the National Indigenous Advisory Committee. Members included:

- Armando Valbuena, Wayu People, President of the Colombian National Indigenous Organization (Organización Nacional Indígena de Colombia (ONIC))
- Arregocés Conchacala, Governing Council, Gonawindwa Tayrona Organization (Organización Gonawindwa Tayrona (OGT)), Kogui or Kaggaba People, Sierra Nevada de Santa Marta
- Gabriel Bisbicus, President, Awa People’s Union (Unión del Pueblo Awa (UNIPA)), member of Indigenous Authorities of Colombia (Autoridades Indígenas de Colombia (AICO))
- Victoria Ballesteros, Wayu People, President of the Association of Traditional Akotshijirrawa Authorities

Although the Advisory Committee included representatives from around the country, members’ participation in the project was affected by their commitments to their own organizations. In spite of the efforts made by members to attend meetings according to the agreed schedule, there were difficulties in achieving full participation in some meetings. These weaknesses were evaluated and a decision was made to propose a restructuring of the committee for the second phase of the project.

The new committee began its mandate by reviewing this final report, but was particularly focused on planning for the second phase of the project, when it will become fully active. The committee will consist of:

- Victoria Ballesteros, Wayu People, President of the Association of Traditional Akotshijirrawa Authorities
- Armando Valbuena, President of the Colombian National Indigenous Organization (Organización Nacional Indígena de Colombia (ONIC))
- Oscar Uriana, Governing Council of the Mayabangloma Resguardo (Wayu People)
- Luis Miguel Carmona, Leader of the Ette Ennaka or Chimila People
The final report was also sent to outgoing committee members Arregocés Conchacala and Gabriel Bisbicus for their comments and feedback.

The cases examined in this project are located in northern Columbia: The Wayu territory in the Department of Guajira, and the Kaggaba–Wiwa–Ijka–Kankwamo Territory in the Sierra Nevada de Santa Marta. The cases are significant because different types of communication and strategy were used in each case to reach an agreement with the various actors in the negotiation process. The cases involved interaction between: the community and the state; the community and multinationals and the state; and the community and NGOs.

During the project, the four Peoples of the Sierra Nevada made an internal decision not to attend the last national workshop. This decision stemmed from a declaration issued by the four Indigenous groups on September 6, 2001 stating that they would refrain for the time being from participating in the projects currently being carried out in the Sierra, especially those included in the Sustainable Development Plan for the Sierra. This plan was the central topic discussed at the INER/NSI project’s workshop held in Santa Marta. To be consistent with this decision, and in solidarity with the other three Indigenous organizations, the Gonawindua Organization decided to abstain from participating in the project for the time being.

The cases considered in the fieldwork are:

- **Department of Guajira:**
  - Consultation and agreement to legalize the port located in the Portete
  - Agreements and negotiations regarding salt mining in Manaure
  - Consultation and agreement for coal exploration in Cerrejon Sur

- **Sierra Nevada de Santa Marta:**
  - Consultation on the Sustainable Development Plan for the Sierra Nevada
  - Consultation and decision-making related to building a coal port near the mouth of the Cañas River

Other cases of consultation were also used as frames of reference.

### 2.3 Activities

#### Workshops

In order to introduce the project, identify concerns about it and begin to discuss experiences with prior consultations with the Indigenous communities selected for participation, three workshops were carried out:

- One workshop with the Wayu People only;
- One workshop with the Organization of Peoples from the Sierra Nevada, the OGT, (including the Ette Ennaka or Chimila People due to their proximity);
• A final workshop that integrated all the participating Peoples so that they could share experiences and perspectives.

The National Advisory Committee met for the first time in Bogotá and later held its meetings on the day before each community workshop in order to prepare, together with the research team, the agenda and the contents for each workshop. One of the weaknesses of the Advisory Committee was its lack of consolidation, which was reflected in the fact that someone was always absent from the meetings.

The workshops had different dynamics, according to the Indigenous People to which the participants belonged and the nature of their experiences. The techniques used included historical narrative, collective work and presentations during plenary meetings. The presence of the Advisory Committee was very important to clarify the legislation and the current context. The representative from the Awa UNIPA presented, during the local Santa Marta workshop, the experience of his people with prior consultation about building a road, which is included in the case summaries.

Fieldwork

In addition to collecting primary information for the project, the fieldwork involved capacity building and training for the communities that did not have a clear understanding about prior consultation. This helped increase participation of Indigenous representatives in the workshops.

2.4 Specific objectives

• To define the degree of knowledge of the Indigenous Peoples about consultation;
• To identify the type of consultation conducted (especially in the mining sector);
• To examine Indigenous perspectives about key issues related to prior consultations, such as: consultation, negotiation, agreement, participation, development, progress, territory, autonomy, relations with neighbours, authority, representation and cultural identity.

2.5 Methodological strategies

• Small group meetings were held in different locations in the resguardos to share with the people the intentions of the project and the topics to be explored, and to publicize its objectives and their importance for the community. Through these workshops, there was active participation of men and women (youth and adults). These small groups discussed Colombia’s legal framework of prior consultation and clarified other key issues in the processes. Perspectives often differed among the participants.

• Individual interviews were held with traditional authorities and leaders who have participated in consultations. In the Sierra Nevada, in Valledupar, interviews with the Cabildo Gobernadores [High Councils] of the Kankuamo Indigenous Organization (OIK) and the Wiwa Yugumaun Bunkuanarrua Tayrona Organization (OWYBT) were conducted, as well as with other directors of the organization.
Visits were made to the homes of traditional authorities and key people in the community, which enabled trust-building. In the Sierra Nevada, the traditional authorities were visited in Nabusimake where the directors of the Tayrona Indigenous Confederation and traditional Arhuac authorities were involved. Also, the traditional Kaggaba authorities from the Garavito River basin (Bonga, Pueblo Viejo and Lwaka) were visited, and meetings were held with some of the *Mamas* [high priests] of the Kagaba People and members of the community.

3. **Context**

3.1 **Ethnic and cultural diversity in Colombia**

According to the last census carried out by the National Statistics Administration Department (DANE) in 1993, and using updated projections for the year 2000 generated by the same institution, Colombia has a population of 41,589,000. The Indigenous population has been officially estimated at two per cent of the total population, or 821,780. The Indigenous Peoples believe that their population is larger than indicated by the census and estimate their numbers at between 1,600,000 and 2,000,000.

Historians and anthropologists have said that at the beginning of the Spanish conquest in America, in the territory currently occupied by Colombia, there lived between six and ten million Indigenous people. These people had a social organization with high political fragmentation, no state formation and much fewer imperial formations than in other regions of America. There were large numbers of cultures, languages and forms of social organization and different adaptations to living conditions, in keeping with the large diversity of environmental conditions (Pineda 1995, among others).

There are 84 Indigenous Peoples in Colombia, with 64 different languages (many of the Peoples are bilingual). These Peoples currently own 25 per cent of the national territory under the title of Indigenous *resguardos*. The 84 Indigenous Peoples are spread throughout the territory. They live in 27 of the 32 departments of the country and in close to 200 municipalities (departments and municipalities are national political and administrative divisions). They are located along all national borders, in different ecosystems. The largest groups of Indigenous Peoples are located in Guajira. The Wayu are estimated to number 280,000 (of which approximately 130,000 live in Colombia and another hundred and 150,000 live in Venezuela); the Paez in Cauca number around 100,000; the Zenu, close to 60,000; the Quillacingas-pasto are close to 40,000; and the Embera number around 50,000. There are other Indigenous Peoples, especially in the Amazon region, who are going through a multi-ethnic merger (see Table 1).

There are departments in which the majority of the population is Indigenous, such as Guania (97 per cent), Vaupes (48 per cent), Amazonas (28 per cent), Cauca (23 per cent) and Guajira (22 per cent).
Table 1: Indigenous Peoples in Colombia

<table>
<thead>
<tr>
<th>No.</th>
<th>People</th>
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<td>Achagua (Aragua, Xagua)</td>
<td>43</td>
<td>Maku (Cacua, Ubde, Judpa)</td>
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<td>2</td>
<td>Amorua (Wipiwe)</td>
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<td>Masiguare</td>
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<td>3</td>
<td>Andoke</td>
<td>45</td>
<td>Matapi (Judichiya)</td>
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<td>4</td>
<td>Arhuaco (Ijka, Bintukua)</td>
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<td>Miraña</td>
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<td>5</td>
<td>Awá (Cuaiker)</td>
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<td>Mocaná</td>
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<td>6</td>
<td>Bara</td>
<td>48</td>
<td>Muinane</td>
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<td>7</td>
<td>Barasano</td>
<td>49</td>
<td>Muisca</td>
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<td>8</td>
<td>Bari (barira, Motilón)</td>
<td>50</td>
<td>Nonuya (Nunuya)</td>
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<td>9</td>
<td>Betoye (Jirarre)</td>
<td>51</td>
<td>Nukak (from the Maku family)</td>
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<td>10</td>
<td>Bora</td>
<td>52</td>
<td>Ocaina</td>
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<td>11</td>
<td>Cabiyari (Kawillary)</td>
<td>53</td>
<td>Paez (Nasa)</td>
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<td>12</td>
<td>Carabayo (Yuri)</td>
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<td>Piapoko (Deja, Dzase, Curipaco, Wenawca)</td>
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<td>Carapana</td>
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<td>Piaroa (Dearuka, Wotiheh)</td>
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<td>Carijona</td>
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<td>Quillacinga –Pasto</td>
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<td>Coyaima and Natagaima</td>
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<td>Sikjaani (Guahibo, Jivi)</td>
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<td>Siriano</td>
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<td>Cuna (Tule)</td>
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<td>Curripaco (Baniva)</td>
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<td>Dujos del Caguán</td>
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<td>Emberá (Catío, Chami)</td>
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<td>Ette Ennaka (Chimila, Simiza)</td>
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<td>Guambiano (Misag)</td>
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<td>Wiwa</td>
</tr>
<tr>
<td>35</td>
<td>Kankwamo (Concuamo)</td>
<td>77</td>
<td>Witoto (Murui)</td>
</tr>
<tr>
<td>36</td>
<td>Cofán (Kofán)</td>
<td>78</td>
<td>Yagua</td>
</tr>
</tbody>
</table>

Colombian Indigenous Peoples are very heterogeneous in terms of culture, territory, demographics, social organization, political organization, forms of self-government and social regulation, and spiritual systems. They also use a variety of economic systems based mainly on non-market forms. There are Peoples whose economy is based on hunting, gathering, fishing and itinerant agriculture, especially in the jungle, savannah and tropical desert. Other Peoples are currently re-creating agricultural and “farming” economies, especially in the Andean area. There are also Peoples who carry out small mining operations and handicrafts production.

Although their economies are not based on free market competition, Colombia’s Indigenous Peoples do maintain different forms of articulation with the market, both in trade and in different forms of salaried work in urban centers or in the countryside. They combine different forms of traditional economy with forms of exchange and redistribution that are based on the re-creation of reciprocity, solidarity and complementarity bonds related to holistic principles about the conception of life, social affairs, nature and spiritual affairs. Each Indigenous People has its own history of relationships and contacts with the national society and with the regional and local societies, with different forms of cultural or re-appropriation and with greater or lesser degrees of articulation with the capitalist system.

The landscape today is varied:

Most Indigenous Peoples have political and institutional, market, trade and labour, service and even entrepreneurial articulations with national societies and international agents. At the same time, they reproduce or reinvent their own cultural manners of being within their own social and territorial spaces. But always facing increasingly greater challenges due to the physical, economic or cultural advancement of “the frontiers of civilization. (DGAI 1997)

Columbia borders Panama, Venezuela, Ecuador and Peru and there are Indigenous Peoples along every border of the country. The Peoples located in border towns are usually bi-national because significant segments and partialities of these Peoples have historically lived in territories that belong to the neighbouring country. This is the case of the Wayu People, who live and are recognized in Colombia and Venezuela; the Kofanes, who live in Colombia and Ecuador; the Cunas and Emberas Wounan, who live in Colombia and Panama; and several other Indigenous Peoples. This condition has given rise to special bi-national agreements specifically for those Indigenous Peoples who are recognized as bi-nationals.
3.2 Indigenous Peoples and ecosystems

The Indigenous Peoples live in all ecosystems found in Colombia: the jungles and savannas of the Orinoco and the Amazon, the Andean region, along the three mountain ranges; the Pacific region, which has a special ecosystem (wet tropical forest); the Caribbean coast; and the semi-arid desert of Guajira. It is estimated that close to 60 per cent of biodiversity and renewable and non-renewable natural resources — including oil, minerals and the so-called strategic resources — is located in lands that belong to the Indigenous Peoples of the country. The wet tropical jungles of the bio-geographic ecosystem of Choco and those of the jungle and savannas in the Amazon and Orinoco river basins have special geopolitical and strategic significance for the current and future exploitation of Columbia’s natural wealth and biological diversity.

There is no doubt about the relationship between the great biological diversity of these lands and the cultural diversity of the Indigenous Peoples of Colombia. This relationship in turn is intimately linked to the various strategies for adaptation and conservation of the ecosystems — strategies followed according to the means of each People and the traditional knowledge acquired over centuries of existence.

3.3 Land

The current territorial situation of Indigenous Peoples in Colombia is the result of long historical struggles carried out by these people to recover part of the land that was taken during the Conquest, the Spanish colonization and the Republic.

During colonial times, the Spanish Crown granted, as part of its policies of submission and Christianization, titles for the creation of Indigenous resguardos to the Indigenous Peoples of the Great Colombia. This form of Indigenous resguardo is maintained at present in Colombia, although with very different legal implications than those of colonial times. At present, Indigenous resguardos are forms of private collective land ownership, unalienable, perpetual and not subject to garnishment. The concept of the resguardo has changed and today it is a legal concept that allows Indigenous Peoples to recover their territories, or at least part of them.

The resguardos have legal personality, and Indigenous Peoples are granted self-governance and internal autonomy. This legal entity is also a way in which the state acknowledges that the possession and use of the territory by Indigenous Peoples is basic to the dynamics of affirming their cultural identities and ethnic reproduction.

The struggles of the Indigenous Peoples for self-determination, territory and culture have transformed their relations with the nation-state, and have led to the establishment of new government policies on territorial affairs, recognition of the rights of Indigenous Peoples in the new Constitution of 1991, and other later legal developments. These developments have advanced the recognition of the rights to use, exploit and preserve the natural resources that exist within Indigenous territories. However, the recently approved mining code contains articles referring to Indigenous Peoples which go against rights that had previously been acquired.
The transformation in the relationships between the nation-state and the Indigenous Peoples has been implemented to such a degree that in the last decade most Indigenous Peoples in Colombia — between 85 and 90 per cent — have received collective title to their lands. Some 28.5 million hectares have been deeded as collective private property in over 456 Indigenous resguardos (see Appendix 2).

In spite of the above, there are Indigenous Peoples and/or communities that have not been able to gain access to or acquire ownership of their land. In other cases, the lands they own are not sufficient or adequate to guarantee their subsistence and their future. These Indigenous Peoples are more vulnerable and their future survival is more fragile. For them, territorial vindication is still a priority.

Indigenous Peoples consider territory as a symbolic space for the re-creation of their cultural and sacred affairs and, therefore, as the basis for their dynamics of life and ethnic reproduction. Indigenous territory, rather than being a means of production, a piece of merchandise or a source of resources to be exploited, is the habitat where their identities and their social, economic, spiritual and government relations are woven. It is the symbolic and material space where the relationship between nature, Indigenous Peoples, the sacred origin of things human, and the spiritual come together. To despoil the Indigenous Peoples of their territories is to despoil them of their culture and of the matrix where their identities are born and renewed.

**Indigenous territorial entities**

The Constitution of 1991 established Indigenous Territorial Entities as a new form of administrative political division. These Indigenous Territorial Entities are another manner, even more advanced, of recognizing Indigenous Peoples’ rights to self-determination, recognizing at the same time that they are Colombian nationals. Within the Indigenous Territorial Entities, Indigenous Peoples will have territorial, governmental, judicial, administrative and fiscal autonomy, and the corresponding administrative and government responsibilities. To the extent that Indigenous Territorial Entities contradict many of the logics and dynamics of regional territorial political power in Colombia, there have been several obstacles to their regulation and implementation. Special National Commissions have prepared several bills, but time and again they have not been passed. This is because they are subject to the approval of the macro law for territorial divisions, about which there are many diverse and contradictory interests that are difficult to bring together. Once again, the political crisis in Columbia has worked against the achievement of this Indigenous vindication. However, the issue is still a focus of Indigenous struggles. If agreements are made for future peace and reconciliation, this issue will be one of the key elements for discussion and agreement.

### 3.4 Identity

The Indigenous Peoples of Colombia — perhaps more strongly than elsewhere due to their situation as a minority population and the strategies for resistance they have implemented — maintain a great vitality, and their identity and dynamics for cultural re-creation continue to be vibrant. Efforts to reclaim the land, obtain property title to their resguardos and recover the
concept of traditional territory and sacred places have helped strengthen Indigenous traditions, internal authorities, practices in health care, education, economy, medicine, shamanism and spirituality. Tradition has been a cohesive force at the same time that Indigenous Peoples have been gaining experience with intercultural contacts through their dealings with the state and private individuals. There are also trends that corrupt Indigenous systems, especially under the influence of the avalanche of offers for resources and money, including the transfers of government resources to Indigenous populations and the countless projects with which they are approached.

This uncontrolled offer of resources, which has not taken into consideration the structures of these societies, has often become a factor that has negated Indigenous Peoples’ collective sense of their purpose and has produced problems of corruption and internal pressures. One of the challenges faced by Indigenous authorities at this time is to establish ways to control these trends and exercise their own control over the use of these resources.

3.5 Traditional Indigenous authorities and Indigenous organizations

The strength of authority and legitimacy of authority among Indigenous Peoples depends on the degree to which Indigenous thinking, needs and traditional customs have been applied to the process for creating those authorities. A process that respects the steps, rites, requisites and secrets of the culture is highly valued as part of the complete creation of a traditional authority. The greater the application of tradition to this process, the greater the recognition of and respect for authority.

The traditional authority is specific to each Indigenous People. For some Peoples it is the priest or spiritual authority. For others it is the doctor, healer or shaman. For others it is the chieftain, the captain or a political or social authority based on cultural prestige or material considerations. In some cases the traditional authority holds both spiritual and political authority; in other cases, these and other functions (such as health care) fall to different types of authority. Each culture has its own way of selecting or interpreting specific signs about who could be an authority. This could also depend on cultural factors related to lineage, which determines the mission or gifts with which the authority is endowed. Each Indigenous People, as well as each type of authority, follows a specific tradition and training process. For example, someone in training may be separated from community life for years, or during specific periods. Food restrictions, sexual abstinence, working with dreams, specific learning experiences, the use of sacred plants and many other practices are part of approach to teaching.

Traditional authorities are very important because they are still the key factor for cohesion of the collective identity and culture. They are also key with regard to social and economic regulations, politics, the relationship to the spiritual world and sacred affairs, the determination of the environmental restrictions and permissions, the exercise of justice and self-control, and the implementation of redistribution and reciprocity systems. It is the traditional authorities that look to the future and alert the people about the dangers brought by development, by upsetting the balance of nature, or by losing touch with the sense of the sacred or with cosmological duties. For some decades, the traditional authorities were relegated strictly to the internal affairs of their Peoples. However, during the last decade, the decisions, reflections and
participation of traditional authorities (according to the specific ways of each People) in the
decisions affecting the future of their Peoples have become more significant.

There is currently a trend among the Indigenous Peoples of Colombia to revalue and
renew the active role of their traditional authorities in the everyday social and political aspects of
Indigenous life, and in the decisions that affect the Peoples in their contact with other cultures
and with development. Perhaps in many aspects these authorities have the same status as before,
while in others a meaning that had been lost has been recovered, and in still others their
participation has always existed but has been a jealously kept secret.

There is no single form of Indigenous traditional authority; there are one or several
authorities for each People. In this respect, the forms of Indigenous authority are multiple.
During the stages of violent struggle to recover their lands and other rights, the leading role in
legal representation before national society and the state was not played by the traditional
authorities; instead, this role was assumed by Indigenous leaders (who were sometimes
traditional authorities themselves, or who were close to them). The job of legal representation for
some decades fell on young leaders who had received professional training or acquired skills on
their own and who actively exercised their role as cultural intermediaries.

These were decades during which, together with traditional authorities, Indigenous
leaders emerged who more skillfully exercised the defence of their vindications against political
and economic powers. This was fundamental to the establishment of some guarantees for the
survival of Indigenous Peoples and improvement of their living conditions. This group of
representative leaders gave rise to organizations that brought forth major achievements, such as
the re-creation of *resguardos* that had been dissolved, the recovery of lands that were in the
hands of large landowners, the right to receive ethnic education without evangelization and the
right to minimum standards of health care.

These vindication movements and the struggles of the Indigenous Peoples during the past
century gave rise to various Indigenous organizations that still exist. The Regional Indigenous
Council of the Cauca (CRIC) was created to represent an Indigenous People, the Paez or Nasa.
This People, led by Quintin Lame, started the rebellion against the expropriation of land and
forms of servitude such as *terrazgueros* and others in Cauca, Tolima and Huila. Later, the
Regional Indigenous Council of Tolima (CRIT) was created. This occurred in another place
where there were strong movements to invade large landholdings in an attempt to recover part of
the land that been designated as colonial *resguardos*. In this way, different local or regional
organizations were created to represent specific Peoples. With the drive of CRIC, the CRIT and
some Arhwak (Bintukua) leaders in the Valledupar slopes, the Colombian National Indigenous
Organization (ONIC) was born. This was the first social organization that established a national
dialogue with the state to resolve conflicts, negotiate, make agreements, make denouncements,
and promote solidarity and support, especially on issues of land, culture and self-determination.

The Indigenous Authorities of Colombia (AICO) was also created. This organization
became strong in southern Columbia and, together with other organizations, promotes a
strengthening of traditional authorities. Several regional Indigenous organizations were created,
initially as affiliates of the ONIC, such as OPIAC (Amazon area), OIA (Antioquia), OREWA
(Choco), OZIP (Putumayo) and others. The ONIC currently represents five micro regions and these regional organizations are more clearly autonomous.

Other regional or local organizations were created by Indigenous Peoples themselves, independent from the two national organizations. These include the following regional organizations: Gonawindua Tayrona Organization (OGT) of the Sierra Nevada de Santa Marta; the Tayrona Indigenous Confederation (CIT); and the Awa People’s Union (UNIPA) in Nariño. Several local organizations have been developed — for example, among the Wayu, due to their segmented and politically decentralized social structure.

It is important to recognize that, in parallel to the centralized and politicized organizational movement of Indigenous vindications in Colombia, many Indigenous Peoples have maintained their local and regional organizational dynamics with a sense of vindication and struggle that is independent from those centralized structures. These autonomous local and regional organizations are just as effective in obtaining recognition for Indigenous rights, and their strategies are developed in solidarity with the struggles of other Indigenous Peoples. The organizational strength of these groups is based on cultural strengthening, as the Koggi, Arhuacos, Wiwa and Kankwamo Peoples recently declared in their September 6, 2001 “Declaration of the Territorial Town Councils to the Regional Environmental Council of the Sierra Nevada de Santa Marta”:

The most important task that the Indigenous Peoples of the Sierra Nevada de Santa Marta, their authorities and representative organizations have at hand is to formulate Indigenous policies to foster territorial consolidation, to strengthen our self-government and cultural integrity on the basis of traditional development.

This complex fabric of organization and representation has played many important roles. Indeed, each level has played important roles: the national, regional and local organizations, and increasingly the traditional authorities, including the Cabildo Gobernador (governing council) of those Indigenous Peoples who appropriated this form of governance. There is no doubt that the re-evaluation of traditional authorities and their principles as authorities and governments has paved the way for these authorities to be powerful forces once again in the recovery and strengthening of identity and tradition. Indigenous Peoples in Colombia are going through a dual process in this respect. Although for several years organized political resistance was critical in ‘guaranteeing’ their territories and cultures, the current focus — alongside political organization — should perhaps be the presence and guidance of traditional authorities based on their visions. This would ensure that cultural re-creation again takes centre stage, and that undue attention to political affairs does not stifle Indigenous identity.

Another way of looking at this schematically is to examine the various levels of representation within Indigenous Peoples in Colombia: traditional authorities and governing councils; local or Indigenous Peoples’ organizations; regional organizations (with representatives from several Indigenous Peoples in an area who have common characteristics or similarities); and the national organizations to which regional organizations are variously connected.
In addition to the above, Indigenous Peoples have also achieved representation in the legislature as an electoral district that was recognized by the National Constitution of 1991. Indigenous people have sat on the constitutional assembly; several have been senators; others have been elected without a special district to the House of Representatives; and many participate in municipal councils. Also, they have been popularly elected as mayors in municipalities where the Indigenous population is large. Currently Colombia has the first Indigenous governor of a department, the Department of Cauca. Indigenous women have been members of the boards of directors of Indigenous organizations for over a decade, which has prompted reflections about their specific roles and outlook, and has led to the organization of several meetings and workshops on these topics. The ONIC also has a Secretary for Indigenous Women. Several Indigenous women have also been representatives before the legislature and others are candidates for the upcoming elections.

In terms of the relationship with the state, there are different levels of dialogue and participation — some national and some sectorial. On the national level, there is the National Commission of Land and the Negotiation Table of the Indigenous Peoples (Decree 1397 of 1996), and the Human Rights Committee (Decree 1396/96). Indigenous Peoples are currently questioning the achievements and efficacy of these fora, and have criticized the government’s lack of political will to implement the policies agreed upon within these fora. During 2001, the ONIC officially withdrew from these tables because it believes the government is not providing any serious answers to the problems, and therefore the tables are not working (ONIC 2001).

The laws in Colombia recognize traditional Indigenous authorities as special public authorities, which means that Colombia’s traditional authorities have the status of a special government and have specific responsibilities in different public sector spheres (health, education and the environment, among others). These levels of participation in sectorial administration or municipal government are very important, although even today this participation has to be assessed further, together with the exercise of the special Indigenous and jurisdiction.

3.6 Indigenous Peoples and national development

Colombia has not escaped the impact of globalization as a dominant force in the 20th century (UNDP 1999). Globalization has fostered much closer relations among countries, especially in the financial sector, affecting trade, capital, information and political regimes, as well as individual rights. It has generated extreme consequences, such as the destruction of what is considered ‘collective’, in order to conquer markets through permanent selection, within a context of generalized competition (Ramonet 2001). One outcome of this new economic policy is the advancement of information and communications technologies that have facilitated and established closer contacts not only among countries but also among people. The liberalizing trend characteristic of national and international economic policies since the 1970s and 1980s forced a greater dependence on the market, together with a decrease in the functions of the state.

Colombia’s economy went from being based mainly on agriculture to being based significantly on the mining and energy sectors (mainly for export). The exploitation of non-renewable resources has been encouraged, as has the exploitation of renewable natural resources
such as forests and biodiversity. Undoubtedly, the sense that Colombia’s mining and energy resources have an important role in the country’s economic and social development has forced a review of participation policies in order to ensure a new productive capacity in the world’s capital markets. Mining operations in strategic regions have been encouraged, supported by changes to the Mining Code and economic legislation to stimulate domestic and foreign private investment. “The country currently has estimated reserves for the major natural non-renewable resources with an emphasis on the coal and hydrocarbon potential. In June 1998 there were reserves for 6,640 million t of coal, 2,625 MBEP of oil and 6,800 GPC of gas” (Rodriguez 2000).

The implementation of large projects as a response to mining expansion and development plans has presented Colombia’s Indigenous Peoples with new crossroads and new challenges. If approximately 60 per cent of this wealth is found within their territories (according to some estimates) and their territories and future are at the crossroads of development, then it should be asked: How can the Indigenous Peoples be made beneficiaries of national development without sacrificing their culture or their territories? What rights do Indigenous Peoples have over the natural resources that are found in their territories but are actually owned by the state? There is no doubt that this dilemma between development and multiculturalism and diversity ties into the debate about autonomy, participation, agreements and consultations with Indigenous Peoples and other ethnic groups as collective subjects. According to the Colombian government:

The socio-economic modernization and direct effects on Indigenous territories from the advance of the fronts for extracting non-renewable resources, in monies, colonization and hydroelectric and public works macro projects; the territorial reorganization, reforms to the state that have been mentioned; and the growth of the media, violence and drug trafficking increase the challenges that modernity poses for Indigenous Peoples, prey on the living conditions of the Indigenous Peoples, and increase the degree of difficulty for them to maintain or improve their own life models. (DGAI 1997)

In addition to this complex situation, within the context of Colombia, the current internal war situation (internal armed conflict) dramatically affects Indigenous Peoples because their territories are the stage for confrontations among the various armed sectors. The territories occupied by certain ethnic groups are part of the territories in dispute for geopolitical and military control by the various armed sectors. This is giving rise to serious situations, ranging from the violation of autonomies and lack of free access and circulation for Indigenous peoples through their territories, to individual and collective threats against their authorities and leaders, and forced displacement within and outside of their territories (which causes multiple violations of their human rights).

This political violence, as surprising as it might seem to some, is related to the advancement of development in the form of natural resource exploitation projects that continue to grow in spite of the war conditions. The regions where the largest projects and mega projects for development exist are the regions with the highest level of social and armed conflict. (See Appendices 3 and 4, maps of the departments with indicators of the most critical armed violence; also see mining and oil maps.)

Over the past several years, this impact has been reflected in multiple assassinations and disappearances of Indigenous leaders who have spoken out against the current development
policies or against specific projects for the exploitation of resources. For example, there are the cases of the Embera leader, Kimy Pernia Domico; Pedro Alirio Domico in Urra; or Cristobal Secue, a Paez leader in Cauca. This violence takes place not only against Indigenous Peoples, but also against union leaders and leaders of Black and peasant communities.

4. Context of Mining in Colombia and Indigenous Peoples

4.1 General political context

Colombia, like the other American countries, is being affected by the international economic crisis. This is reflected in the figures for the GNP, which, beginning in 1996, started decreasing until it reached -5.2 per cent in the year 2000. Although economic recovery has begun, figures are still negative: unemployment is increasing and the economic crisis is augmented by the social, political and state crises, and by the consequences of internal armed conflict.

In spite of and contrary to the general trends in the economy, the trend in the mining and hydrocarbon sector is toward sustained growth. This is why the total GNP in this sector has grown increasingly higher since 1990. The sectorial GNP in 1998 was 4.64 per cent and increased to 5.64 per cent in 1999, growing by one point. It is expected that this trend will continue (DANE–DNP 2000). When this shift toward a mining economy took place, the development policies were adjusted to favour that trend. This has given rise to new problems related to territory, the environment, and impacts on agricultural communities, Indigenous Peoples and Black communities. The state has fostered a revision and modification of the mining laws and other issues that have to do with the exploitation of natural resources (such as participation and consultation), and has supported, as part of that modification, the development of different privatization policies.

However, although the ethnic and cultural diversity of the nation is a constitutional principle, and although the Constitutional Court itself has said that it is a fundamental collective right of Indigenous Peoples and Black communities, this principle has not been translated into intercultural policies or into a national culture of co-existence and respect for ethnic and cultural differences. This is why, although there might have been, at specific times, government or state intercultural policies for Indigenous Peoples or Black communities, the state’s implementation has been weak. Implementation of criteria for cultural and ethnic diversity, and for the responsibility of the state to protect and establish guarantees for these groups (so they can fully exercise their rights), has been weak and contradictory. It could be said that, in general, the government has given in to the interests and pressures of development policies to the detriment of a policy of respect for Indigenous rights, general well-being and peaceful coexistence.

4.2 The change from agriculture to mining for Indigenous Peoples

The model of development based on agriculture meant that in Colombia the Andean lands and the lands in the valleys between the Andes received preferential treatment where peasant agriculture, large landholdings or agricultural industry developed. The lands in the savannas and the plains dedicated to extensive cattle raising operations were also privileged.
During the periods when Indigenous movements recovered their territory, the lands where recovery was more difficult and harder fought were agricultural lands. The resguardos that were more easily constituted and the lands that were more quickly recognized as Indigenous were those lands located outside of this sector; that is, in the jungles, deserts or semi-deserts, plains, coasts, and borders between countries, far from the national political administrative center and without any agricultural use. Some Peoples were even displaced toward territories further from these Andean zones which at that time were not strategically interesting. In some of those territories, mines or deposits of hydrocarbons and other minerals demanded by the international industry were found during the 1920s, 1930s and 1950s. There was also gold, which has always been a focus of greed (See maps in Appendix 4 showing overlap of mining and Indigenous resguardos).

When the agricultural development model began to change toward mining for extraction and exports, the territories that were held as Indigenous resguardos and that had mining and energy resources became the focus of interest for national and international mining. The regions with the highest concentration of mining resources which coincide with Indigenous territories are found in the Departments of Antioquia, Choco, Cauca, Tolima, Huila, Caldas, Risaralda and Guajira. If these areas are compared to the colonial mining zones, it can be seen that they are exactly the same as the regions where the gold boom took place at that time.

Table 2: Mining Resources in Indigenous resguardos, by Department

<table>
<thead>
<tr>
<th>Department</th>
<th>Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antioquia</td>
<td>Energy, precious, ferrous, non-ferrous minerals</td>
</tr>
<tr>
<td>Chocó</td>
<td>Energy, precious</td>
</tr>
<tr>
<td>Cauca</td>
<td>Energy, precious, non-ferrous metals</td>
</tr>
<tr>
<td>Tolima</td>
<td>Precious, non-ferrous metals, non-metallic minerals</td>
</tr>
<tr>
<td>Huila</td>
<td>Energy, precious, non-metallic minerals</td>
</tr>
<tr>
<td>Caldas</td>
<td>Energy, precious, non-ferrous minerals</td>
</tr>
<tr>
<td>Risaralda</td>
<td>Precious</td>
</tr>
<tr>
<td>Valle del Cauca</td>
<td>Energy</td>
</tr>
<tr>
<td>Cesar</td>
<td>Energy</td>
</tr>
<tr>
<td>Guajira</td>
<td>Energy</td>
</tr>
<tr>
<td>Nariño</td>
<td>Precious, non-ferrous metals</td>
</tr>
<tr>
<td>Putumayo</td>
<td>non-ferrous metals</td>
</tr>
<tr>
<td>Santander(N)</td>
<td>Energy, precious, ferrous, non-metallic minerals</td>
</tr>
<tr>
<td>Santander</td>
<td>Energy</td>
</tr>
<tr>
<td>Guainía</td>
<td>Precious</td>
</tr>
<tr>
<td>Boyacá</td>
<td>Energy, non-metallic minerals</td>
</tr>
<tr>
<td>Vichada</td>
<td>Energy, ferrous</td>
</tr>
<tr>
<td>Quindío</td>
<td>Non-ferrous minerals</td>
</tr>
<tr>
<td>Amazonas</td>
<td>Energy</td>
</tr>
</tbody>
</table>
4.3 Historical context of mining in Colombia

Mining has been a traditional activity of Indigenous Peoples on the American continent since before the Spanish came to America. This activity was tied to their economy and also to their rituals, their ceremonial and religious systems, their everyday life, the development of their handicrafts, their arts and crafts and the dress of their authorities and warriors. The persecution in search for the gold that existed in Indigenous societies, the sacking of tombs and sacred places and the search for and appropriation of mines began with the conquest of America by the Spaniards, and was spurred by their uncontrolled agreed. After the sacking, deceit and looting was completed, the Spaniards established mining projects that they controlled. They used Indigenous labour, subjecting Indigenous people to subhuman forms of service that decimated them and caused a demographic catastrophe during the early centuries of the conquest and colonization (Pineda 1995).

Initially, the Spaniards exploited the gold from the same places as the Indigenous Peoples. When these mines were exhausted, they ventured to search for new deposits. From that time, mining was characterized as a sudden, opportunistic and unplanned activity, breaking into the social life of the Indigenous communities and societies abruptly and violently. This is a nefarious strategy that is still reproduced by mining projects today, although it has been adapted to contemporary historical circumstances.

From the beginning of the conquest, the Spanish Crown established rules about gold mining. In 1504, the first royal license was issued encouraging expeditions and the conquest of new American lands that promised gold. The Crown provided incentives, regulating the freedom of access to search and extract the mineral, and established the first fiscal mining tribute on gold, the “Royal fifth in gold”. The first regions to which Spanish gold mining extended were those known today as Antioquia, Lower Cauca, Lower Nechi, Frontino, Buritica, Marmato, Supia and Santa Rosa. Later came Choco, Novita, the Atrato River and other areas. Toward the end of the 16th century, in the region of Antioquia alone, gold extraction was considered the most significant economic activity. It was estimated that close to 8,000 Spaniards and mestizos as well as some 15,000 Indigenous Peoples were involved in that activity (Preciado 1995).

As a result of poor treatment, unhealthy conditions, poor food and abuse, the Indigenous Peoples were exterminated. After a century of sustained exploitation, the Spaniards acquired new labour. They made use of African slaves. The central market for these people was Cartagena. Black people were enslaved and subjected to the same or worse mistreatment — they lost freedom, they were relocated to a faraway land, their social structures were destroyed and they were subjected to the heaviest forced labour in the mines.
The Indigenous Peoples who survived were taken out of the mines and put to work transporting the minerals and other required materials by land or river, or were employed in other activities required by mining enclaves, such as building camps, planting and gathering food and building houses.

During the 17th century this type of mining decreased as a result of a variety of difficulties. Toward the end of the 18th century, however, the discovery of new deposits gave new impetus to mining activities. This impetus was maintained until the wars of independence. Creole miners participated in these wars with financial contributions from mining.

**Historical evolution of mining legislation**

At the legal level, over the centuries, the Crown slowly established the laws and principles that would govern mining in Colombia, giving continuity to the Spanish tradition. The first mining ordinances issued by Governor Gaspar de Rodas in 1584 established three fundamental principles: “a) the rights to the wealth found in the subsurface belong to the Sovereign; b) the limits of the area that the sovereign could grant as a concession to each person; and c) the precedence of the mining concession above the owner of the land or the holder of an agricultural concession” (Preciado 1995).

As a reaction and response to the countless claims and complaints of abuse that started to come to the King of Spain, the Spanish Crown issued the Compilation of the Laws of the Indies in 1680, which established a number of institutions for the protection of Indigenous Peoples.

With the Declaration of Independence in the territory of New Granada, the Liberator's Mining Decree was issued. This decree established national dominion over the subsurface, and adjudication as the legal means through which private individuals could exploit mines. However; ownership was granted through concession, and with this came the obligation of exploiting mines even before the deed was issued (Preciado 1995).

For a long time the mining legislation varied greatly. For example, in Cauca in the early 19th century, mines (except for salt and emeralds) were declared state property that belonged to the Confederation. Then, toward the end of the century, a total access regime was established in which the owner of the land was the owner of the mines. Using a different system, in Choco contracts were given in perpetuity and were recorded and notarized through public deeds. These became ways to access private ownership rights and specific concessions. During this period, the mines that did not meet all the legal requirements reverted to the nation. Later, a mining or concession license or permit was applied in Choco, like the one that is currently being applied in Colombia.

These legislative ups and downs gave rise — even during the 1970s and 1980s — to legal actions by private individuals to have their rights acknowledged as private owners of the subsurface, a recognition that in some cases has been accompanied by lawsuits that have made headlines all over the country. The mining laws issued in the mid- and late 20th century
determined the exclusive rights of the nation over subsurface resources and established as a condition for the right of access that active mining operations be maintained.

In 1969, Law 20 and the first mining code were issued. The code was adopted in Colombia as Decree No. 2655 of December 23, 1988, and has recently been modified through Law 685 of August 15, 2001. It is called the New Mining Code.

5. Context of the human and mining rights of Indigenous Peoples

A new political Constitution was adopted in 1991 that redefines the project of nation building on the basis of ethnic and cultural diversity (Article 7 of the National Constitution), acknowledging that Colombia is a multi-ethnic and multicultural nation. This new political charter made significant advances in recognizing the rights of the Indigenous Peoples and other ethnic or cultural groups. The Constitution recognizes for Indigenous Peoples (and also for other ethnic groups) their nature as collective subjects and, as such, a set of fundamental collective rights intimately related to the struggles and aspirations that Indigenous people have held for 500 years. The Constitutional Court affirms and explains these rights with the following interpretation in decision T-380-93, which reads in part:

the Indigenous community is no longer just a factual and legal reality and has become a subject of fundamental rights. In its case, the interests that are worthy of constitutional protection and that can be covered by these fundamental rights are not reduced to those that are predicated for its members considered individually but can also take root in the community itself, which enjoys its own singularity, which is precisely the assumption for the express recognition made in the Constitution of the ethnic and cultural diversity of the Colombian nation …

The special fundamental collective rights for Indigenous Peoples are: the right to territory (understood as traditional habitat); the right to cultural identity and re-creation of difference; the right to self-determination (that is, governmental, juridical, administrative, fiscal and territorial autonomy); the right to intercultural and pluralistic participation; and the right to development according to their own life plans (guided by their cosmology and social, economic and spiritual systems). These rights are vested on the Peoples, and their representation is vested on their traditional authorities, which are special public authorities.

Before the Constitution was created, Colombian laws were based on the following definition for Indigenous partiality or community:

a group of families of American Indian descent who share feelings of identity with their Aboriginal past, maintaining traits and values specific to their traditional culture, as well as internal forms of government and social control which differentiate the group from other rural communities. (Article 14, Decree 74 of 1898)

This constitutional and legal recognition has been the result of countless movements and Indigenous struggles that have transformed the legal and judicial systems of Colombia. Even today, movements are attempting to transform the relationship between the national state and
Indigenous Peoples because, although structural conditions and events have changed and the normative framework has been modified, the contradictions within society, the ethnic, social and cultural discrimination and the inequalities still persist.

These contradictory trends have allowed the development of both constitutional change processes and judicial and social dynamics for protecting and guaranteeing the rights of Indigenous Peoples and other ethnic groups. Since 1991 the Constitutional Court, the Supreme Court of Justice and the High Council of the Judicature have issued many decisions with progressive interpretations. These have included the legal materialization of the concepts of plurality, cultural diversity, autonomy and self-determination of Indigenous Peoples, and the public responsibilities toward Indigenous Peoples that the government and the state of Colombia must fulfill. These include decisions made concerning the U’wa (SU-03 9/97), among others.

The Constitution, laws and decrees contain definitions for the concepts of traditional territory, Indigenous resguardos (Article 63 of the National Constitution), Indigenous Territorial Entities (Article 286 of the National Constitution) and their form of government (Article 330 of the National Constitution). To facilitate participation in the economy of the Nation, the Indigenous resguardos were assimilated into municipalities in order to have access to the current revenues of the nation (Article 257 of the National Constitution). These resguardos began by receiving approximately 13 per cent of revenues, which would gradually increase to 22 per cent by the year 2002.

Another very important fundamental right is the recognition of self-government and of the special Indigenous jurisdiction — that is, the recognition that the political, governance and justice systems of Indigenous Peoples are still very much alive today and are exercised as a form of self-government, social control, regulation and justice. In this respect, Colombia has grown past the old system in which Indigenous Peoples were simply ruled by customs and mores. It is now recognized that Indigenous Peoples maintain both simple and complex government and justice systems.

5.1 ILO Convention 169: International Treaty on Human Rights

Articles 93 and 94 of the National Constitution state that international human rights treaties ratified by Colombia shall have the same force as constitutional norms; that is, they are incorporated within the Constitution.

ILO Convention 169 was approved in Colombia through Law 21 of 1991 and came into effect two years after it was ratified. It is a very valuable international instrument for the development, protection and defence of the collective human rights of Indigenous and tribal Peoples in independent countries. This treaty contains a series of rights that reflect the same direction and intent as the current National Constitution.

For example, the agreement establishes that it is mandatory to carry out prior consultations with Indigenous Peoples and tribes when any legislative or administrative act is likely to affect their future (Article 6). Also, where subsurface resources belong to the state, and prior to the authorization of exploration or exploitation of natural resources on Indigenous
territories, Indigenous Peoples must be consulted in order to determine whether their interests will be affected, and to what extent. Article 330 of the National Constitution reads:

The exploitation of natural resources in Indigenous territories shall be carried out without any damage to the cultural, social and economic integrity of the Indigenous communities. The government will enable the participation of the representatives of the respective communities in any decisions made about said exploitation.

The approval of ILO Convention 169 gave great legal force to Indigenous rights and provided Indigenous Peoples and ethnic groups with a powerful national and international tool to defend and achieve their rights. For over a century, the Convention was the main tool in support of Indigenous claims against the state and different sectors of the national society. The use of this Convention in different conflicts has been frequent and extensive over the past several years. Its use began almost as soon as it came into effect. Almost every Indigenous Person in Colombia is aware of its existence, and invokes or has invoked the Convention to defend its rights. All, or almost all, Indigenous organizations have studied, used and applied it, especially the articles dealing with the exploitation of natural resources within their territories, the concept of territory itself and statements regarding prior consultation.

The Convention has been particularly useful with regard to the debate on prior consultation. This debate began in Colombia late in 1994 with the case of oil exploration by Oxxxy in the so-called Samore block, which partially overlaps the traditional territory of the U’wa People. While Oxxxy, the Ministry of the Environment and the Ministry of Mines and Oil claimed the requirement was for prior consultation on the environment as established by Law 99 of 1993, the Ministry of the Interior, through the General Directorate for Indigenous Affairs (DGAI) as well as the Indigenous Peoples and their organizations, claimed that prior consultation was a constitutional requirement (Article 330) and a requirement established through ILO Convention 169. They argued that the consultation had to refer not only to environmental issues, but also to the preservation of the ethnic and cultural integrity of Indigenous Peoples when a natural resource is being exploited. This same position was assumed by Colombia’s Ombudsperson and by the Constitutional Court in a decision handed down on this case. The problems discussed in the U’wa case included a variety of other issues in addition to oil exploration and prior consultation: the lack of legal recognition; the creation of a single resguardo for the U’wa People; respect for the boundaries of their traditional territory; and full acknowledgment of autonomy.

A new perspective on the topic of prior consultation considers whether ILO Convention 169 requires states and governments to carry out prior consultation, or, instead, to obtain free, prior and informed consent. The Spanish translation of ILO 169 establishes that it is mandatory to carry out prior consultation and ensure adequate participation of Indigenous or tribal Peoples when determining their priorities in development, particularly in cases where natural resources are going to be exploited within Indigenous territories and those resources belong to the state, or in cases of proposed projects or administrative decisions that could affect Indigenous ethnic and cultural integrity. But if the original text of ILO 169 means to take into consideration free, prior and informed consent by these communities as a determining factor, the framework and meaning of the law changes radically. It is important to clarify this because the focus of debate changes
completely. While prior consultation occurs basically (although not completely, as indicated in this report’s chapter on consultation) within the framework of adequate, transparent and informed intercultural participation and other criteria, an international framework of free, prior and informed consent places these processes in the context of articulation between different systems with precise autonomies — national and state sovereignty and its appropriate articulation and correspondence with the autonomies of the Indigenous and Tribal Peoples that are part of that nation.

This issue is not explored in this document because it only arose recently during an international workshop held for this research project. It is first necessary to gather more information about the issue. However, given the significance of its implications, this issue must be underscored: there is a clear need to examine the actual scope of ILO Convention 169 at the national and international level.

5.2 Operational Directive 4.20 from the World Bank (OD 4.20)

In 1991 the World Bank prepared what is known as its Indigenous Peoples Operational Directive 4.20. This directive outlines the World Bank’s policy in reference to Indigenous Peoples for those projects in which the Bank will be present as a donor, or financing credits. It describes Bank policies and processing procedures for projects that affect Indigenous peoples. It sets out basic definitions, policy objectives, guidelines for the design and implementation of project provisions or components for Indigenous peoples, and processing and documentation requirements. (OD 4.20 Introduction 1)

In addition,

the directive provides policy guidance to (a) ensure that Indigenous people benefit from development projects, and (b) avoid or mitigate potentially adverse effects on Indigenous people caused by Bank-assisted activities. Special action is required where Bank investments affect Indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources. (OD 4.20 Introduction 2)

This early directive affected several of the projects being financed, and anticipated legal developments in several nations. Nevertheless, the evaluation carried out in 1997 by the World Bank shows the need to review the directive and correct the weaknesses that were found. According to evaluators Johns and Uquillas (1997):

The Latin American and Caribbean Regional Office’s record for the identification of Indigenous peoples is good because in 70 of 72 projects, or 97 per cent, the presence of Indigenous communities was recognized during the preparation of the project. However, the identification of these populations did not always translate into the preparation of plans for the development of the Indigenous people (PDPI) or into specific components that meet the specifications of the Operational Directive.

The evaluators conclude that:
More information is needed about the Indigenous peoples of Latin America in order to incorporate them completely to the development plans. The needs of Indigenous groups vary considerably, ranging from security in the ownership of the land to bilingual and multicultural education. The social capital, including shared values and ethnic identity, is the strongest cultural characteristic of Indigenous communities. The Bank can take advantage of the strong points and give the peoples the opportunity to reach their human potential and their development goals as defined by their own cultures and societies.

There should be an attempt to work more intensively with the Indigenous organizations and traditional authorities. For example, these organizations participate in the preparation of new projects when the whole project benefits the Indigenous people …

The World Bank began evaluating this policy in 1995 and is in the process of redefining it through regional consultations all over the world.

A variety of projects funded by the World Bank took place under the aegis of OD 4.20, and its mandatory application helped to ensure greater respect for Indigenous Peoples. However, it should be noted that this directive is based on and is focused unequivocally on supporting development projects in a context of capitals and markets, which limits its view of Indigenous Peoples because “Indigenous development” is conceived only within the same parameters as capitalist development. The World Bank’s policies, obviously, are at the service of the investment policies for world development, although it advanced the interests of Indigenous Peoples by including in the projects financed by the World Bank requirements aimed at achieving some cultural adaptation of the projects and taking into consideration ethnic and cultural differences.

In Colombia, in the case of the salt mines of Manaure, this directive was a form of lateral support for Indigenous vindications (see case study profile in this document), even though the current revisions to this directive are a step backward for the World Bank.

The Indigenous Peoples surely embrace very different concepts than those of the World Bank, its policies, objectives and tendencies, but at least it is a positive step for a financing institution to demand of development agents cultural respect and respect for fundamental Indigenous rights. It is critical to wait for, and review, the World Bank’s new revisions.

5.3 Current legal context for mining in Colombia

In Colombia, the topic and activities of mining involve Indigenous Peoples intimately, both because Indigenous Peoples carry out small-scale mining and because of the growing exploitation of non-renewable resources and large-scale mining and energy projects taking place on ancestral territories.

For the first Mining Code (Decree 2655 of 1988), a process of consultation and agreement between the state and Indigenous Peoples’ representatives took place regarding the contents of the legislation and issues related to Indigenous rights. This process took place because of the pressure and requests from Indigenous organizations. As a result, a Commission
of Study and Reform was struck to examine the contents of the legislation, and a sub-commission was formed to analyze the specific topic of mining and Indigenous Peoples. The participants of the sub-commission included representatives from the Regional Indigenous Council of Cauca (CRIC), and the National Indigenous Organization of Colombia (ONIC) as well as various government organizations, including the Office of Indigenous Affairs from the Ministry of Government, representatives from the Ministry of Mines, and other government representatives. This sub-commission agreed on and prepared a joint proposal with specific definitions and regulations for the exploitation and use of mining resources on Indigenous territories. The resulting Code legalized some issues of particular importance to Indigenous Peoples.

The 1988 Code established, in accordance with the Constitution, that natural non-renewable resources found in the subsurface, as well as rocks and salts (rock salt, sea salt, salt waters — whether natural or artificial — higher than 6 degrees Bº, and the maritime spaces under national jurisdiction) belong to the nation (Article 3). This Code regulated accession as a means of exploiting resources and established the means to harmonize this legislation with previous law and acquired rights.

The most important achievement for Indigenous Peoples — although not precisely what they had hoped for — was the creation of Indigenous mining zones, which were defined as follows:

The Ministry will indicate and delimit, within Indigenous territories, Indigenous mining zones in which the exploration and exploitation of the soil and subsoil for minerals must be carried out according to the special provisions of this chapter about protection and participation of the Indigenous communities and groups settled in those territories.

To enable full compliance with the above, the definition of Indigenous territories was agreed upon as follows:

For the purposes of the previous article, Indigenous territories are defined as those areas that have been owned regularly and permanently by an Indigenous community, partiality or group and those which, although not owned in this fashion, represent the traditional environment for their economic and cultural activities.

For the same purposes, an Indigenous community or partiality is defined as a group or set of groups of American Indian origin, identified with their Aboriginal past, who maintain traits, customs and values of their own traditional culture and internal forms of government and social control which differentiate them from other rural communities. (Article 124 of the Mining Code, 1988)

Although this definition establishes a special protection regime, it overlooks the historical vindication that Indigenous Peoples have demanded: recognition of ownership of the subsurface within their territories.
For years these definitions represented a legislative breakthrough in the legal concept of Indigenous territory, and anticipated the provisions of the new National Constitution adopted in 1992. This Code also established preferential rights:

Indigenous communities and groups shall have the preferential right for the Ministry to grant them special licenses for exploration and exploitation of the mining deposits located in Indigenous mining zones. This license may include one or several minerals, with the exception of coal, radioactive minerals and salts. The norms will indicate the procedures and formalities required for this special license.

The Code established a special license that indicated the collective nature of the access, in subordination to the Indigenous government. It established restricted Indigenous areas, which represented a major step forward in terms of cultural respect:

The Indigenous authorities will indicate, within the Indigenous mining zone, the places which cannot be explored or exploited for minerals because they have a special social or religious significance for the Aboriginal community or group, according to their beliefs, customs and mores. (Article 130)

The Code also indicated restricted areas for mining activities and determined economic compensation, royalties and taxes, among other issues.

This Code was partially regulated by Decree 710 of 1990 for issues affecting Indigenous Peoples. Part of that regulation included the competencies assigned to the Ministry of Mines and the Ministry of Government (today the Ministry of the Interior) through the Office of Indigenous Affairs, which is in charge of watching over the rights of Indigenous Peoples. The Code also created the Mining Monitoring and Assistance Commission for Indigenous Territories as an advisory body to the Ministry of Mines and Energy on issues related to the formulation and implementation of special mining programs in Indigenous mining areas. The Commission consisted of a delegate from the Ministry of Mines and Energy, a delegate from the Division of Indigenous Affairs of the Ministry of Government and a delegate from the most representative Indigenous organization, and was an advisory body to the Ministry of Mines and Energy. This advisory body played a very important role in processing Indigenous mining exploitations and in defining policies and resolving various conflicts.

The new Mining Code (Law 685/01) provides that subsurface resources belong to the state and not to the nation according to the 1992 Constitution, Article 332, which states that the state is the owner of subsurface and non-renewable natural resources. This was a step backwards for the rights of Colombians, not only for Indigenous Peoples. The new Code states:

Minerals of any kind, wherever they are located, whether in the surface or subsurface, in any natural physical state, are the sole property of the state, regardless of whether the respective land is owned by other government organizations, private individuals, communities or groups. Individual juridical, subjective and specific situations derived from deeds of private ownership for mines that were executed according to preexisting laws are excepted. (Article 5)
If the nation owns the surface, the subsurface and their renewable and non-renewable resources, then all Colombians are the owners of these resources, and therefore, their potential participation and influence in defining public and development policies is greater — and so is the obligation of the state to comply with their decisions, as it is simply the administrator of these resources. If the resources found in the surface and subsurface are the property of the state, it is the state that determines autonomously the policies for their use and exploitation as well as the degree of restriction on social participation to determine the future of the resources. In this respect, the new Constitution of 1992 expropriated the renewable and non-renewable resources from the Colombian people.

Article 3 of the New Code provides that the Code is a complete regulation and that:

The rules and principles of this Code implement the mandates of Article 25, 80, of the paragraph in article 330 and Articles 332, 334, 360 and 361 of the National Constitution, in reference to mining resources, in a complete, systematic, harmonious manner, with a sense of specialty and preferential application. Therefore, the civil and commercial provisions involving situations and phenomena regulated by this Code will only be applicable to mining issues if this Code makes a direct reference to them or because of their substitutive application in case of a lack of explicit norms. (emphasis added)

Although this article includes a paragraph referring to compliance with the law and the Constitution, it actually excludes the legal requirement of prior consultation established by the Constitution itself (paragraph in Article 330 and Law 21/91 or ILO Convention 169) and other legislation, such as Law 99/93, which regulates and creates the National Environmental System through Article 76 (including prior consultation when natural resources are to be exploited, which must be done without harm to the ethnic and cultural identity of the Indigenous and Black communities). This interpretation is supported by the fact that the Mining Code states that it is complete, although it omits the concept of prior consultation (Vasquez 2001).

This article is a legal maneuver to prevent, through the use of another legal instrument, the full application of prior consultation to mining situations. In light of the prior consultation precedents that have existed in Colombia since 1995, and given the difficulties faced by various private and government agencies in carrying out consultations, agreements or negotiations and making transparent and equitable decisions, it is obvious that this article was introduced to allow the private sector and the state a way out of implementing prior consultation. There will surely be many conflicts as a result of this contradiction between the norms.

The new Code also regulates reserved, excluded and restricted zones. The special reserves are one form of protection for traditional mining. The Code lists a set of criteria to be applied to the zones of exclusion from mining; and, finally, it provides for this norm to be bypassed by the mining authorities through a justified administrative action decreeing the exception of the area required. This can be applied to any area, except if it is a national park (which once again shows that ethnic and cultural protection is secondary to the protection of the environment). Article 35 lists the criteria for restricted mining zones, that is, those areas where mining projects can be carried out only if certain conditions are met. The following items affect the Indigenous people:
c) In those areas defined as having a special archaeological, historical or cultural interest, as long as there is an authorization from the competent authority; …

f) In areas defined as Indigenous mining areas, as long as the appropriate community authorities, within the established terms, have not exercised their preferential right to obtain the mining permit for exploration and exploitation in accordance to the provisions of Chapter XIV of this Code. (emphasis added)

It is clear that this norm ignores the principle of interculturality, the nature of Indigenous authorities as special public authorities and the principle of refraining from any exploitation of natural resources that implies a deterioration in the ethnic and cultural integrity of Indigenous or Black communities. Additionally, by establishing a possible exception to each restriction, the restriction can always be bypassed with the appropriate argument and following the legal formalities.

Chapter XIV of the Code, on ethnic groups, avoids the issue of the state’s obligation to protect the integrity and culture of ethnic groups and leaves that responsibility in the hands of private individuals doing the mining exploitation. In other words, it privatizes the relationship between Indigenous Peoples and mining. In this respect, public interest for the survival of the various ethnic groups tends to disappear, as does the state’s responsibility to protect them and guarantee their survival.

Article 124 introduced the participation of representatives from Indigenous communities in the proposals made by private individuals to explore and exploit, and here it also fails to mention prior consultation as a fundamental instrument for participation.

Article 123 redefines the concept of Indigenous territory and excludes from the text the part that earlier read: “and those whose ownership is not held in that form, are the traditional environment of their economic and cultural activities”, although it refers to ILO Convention 169. This represents a significant weakening in the concept of traditional territory.

The preferential rights of Indigenous communities for a specific mining operation are maintained, but an exception is also established. This Code eliminated the tax exemption for Indigenous Peoples who carry out mining operations.

Although the previous Code recognized and established some functions for the government office in charge of Indian Affairs (under the Ministry of Government and later under the Ministry of the Interior) — functions that were very important for the protection of countless rights and the resolution of many conflicts — the current Code removed all those functions from that government office and, therefore, from the state.

It should be noted that, although ILO Convention 169 provides that any administrative or legislative measure that could affect the ethnic or cultural integrity of Indigenous Peoples be subjected to a transparent and impartial prior consultation, this Code was issued without an adequate prior consultation process. The meetings held did not constitute a consultation with all its requirements, as can be clearly seen in the pronouncement of the Indigenous Peoples presented in the next section of this document.
The New Mining Code is a step backwards from the previous special mining regime for Indigenous Peoples. The Code favors the development of large mining projects, the establishment of large companies and the development of micro projects to the detriment of small mining operations, mining in Indigenous areas and mining by other communities such as the Black or peasant communities (Vasquez 2001).

Lastly, it is significant, in terms of international policies and the globalization of trends, that the Canadian International Development Agency (CIDA) promoted this revision of the Mining Code. CIDA provided ongoing technical advice to the Colombian government, and helped design, in conjunction with a group of Colombian technicians, the substance of the Code. It should also be noted that several of the Canadian technicians who invested time, knowledge and resources to complete the current Code and have it approved are also consultants for Canadian companies that have invested in mining operations in Colombia.

5.4 Pronouncements from Indigenous organizations

Both ONIC and AICO, the two national Indigenous organizations, have made statements about the New Mining Code and the step backwards that it represents. On October 1, 1997, AICO sent a statement to the Ministry of Mines and Energy using their right to petition (Article 23 of the National Constitution). In addition to analyzing the content of the bill (which was in the process of approval), the statement also requested “compliance with the right to prior consultation”. It adds:

About this [legal] project, we make the following statement: The greatest right of Colombian Indigenous Peoples, because they were the first Americans, is not negotiable. In 1988 we had already agreed with the Colombian state the legal recognition of minimal mining rights which are part of the current Mining Code, and regulatory decrees were issued which are part of the National Indigenous Legislation and are rights acquired by the Indigenous Peoples because they have a deep spiritual, cultural, social and economic significance for the survival of Indigenous Peoples.

For us the right is permanent, it is the root, it is ours, and that is why we do not admit that a new Code or any law will take away the rights that have already been acknowledged in our favour as a result of our historical struggles.

1. [The Code] ignores the rights acquired by Indigenous Peoples to have the areas of the Indian Mining Reserves considered zones or areas restricted for mining activities;

2. articles … of the bill to reform the Mining Code establish an unequal regime of rights to benefit ethnic groups, ignoring the rights of Indigenous Peoples. The recognition of rights over subsurface natural resources for ethnic groups should be equal.

Close to 30 million hectares have been recognized as resguardos for Indigenous Peoples, territories which, according to the law and the Constitution, are perpetual and cannot be garnished. We also have a large number of Indigenous
mining zones. It is not right to create a regime excluding mining rights to benefit exclusively those areas that can be assigned as collective property to Black communities, and not have the same provision in reference to Indian resguardos, Indian territories and the areas that can be deeded as Indian resguardos.

3. In terms of the substantive rights actually recognized on the topic of Indigenous mining zones, the project in reference does not recognize the judicial pluralism established by the National Constitution in favour of ethnic groups, and weakens the rights currently recognized by the Mining Code in the following aspects:

In the first place, it limits the territorial rights of Indigenous Peoples that are currently recognized in a manner that is unconstitutional, illegal and inconvenient.

As far as the territorial rights of Indigenous Peoples are concerned…. While the norm recognizes the totality of such rights (as established by the National Constitution, the National Indigenous Law, Law 21 of 1991 or ILO Convention 169, Decree 21641995), in the proposed reform the areas which are not regularly and permanently occupied “but constitute the traditional environment for their economic and cultural activities” is no longer recognized as Indigenous territory, which constitutes a profound violation of our territorial concept and our rights.

The period of four months indicated in article … nullifies the exercise of preferential rights and reduces Indigenous participation to the mere possibility of individuals from each People to be hired as workers …. The preferential rights should be projected over time by establishing the legal possibility for direct exploitation by Indigenous Peoples, or exploitation together with individuals or corporations as currently provided by Article128 of the Mining Code.

This argument is even more relevant when one considers that the current legislation considers Indigenous authorities, communities and territories as special public entities and for this reason it is not allowed to set up short and peremptory terms of administrative silence to limit our rights and decisions.

Secondly, the bill to reform the Mining Code limits the possibility established by Article 127 of the current Code by stating: “For the exploitation of certain minerals located in Indigenous mining areas that have been exclusively assigned to a decentralized organization, this organization will establish special regulations and agreements in order to train and employ members of the Indigenous communities or groups settled in those areas. These regulations and agreements must be approved by the Ministry after approval by the Director of Indigenous Affairs.”

Thirdly, the current national Indigenous legislation provides a special fiscal regime which benefits Colombian Indigenous Peoples who are exempted from paying taxes, duties, contributions and even certain public utilities. In this respect, Article 129 of the current Mining Code exempts the respective Indigenous Peoples or groups from such payments in reference to the exploitation within the Indigenous mining area, a norm which is not reflected in the bill and violates the rights and interests of Indigenous Peoples.
In fourth place — and as a topic of fundamental importance for the recognition and protection of the ethnic and cultural diversity represented by Indigenous Peoples — the bill to reform the Mining Code fails to include reference to the institution “restricted Indigenous areas within Indigenous mining zones”, which is currently in force according to the provisions of Article 130 of the current Mining Code. This is a step backwards with regard to recognizing the rights of Indigenous Peoples. That institution was recognized even before the National Constitution of 1991. It is unacceptable to our Indigenous Peoples and organizations that the New Mining Code does not include it and that such an institution be modified or reduced to our disadvantage.

Fifth, the bill to reform the Mining Code excludes the economic participation of Indigenous Peoples and communities in shares or royalties derived from the mining operations located in Indigenous territories established in the current Mining Code in Article 132, which is another violation of our acquired rights.

Finally, we respectfully request that this bill be withdrawn from Congress to allow compliance with the legal procedure requiring the national government to consult the Indigenous Peoples using the appropriate means and, in particular, through their representative institutions, whenever legislative or administrative measures that could affect Indigenous Peoples directly are being entertained.

Cordially,

[Signed by the legal representative of AICO (Martín Tenganá) and the Governor of Guachucal]

As one can see, not only was the consultation procedure ignored, but none of the issues presented here more than two years before the bill was approved were taken into consideration. The above statement was not the only Indigenous pronouncement. There were many meetings in which an adequate consultation was requested and discussions about the contents of the project were started without any positive results. Regardless, the New Code was approved.

Indigenous leaders and organizations, such as Armando Valbuena, president of ONIC, note that the current trend of the Colombian government is toward legally reducing the rights that had been originally established for Indigenous Peoples. This trend can be seen in the mining legislation, the concept of territory, the regulation through Decree 13 20/98 (which reduces and dismantles prior consultation), the new criminal code and other initiatives. Through the scaling back of rights, the Indigenous Peoples claim, other economic and political interests are served — interests in investments and profits for large financial, mining and industrial capitals — and the public responsibilities of the state are avoided.

6. Prior Consultation in Colombia

Prior consultation with Indigenous Peoples and Black communities became a valuable instrument to protect ethnic rights following the approval of ILO Convention 169 as Law 21 of
National steps to establish prior consultation as an instrument for articulation and dialogue between different cultures that enjoy self-government and self-determination have been contradictory and have taken place in the midst of major political, social and economic tensions. These tensions are made worse by a lack of understanding and tolerance regarding intercultural relations and the application of plurality to the concepts of social development, well-being and future planning.

Between 1995 and 1998 there were major contradictions within the national government regarding the procedures and processes for prior consultation established by ILO Convention 169. In general, there were contradictions regarding the use of consultation and agreement as an instrument for dialogue, intercultural decision-making, and articulation between the autonomies of ethnic groups and the national government, in order to generate decisions considered valid both by the Colombian state and by Indigenous Peoples or Black communities. The differences and contradictions within the state occurred in relation to almost every aspect of the issue: What do consultation and agreement mean? What is the scope and significance of the constitutional mandate to safeguard the ethnic and cultural integrity of Indigenous Peoples and Black communities? Why not divide it and regulate only for environmental affairs? There were also differences and contradictions regarding (among other issues) proper articulation between national interests and the special interests of ethnic groups; legitimate and sufficient procedures; harmonizing the timeframes and procedures of making decisions; ‘interculturality’; and the interests of domestic and international companies, the nation and ethnic groups.

Although agreements and consultation with Indigenous Peoples (and also with Black communities in the past few years) have been a de facto practice, the implementation of consultation and agreement as a formal and mandatory juridical instrument created additional difficulties and antagonisms.

On the one hand, the ministries in charge of mines and energy and environment considered — and still consider today — this instrument simply as a mechanism and requirement for issuing licenses, permits and other procedures for the exploitation of natural resources, subject to technical and environmental parameters and to the policies for development and exploitation of natural resources. Both sectors — mining and environment — are considered piecemeal, and neither sector conceives sectorial affairs within the totality of the problems mentioned. This is indeed a great limitation and difficulty because the crux of the conflict lies in the articulation of these sectorial policies with the ethnic and cultural policies of the government, and the rights and policies of the peoples themselves.

The section of the government in charge of protecting Indigenous Peoples during that time (1994–1998) was the General Directorate of Indigenous Affairs (DGAI), which is part of the Ministry of Interior. This ministry proposed consultation and agreement as an instrument of fundamental importance to help the government establish respectful policies and intercultural relationships whose transparent application would enable a complete view of the different problems and perspectives involved in any given project. The directorate proposed prior
consultation as a procedure for making decisions in which national development interests could be articulated along with the specific interests of the communities or Peoples, enabling modifications, adaptation or rejection of projects within Indigenous territories. The rejection of those projects would obviously produce difficulties, and there would be additional ways to solve them. The position of the General Directorate for Indian Affairs of the Ministry of Interior changed radically after 1999, blurring the existence of consultation, nullifying the debate about such consultation and no longer enforcing its application — that is, renouncing the use of this instrument for the protection of ethnic rights.

The companies that exploit natural resources have viewed consultation as an unnecessary requirement and as one more obstacle on the long road they have to travel to get access to a license to explore or exploit a natural resource. They believe that it is part of those social aspects of the project that, for them, are of secondary or tertiary importance compared to the technical and environmental studies and parameters, and the interests of productivity, profits and yield. Until now, companies have never considered consultation an instrument for creating harmonious social, cultural, economic and environmental conditions and ensure a respectful and peaceful social environment of well-being for all, so that the implementation of a specific project can have a sound social basis and be better implemented.

On the other hand, business culture is used to direct and private negotiations with individuals within communities, with whom the businesses agree on social benefits from a paternalistic position of power. Historically, business culture has counted on the national, regional or local political and economic power relations, inclining decisions and investments in a single direction, with very little actual participation, or with manipulated social participation.

Multinationals have been reluctant to assimilate another culture of negotiation, to recognize cultural differences as capital and not as something that can be manipulated and subjugated through the exercise of power, or to acknowledge that Indigenous Peoples and Black communities are collective subjects and not the summation of individuals that can be bought off one by one.

This debate also took place among Indigenous communities that were facing decisions about projects within their territories or that had been affected by projects, and among Indigenous organizations at the local, regional and national levels. Positions evolved differently according to the level of debate and also according to the specific situations. For example, in the case of the U’wa People, with regard to oil exploration by Occidental de Colombia, and in the case of the Embera People, with regard to the building of the Urra hydroelectric dam, the debate over the right to consultation became politicized. The positions were irreconcilable, and the debate ended up in the courts.

The local organizations of Indigenous Peoples who faced the development of projects on their territories during these years participated in consultation processes and enriched their vision with experiences and understandings of what was at stake. This enabled them to mature their own positions and very often to achieve skillful and respectful agreements.
The debate with national Indigenous organizations had other political undertones, with many difficulties in reconciling positions. For example, the political directors of ONIC did not accept consultation as an instrument to protect their rights and claimed agreement-making based on the will of the Indigenous Peoples as the only valid means. This concept was finally set forth in Decree 1397 of 1997, which, unfortunately, confused dialogue among Indigenous organizations and the state with the other instruments for the protection of Indigenous rights. In addition, Indigenous organizations did not identify the internal fragmentation within the government or the different positions on the topic. This led to Indigenous organizations confronting the government as if it were a monolithic unity with a single position against the recognition of rights.

On the other hand, because the debate about consultation began at the same time as the debate on two complex mega-projects, the seismic exploration of the U’wa territory, and the construction of a hydroelectric dam in Urra (on Embera land) the topic of prior consultation was conflated with political opposition to the implementation of those two projects, which made the discussion confusing and polarized the positions as politically antagonistic.

The current executives of ONIC have approached this debate differently, although at the moment consultation is not the priority topic and is not under discussion. Among other reasons, this is due to the internal war, which gives other problems a higher priority. Most Indigenous organizations have seen consultation and agreement as instruments linked to the capacity of the peoples to exercise their autonomy in full, without decisions about projects being made by the state or jointly. They have also fought for the identification of criteria with regard to interculturality and traditional territory within the implementation of consultations and agreements.

As a result of actions such as peaceful “takeovers” of offices, two regulatory decrees (Decrees 1936 and 1397 of 1997) were issued outlining instances for participation and negotiation. However, these decrees leave a lot to be desired with regard to their objectives, their degree of representation or their power to enable dialogue with the government — weaknesses that underscore their ineffectiveness. Indigenous organizations will certainly have to evaluate these instances and rethink them so that legitimate spaces can actually be created for dialogue, discussion and agreement between Indigenous Peoples and the national government, where national policies regarding Indigenous Peoples can be discussed and determined with their participation as public entities. These spaces for self-determination and national participation need to be seen as separate from the spaces and instances created to protect specific rights. The current president of ONIC, recognizing the inefficiency of these instruments (particularly in light of the lack of political will on behalf of the national government to implement them), has said:

We have law 21 of 1991, Decree 1396 (Human Rights Commission) and Decree 1397 (negotiation tables), but the government has not shown any interest in complying with them. They do not convene the tables, because there is a great fear due to the fact that at those negotiation tables all topics are discussed, such as territory, education, health, etc. (Correa 2001)

These different points of view about prior consultation among the direct actors have produced strong confrontation. Additionally, during these years, there have been many attempts
by many agents of the state and some companies to manipulate the purpose of the consultation or the attempts at regulation. This is what happened with Decree 1320 of 1998, which will be discussed later in this report.

The state controlled agencies, like the Ombudsperson (Delegate for Ethnic Affairs) and the Deputy Attorney General for Ethnic Affairs, have played an important role although their activity and policies in relation to human rights have also depended on their own ups and downs and changes of direction, as well as on whether public policies exist on the issue in question. The Ombudsperson has participated in the debates and consultation processes that have taken place, as has the Attorney General. In the U’wa case, it was the Ombudsperson who brought the action for the protection of constitutional rights and the legal action against the first environmental license granted by the Ministry of the Environment. The Constitutional Court handed down decisions, in both the U’wa and the Urra cases, giving advanced interpretations of this right, its procedures and its purposes.

In spite of these contradictions, since the end of 1994 (especially between 1995 and 1998) there have been 128 prior consultations with Indigenous Peoples under ILO Convention 169, the Constitution and Law 99 of 1993. Some 6 per cent involved mining projects; 35 per cent involved seismic studies and hydrocarbons; 15 per cent involved energy projects; around 35 per cent involved road infrastructure; and the rest involved legislative issues, land improvement, biodiversity, communications and military projects (See Appendix 5 for details on prior consultation processes undertaken between 1994 and 1998).

When the administration completed its term in 1998, and the Pastrana administration started, the change in terms of prior consultation policy was radical and complete. The General Directorate for Indigenous Affairs (DGAI), Office of the Ministry of the Interior, was weakened by the executive. In addition, with the approval of the current director of that body — and against the Patzcuaro Agreement which binds the national government to establish an autonomous organization for developing public policies with Indigenous Peoples — the technical units that used to support the investment resources for its functions were dissolved. This limited the DGAI’s power to develop and implement policies.

The current approach of the national government and the DGAI is to eliminate consultation as an instrument by simply not carrying out the appropriate processes or by allowing them to be carried out on a case-by-case basis, as private negotiations or negotiations carried out by the Ministry of the Environment. After 1999, the DGAI only formalized the ending and implementation of three cases of prior consultation with Indigenous Peoples: with Perenco Caño Duya, in the Department of Arauca, on the use of seismic studies for oil exploration; with the electricity company Icel, in the Department of Putumayo, on the installation of a transmission line between El Yarumo and La Hormiga; and with the government public roads office Invias, for improving the road between La Paila and Armenia (Correa 2001).

The Attorney General’s Office and the Ombudsperson so far have not responded to this open omission in the functions of the Ministry of the Interior, the DGAI and the national government.

In 1995, the DGAI of the Ministry of the Interior prepared an Indigenous Peoples’ policy for the four years of the administration (1994–1998). The policy was approved by the political and social council of the government, where all the ministers dealing with social areas are represented (COMPES document #2773, April 1995). It consisted of five key points. One of these was the implementation of consultation with Indigenous Peoples:

d) consult and facilitate the participation of Indigenous Peoples and communities, their authorities and representative organizations in the programs and projects involving them, and consider what those Peoples propose in order to reach agreements.

Another objective of the DGAI was to foster “their right to participate in the various areas of national life, and the right to prior consultation about the measures, plans, and projects that might affect their ethnic integrity, their territories, or the natural resources located therein” (DGAI 1998).

According to those guidelines, during the following four years this office coordinated 128 prior consultations and developed a frame of reference for the prior consultation process with Indigenous Peoples which was submitted for consideration and discussion both to government and to Indigenous Peoples. This frame of reference was prepared in October 1994. By April 1995, the DGAI had a text to use as a guide while there was no legal regulation about prior consultation. There was Indigenous participation in the process from the beginning and throughout all the phases. The frame of reference reads as follows:

1. Legal framework and main goals of prior consultation:

   a) Inform the traditional authorities and Indigenous organizations about the characteristics of the national and regional projects that might affect them, consult their opinion about the convenience of these projects for their ethnic reproduction and their expectations for participation therein, and agree with them on the terms according to which the projects will be implemented, ensuring that they participate in the respective decisions (Articles 1, 2, 7 and 330 of the National Constitution, and Articles 5, 6, 7 and 15, Law 21 of 1991).

   b) Instruct the state about the way in which it must fulfill its constitutional and legal obligation to respect the ethnic and cultural integrity of Indigenous Peoples in the case of these projects (Article 330 of the National Constitution, Laws 52 of 1989 and 199 of 1995, Decree 0373 of 1996).

   c) Adapt these projects, when they are to be implemented after prior consultation, to the requirements of interculturalism required by the fact that they will be operating within the Indigenous territory in question (Article 7 of the National Constitution, CONPES document dated April 5, 1995), and use any measures agreed on for the social, cultural and environmental abatement of possible impacts (Article 76, Law 99 of 1993).

2. General components of prior consultation:

- Mutual identification: Identification of the Indigenous Peoples, territories and partialities; and identification of the inter-institutional parties, including those with interests at the national and international levels
- Communications
- Studies and research
- Representation (legitimacy of parties to the dialogue)
- Information
- Reflection
- Agreement
- Participation

3. Main stages in prior consultation:

The prior consultation prescribed in the constitutional and legal texts mentioned above is, above all, a public process of intercultural communication and articulation that must be built step-by-step over several phases under the coordination of the General Directorate for Indian Affairs of the Ministry of the Interior (Law 199 of 1995, and Decree 0372 of 1996). These phases are:

- Inter-institutional coordination and general planning for the consultation process.
- Beginning of the socio-cultural study of the Indigenous Peoples related to the project, considering: the social and ethnic reproductive dynamics of the Indigenous people and the affected communities; the possible types of effects; and the plans for compensation and mitigation. (This study is started according to the frame of reference handed down by DGAI and the competent environmental authority.)
- Intercultural information about the project itself and the first draft of the previous study, which must be done adequately, must be bilingual and must be disseminated within the Indigenous territory in question.
- Inter-institutional and Indigenous Peoples’ reflection, intercultural communication, project conclusion and definition of plans for Indigenous participation.
- Agreement about the project and the plans for compensation and mitigation of project effects, and definition of plans for participation of the Indigenous people.
- General Agreement for the consultation (minutes), opinions by the General Directorate for Indigenous Affairs and by the competent environmental authority, licenses, and intercultural regulations.
- Follow-up of the process, after establishing appropriate intercultural mechanisms.

4. Representation of Indigenous Peoples: legitimacy and general forms:

The following forms of authority must be taken into consideration for the consultation and, in general, for the relationships between the state and national society and Indigenous Peoples.

a) The traditional authorities and/or high councils for each Indigenous People
b) The traditional authorities and local councils in the communities, especially those related to the project for which the consultation is being carried out

c) The legal representatives of those communities

d) The Indigenous organizations with legal personality in those communities

e) Regional and national Indigenous organizations related to the community that is directly involved

5. General criteria for the consultation:

Finally, according to the legal and constitutional provisions cited above, and the opinions issued by the General Directorate for Indigenous Affairs of the Ministry of the Interior since 1995, the consultation process must take place according to the following principles:

a) Legitimacy — that is, with the different instances of Indigenous authorities mentioned above.

b) Inclusiveness, with everyone involved in the project in question and all social segments or sectors of the Indigenous People being consulted.

c) Interculturalism and bilingualism in the consultation process, which should: be appropriate to the culture of the Indigenous People; take place within their territory; and include translation according to the protocols and forms appropriate for that People to ensure true communication, information, consultation, bi-cultural evaluation of the proposals, and of the possible effects of the project, agreement, participation and follow-up among the state, the Indigenous authorities and the direct agents involved in the project.

d) Unity and integrality of the topic and the parties in order to prevent fragmentation of the real objectives, means and scope of the project or the communication and information established among the parties.

e) Timeliness in terms of ensuring an appropriate amount of time before implementation of the project, in order to guarantee that it is possible not to implement it — as determined by the consultation itself, seen from the point of view of the ethnic integrity of the Indigenous People consulted. (April 1995) (DGAI 1998a)

6.2 Legal developments regarding prior consultation

The frame of reference for consultation proposed by the DGAI served to open the debate and acted as a guide for prior consultations for a short period of time. However, the framework was not accepted by the Ministry of the Environment, the Ministry of Mines and Energy or ECOPETROL (a Colombian oil company) as the basis of a proposal to structure a regulation. Because it was not possible to reach an agreement within the government about a single text that would satisfy all sectors and address human rights issues in a holistic fashion (and which could also be subjected to prior consultation) several inter-institutional working groups were
established and meetings were held with Indigenous Peoples and organizations to discuss the
topic.

The oil and mining companies (both public and private) put pressure on the Ministry of
Mines and the Ministry of the Environment as well as on the President of the Republic to arrive
at a regulation for prior consultation which would fit their interests at the time. These interests
included that the requirement for prior consultation should be as streamlined as possible and
operate within the procedures to acquire licenses. In addition, companies wanted Indigenous
initiatives to affirm their autonomy and territories to be ‘checked’ because they believed that
these initiatives — rather than the lack of intercultural parameters or respect for the collective
rights of the Indigenous Peoples during the approval and implementation of projects to exploit
natural resources — were at the root of the conflict with the U’wa and Embera Peoples. Under
this pressure, the Ministry of the Environment, the Ministry of Mines, the Ministry of the
Interior, Ecopetrol and their respective legal offices, set up a commission that, almost in secret,
developed a text without prior consultation with the Indigenous or Black Peoples and
organizations. Without the DGAI’s knowledge, it was approved and signed as Decree 1320 of
1998 “which regulates prior consultation with Indigenous and Black communities for the
exploitation of natural resources within their territory”. When the decree was issued, the DGAI
told the Minister of the Interior that the procedure was illegal and some of the content was
unconstitutional.

The basic criticism against Decree 1320 is as follows:

a) The procedure followed to issue the decree was irregular and omitted the mandatory prior
consultation with Indigenous organizations, according to Law 21 of 1991 (ILO
Convention 169, number 1, paragraph a), Article 6, which reads:

When applying the provisions of this Agreement, governments shall: Consult
with the interested Peoples using appropriate procedures and, specifically,
through their representative institutions every time that legislative or
administrative measures are envisioned which could affect them directly.
(emphasis added)

b) The procedure weakens and fragments prior consultation as conceived in ILO
Convention 169 (Law 21 of 1991) as an instrument to protect the rights of Indigenous
Peoples and tribal groups from a legislative or administrative measure likely to affect
them. Instead the Convention is turned into a sectorial instrument for effective
management of the environment during the implementation of projects for exploiting
resources — to the detriment of the integrity of Indigenous Peoples and Black
communities.

c) It weakens the concept of ‘territory’ — defined in previous legislation as a habitat and as
“areas held regularly and permanently by an Indigenous community, partiality or group,
and those which, although not held in this fashion, constitute the traditional environment
for their economic and cultural activities” — to the following definition, narrow in its
concept and, therefore, in its implications for the right to territory:
Article 2: determination of territory. Prior consultation will be carried out when the project, work or activity is intended to be carried out in areas of Indigenous resguardos or protected areas, or in areas assigned as collective property to Black communities. Prior consultation will also be carried out when the project, work or activity is intended to take place in areas not deeded but inhabited regularly and permanently by such Indigenous or Black communities according to the provisions of the following article. (Decree 1320/98, emphasis added)

The following article requires the Ministry of Interior to certify the presence of Indigenous or Black communities when they have not received property title over their territory. Thus, it limits the concept of territory to that which has been deeded as private property or has been held regularly, and excludes from this concept areas such as “those which, although not held in that fashion, constitute the traditional environment for their economic and cultural activities.” That is, it excludes precisely the key aspect that differentiates the concept of land as property from the concept of territory as the basis for the identity and ethnic and cultural reproduction of Indigenous Peoples and Black communities. It also contradicts the concept of land and territory found in ILO Convention 169 (Law 21 of 1991), which says that land and territory “covers the totality of the habitat of those regions which the interested Peoples occupy or use in any way”, and that “the governments must respect the special importance that their relationship with the land or territory or both has for the cultures and the spiritual values of the interested Peoples…”

d) It establishes the participation of Indigenous and Black communities in environmental studies but does not establish the legitimate representation by the traditional government structures of each People or group in the first instance, making it mandatory to refer and ratify the agreements if, for any reason, those authorities are represented by legal intermediaries, and thus leaves open the possibility for participation to be accredited in any manner or substituted by whomever calls him or herself — or has him- or herself — certified as a legal representative. It establishes peremptory terms of 20 and 10 days after the notices have been issued so the parties that could possibly be affected can start the environmental impact study. This time is given so that those who could be affected may express their desire to participate in this study (EIA). If this desire is not expressed within that term, the interested party (that is, the company) “will prepare the environmental study without such participation” (emphasis added). No comments are necessary.

e) The procedures established to carry out the consultation are not intercultural and they do not include respect for governmental autonomy of the Indigenous and Black Peoples. It does not require that consultation be carried out within their territories but rather leaves it as “preferable”; it denies the timeframes needed by Indigenous and Black communities for information, reflection and decision-making, and imposes Western executive-type forms that violate Indigenous autonomies and identities. It establishes, going against the Constitution, Spanish as the official language of the consultations and not bilingualism; it ignores Indigenous authorities’ nature as special public authorities; it reduces the different meetings required by a real consultation process to a single audience-like meeting, where the possibilities for expression, information, communication and
decision-making are already violated and curtailed. It does not establish clear, precise, mandatory mechanisms to follow up on the compliance with the agreements and it does not envision the occurrence of new events that could take place as a result of the projects themselves. It does not establish the possibility for intercultural rules within the territories of the communities during implementation of the project, either to handle social situations or for the use of property or areas of territory for the projects.

f) Another topic of discussion is the power that the prior consultation process has to decide and bind. What is the decision-making power of the communities and what is the decision-making power of the state when the community does not accept the project and does not want the project to be carried out? This key topic to determine the potential of consultation is omitted because the subjects involved in prior consultation, the Indigenous and Black communities, are collectives with their own systems of identity, culture, government and self-determination. Additionally, the Constitution has recognized these characteristics as the only way to ensure their ethnic and cultural integrity. Therefore, prior consultation is not something in which the only decision-making power can be wielded by state agencies, or even worse, as defined by Decree 1320, by one state agency (the Ministry of the Environment). This is an instance for agreement between special governments of Peoples and communities, the national government and private enterprise. For this reason, giving the Ministry of the Environment the authority to make a decision when, in a single consultation meeting, no agreement is reached on the impacts and proposals, is arbitrary and shows a total ignorance of multicultural processes and dynamics and the meaning of the Peoples’ self-determination.

g) Decree 1320 also ignores the fact that these resource exploitation projects, which affect the territories and the future of special communities, are framed within a development model that is based exclusively on market and capital parameters, and that these communities base their economic systems and development models on traditional systems in which market relations are not usually dominant (although they exist in different proportions and with different degrees of articulation). It also ignores the fact that consultation is, therefore, a space to structure new possible articulations without negatively affecting the cultural basis of these communities and their reproduction matrices. The recognition that the Nation is plural also implies plurality in the existing development models and, therefore, that there is no predominance of one model over the other.

h) Another topic of discussion at the national level looks at the judicial nature of consultation: Is it an instrument for participation or is it more than an instance of participation if we take into consideration the autonomies of the governments of Indigenous Peoples and Black communities? If we only consider it as an instance for participation we would be applying simple national legislation, without taking into consideration the cultural differences and the right to autonomous government. Additionally, the instances for participation are “for participation” but not necessarily for decision. To participate could mean simply to listen and exchange opinions; and the levels and degrees of participation can be very different. Social participation starts from a clearly defined power situation: it is the government or the state which, obeying the
constitutional mandate (Article 2 of the National Constitution) creates mechanisms for the relationships with communities that are not part of the power structure and whom they represent. When participation occurs in a context involving ethnic groups, autonomy and plurality, the forms of democratic participation need to be open to cultural differences and incorporate intercultural criteria so that the dialogues and decisions can be real and equitable.

To the extent that the autonomy and self-government of Indigenous Peoples and Black communities have been recognized, they do not participate like any other ethnically diverse community. Their participation is based on the constitutional and legal recognition of their right to self-determination, their cultural differences and the acknowledgement that they have a legitimate instance of internal government. Thus, it is not enough simply to speak about forms of participation; rather, there must be instances where two different levels of government work on agreements, negotiations and definitions: the national government or state, and the self-government of a group or a People with systems of organization and life that are different from those of the national majority and whose members are recognized by constitutional jurisprudence as collective subjects. This is why, although prior consultation implies one way of participating in the decisions that might affect these groups, it is also an occasion to exercise a pluralistic democracy where different levels of government interact, with both collective and public responsibilities. Real recognition and respect for the self-determination of ethnic groups is also fundamental to ensuring their ethnic and cultural future. At this level, the two parties are instances of government. Prior consultation would be more an instance for dialogue and agreement among different levels of power, government and self-determination, than a simple instance for participation between the party representing the totality of power and those who have elected but cannot exercise that power because it is the state or the government who acts on their behalf (a state which historically has discriminated against them, oppressed them and tried to make them invisible). Traditional Indigenous Peoples and Black communities are not the same as any other community. They are communities with a substantial difference from the ethnically diverse communities that are totally represented by the state, whose only government is the national government and whose only autonomy is individual.

i) It is also necessary to note that Indigenous Peoples are very different from Black communities, and establishing regulations with the same procedures, timeframes, schemes of legitimacy, etc. for such different subjects is one more way of failing to apply cultural diversity and plurality as a right. Each one has different points and forms of cultural reference, reflection and decision-making. Their relationships with territorial issues, natural resources and their use and/or exploitation, and their forms of autonomy are very different. Therefore, this requires clearly differentiated and extremely flexible regulations and not a single straightjacket of procedures that does not allow either of these groups to have a real bona fide consultation. In this sense, prior consultation worked better when the frames of reference focused only on prior consultation, with criteria built jointly and applied by consensus — criteria which provided the flexibility required for a process as complex as consultations among subjects with cultural
differences and historical inequities, and among different levels of relationships — and with access to state power.

In summary, Decree 1320 violates Indigenous (and Black) communities’ rights to autonomy, cultural identity, territory, pluralistic participation and development. The Decree includes content that is unconstitutional and, although it has been challenged in court, the actions probably will not proceed, as has been the pattern so far. For this reason it is important to remember that Indigenous Peoples and Black communities can claim unconstitutionality and in the future can request nullification of Decree 1320.

The position of all Indigenous organizations and organizations for the Black communities has been to completely reject Decree 1320 of 1998. Indigenous organizations in different meetings and through various forms of expression have presented the arguments summarized above, as well as others that have not been included in this report (to avoid making it too long). Asked about this topic in an interview, Armando Valbuena, current President of ONIC, said: “In summary, prior consultation is not a legal but a political problem.”

In order to determine whether the debate over the scope of ILO Convention 169 refers to the concept of prior consultation or to free, informed and prior consent as a legal framework and to the rights of Indigenous Peoples and Tribal groups, it is necessary to review the Colombian experience. A focus on free, informed and prior consent would provide a new perspective on the development, definition and use of ILO Convention 169 in the protection of rights. It would further highlight the topic of the limitations and scope of the governmental autonomies of ethnic groups and their articulation with the national state and national interests.

For the sake of clarity, we must summarize the different positions identified in Colombia in terms of who has the decision-making power to start development projects or impose administrative measures in Indigenous territory which could violate the ethnic and cultural integrity of these groups, and when these decisions are made. The debate from 1995 to date has shown three distinct trends:

1) The first is defined mainly by the policies issued by the Ministry of Mines and Energy and the Ministry of the Environment with the backing of the President, stating that the decision is in the hands of the national government — specifically, the Ministry of the Environment, which grants or denies the environmental license. The Council of State has also made a pronouncement in this respect, going back to a narrow definition of consultation which does not take into consideration ethnic governmental autonomies or integrated participation.

2) The second position was outlined by different government organizations dedicated to the defence and protection of ethnic rights, and was developed in the decision by the Constitutional Court, which recognizes the rights to participation and governmental autonomy and the need to harmonize these rights with national rights and duties. It established the requirement to create an impartial forum for authority and decision-making that could adopt a consensual position about the decision to be made. Such a forum should consider and give special value to the possible violation of ethnic and cultural integrity as the basis for the decision. This position was never completely developed or matured due to the conflicts that occurred at that time (especially in

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relation to oil exploration in the U’wa territory and the case of the Urra hydroelectric), which became more serious as a result of the decisions of the government and the conflicting judicial decisions from the Constitutional Court and the Council of State which eliminated this option from the discussion. Issues such as the possible composition of such a forum, the participation of the Indigenous Peoples and matters related to criteria and procedures were not developed or implemented.

3) The third position is the one held by the Indigenous organizations that claim that the decision can only be made by the Indigenous Peoples and their organizations. This position has been proposed even without further development of strong support for Indigenous participation, governmental autonomy of the Peoples and the goal of safeguarding ethnic and cultural integrity. It came about because there was a need for ethnic resistance, in the context of the tendency to take all conflicts to court, and the organization’s need to adopt national and international political positions in the debate about development and state policies and models.

6.3 The Constitutional Court on prior consultation

The Constitutional Court has already made several decisions about participating in the decisions that affect Indigenous Peoples when proposals are made to exploit natural resources in their territories. In reference to the cases of the U’wa People and of the oil exploration and exploitation in the Samore block by Occidental de Colombia, the court stated in decision T-039-97:

3.2 The exploitation of natural resources found in Indigenous territories makes it necessary to harmonize two opposing interests: the need to plan the management and use of natural resources found in the territories in reference to ensure their sustainable development, their preservation, restoration or substitution (Article 80, Political Constitution); and the need to ensure the protection of the ethnic, social, cultural and economic integrity of the Indigenous communities who occupy those territories — that is, the key elements which constitute their cohesion as a social group and, therefore, are the basis for their subsistence. This means that a balance should be sought between the economic development of the country that requires the exploitation of those resources and the preservation of that integrity which is a requisite for the subsistence of the Indigenous human group.

...
Article 40, No. 2 of the Constitution, such as the community’s right to participate in making the decisions mentioned above.

3.3 The Constitution refers to citizen participation, which has different modalities, in different sections (the Preamble and Articles 1, 2, 40, 79 and 103, among others). Therefore, politics is not the only form of participation.

In the opinion of this Court, the participation of Indigenous communities in making decisions that could affect them in reference to the exploitation of natural resources has the peculiarity that the participation in question, using the mechanism of consultation, acquires the connotation of a fundamental right because it becomes a basic instrument to preserve the ethnic, social, economic and cultural integrity of Indigenous communities, and, therefore, to ensure their subsistence as a social group. This way, participation is not limited to a mere intervention in the administrative act aimed at securing the right to defence for those people who are going to be affected when an environmental license is issued (Articles 14 and 35 of the Contentious Administrative Code and 69, 70, 72 and 76 of Law 99 of 1993) but rather has a greater significance due to the higher interests that it intends to protect: those that refer to the definition of the fate and security of the subsistence of the communities in reference.

This section goes on to point out that national laws and ILO Convention 169 (Law 21 of 1991) and the Constitution complement each other. Later the Court states:

On the basis of Articles 40–2, paragraph 330, in the Constitution and the norms of Convention 169 cited above, this Court believes that the institution of consultation with Indigenous communities that could be affected by the exploitation of natural resources involves the adoption of relationships or communications and understanding characterized by mutual respect and good faith between the Indigenous communities and the public authorities in an attempt to achieve the following:

a) That the community be fully informed about the projects to explore or exploit natural resources in the territories they own or occupy, [and] the mechanisms, procedures and activities required to implement them.

b) Also, that the community be informed about how the implementation of the projects can cause effects or damage to the basis of their social, cultural, economic and political cohesion and, therefore, the substrate of their subsistence as a human group with unique characteristics.

c) That they be given the opportunity so that they can, freely and without outside interference, gather their members or representatives, consciously evaluate the advantages and disadvantages of the project for the community and its members, making its concerns and aspirations heard in reference to the defence of their interests, and make pronouncements about the viability of the project. The purpose of this is to give the community an active and effective participation in making the decisions that the authorities require which, as far as possible, should be reached through an agreement.
When it is not possible to reach an agreement, the authority’s decision must not be arbitrary or authoritarian. Therefore, the decision must be objective, reasonable and proportionate to the constitutional purpose that requires the state to protect the social, cultural and economic identities of the Indigenous communities.

In any event, the required mechanisms to mitigate, correct or restore the effects produced by the authority’s decision to the detriment of the community or its members should be established.

Therefore, the information or notice sent to the community about a project to explore or exploit natural resources is not the same as consultation. It is necessary to comply with the abovementioned directives, that formula for agreement with the community be submitted, and for the community to express, through its authorized representatives, its agreement or disagreement with the project and the way in which it affects its ethnic, cultural, social and economic identity.

6.4 Proposal about prior consultation

As an important example of where internal reflection has gone within Indigenous organizations and what their perspective is on the issue of consultation, transcribed below is the text that was submitted by the Wayu Indigenous organizations from the south of Guajira during one of the regional workshops of this project, out of their own initiative:

Based on the ill-fated and deathly experience of the Wayu People of Southern Guajira with regard to coal mining — the case of El Cerrejon — we think and recommend that consultation should be:

A transparent process, sincere, grounded in the truth, participatory, respecting the times and spaces of each Indigenous People, free, conscious, taking into account the legitimate spokespeople of each People, respecting the spiritual conceptions of each People, respecting the moments of internal reflection, permitting the exercise of Authority—Power, where the State fulfills its functions of representing the interests of the community and oversees the favourable implementation of norms, permitting community participation from the very formulation or programming of the stage of consultation. That there be a guarantee that the decision the community takes will be respected: a consultation to decide, not to negotiate, where the maximum number of participants is guaranteed and the necessary time is taken as determined by the communities. Consultation should also be prior and not post, because otherwise it would not be consultation, but imposition. Consultation should be prior, written, spoken in our own language, in our own spaces, visually implementing the mechanisms that allow the communities to know the positive and negative consequences of those topics being consulted.

We believe the principal condition of consultation should be strengthening the autonomy of Indigenous Peoples to freely decide their future, enabling the revalorization of their own structures of traditional authority and fundamentally revitalizing the spiritual conception of interconnectedness/integrity that we have as Indigenous Peoples with our own practices such as dreams, la yonna, customs. It must be bilingual.
From our own experience, we recommend that the following parties should be present:

1. The legitimate representatives of the community in keeping with the structures of authority and power of each People
2. The spokespeople such as the leaders, members of the Cabildo (Council) or legal representatives
3. Teaching faculty, health promoters
4. Women representatives
5. Representatives of Regional Indigenous Organizations
6. The National Organization of Indigenous Peoples of Colombia (ONIC)
7. Representatives from the Company
8. Attorney General
9. Ombudsman
10. International observers, NGO guarantors
11. Representatives of International Humanitarian Rights for Indigenous Peoples

We believe that consultation cannot limit itself to a predetermined timeframe, but should respect the autonomy of Indigenous Peoples to use the time they feel necessary to take a decision that will affect them for the rest of their lives. We believe that the spaces and schedules of each People to speak, converse, agree and take decisions should be respected (enramadas, around bonfires, at dawn).

The steps we propose consultations should take include:

**Open Public Discussion Stage**

There should be capacity-building, awareness-raising, reflection, presentation of background information, references, gathering of different points of view with regards to the consequences of the project, benefits, risks, meetings with other Indigenous Peoples at the national and international level. The necessary time should be taken to guarantee that the whole community assimilates and knows the topic. The following people should participate: traditional authorities; Cabildo; ONIC; company; international observers; the State; local and regional organizations. Place: It should take place in various spaces. Timeframe: unlimited.

**1. Stage for Internal Reflection**
This is an internal process of analysis, without pressures from external agents. It should be exclusively the community with its own authorities, in its traditional spaces. Place: own spaces determined by the traditions of each community. Timeframe: unlimited.

**2. Presentation of Results/Decision-making**
The results will be presented publicly, as a position of the entire affected community. Participants: traditional authorities, interested company, ‘guarantors’, ONIC, media.

**3. Monitoring of Implementation/Follow-up**
A special committee/commission will be created to oversee the agreements if there is a stage of negotiation. This will include international oversight.
Therefore, WE REJECT Decree 1320 of 1998 because it is a norm that violates the fundamental rights of Indigenous Peoples and clearly contradicts constitutional precepts and ILO Convention 169 ratified through Law 21 of 1991.

Signed: Asociación Territorial Cabildos sur de la Guajira: Entidad Territorial de Mayabangloma; Entidad Territorial de Caicemapa; Entidad Territorial de Zahino; Entidad Territorial de Provincial; Entidad Territorial de Cerrito; Entidad Territorial de Cerrodeo. Santa Marta, September 22, 2001.

7. Environmental Licenses and Environmental Impact Studies

It was in 1991, when the new National Constitution was approved, that environmental issues were assigned an important place in national policies for the development, protection, preservation and exploitation of natural resources. In 1993, a law to create the National Environmental System and the Ministry of the Environment was approved, and concepts such as sustainable development, environmental integrity and citizen participation were incorporated. Through this law, the procedures for gaining access to natural resources for exploitation are regulated, and the legal requirement of undertaking a series of steps, procedures and studies to obtain an environmental license for resource exploitation projects or implementing a project is maintained.

According to Rodriguez (2001):

the environmental license is the response to the principle of planning environmental management to achieve sustainable development and ecological equilibrium. It is the administrative act given to a person when a project, work or activity can produce serious deterioration to renewable natural resources or to the environment, or introduce considerable or noticeable modifications to the landscape.

Environmental licenses are granted by the Ministry of the Environment and the other organizations that are part of the National Environmental System, according to the level of the project, work or activity. These organizations can be the autonomous regional corporations; the municipalities, districts or metropolitan areas with an urban population greater than one million people; or the territorial authorities delegated by the regional autonomous corporations.

Three types of environmental measure are required to obtain the license: the diagnostics of environmental alternatives; the environmental impact study; and the environmental management plans (Rodriguez 2001). The environmental impact study is used to “define the measures to prevent, correct, compensate and mitigate the impacts or negative effects of the project, work or activity”. It should:

- Describe and characterize the biotic, abiotic and socio-economic milieu where the project, work or activity is to be carried out.
- Define the ecosystems which, according to the environmental analysis to which the previous item refers, are environmentally critical, sensitive and important; and identify
the areas of special management to be excluded, treated or managed in a special way during the implementation of the project, work or activity.

- Evaluate the supply and vulnerability of the resources used or affected by the project, work or activity.
- Size and evaluate the impact and effect of the project, work or activity in order to determine the severity of potential impacts and effects as well as the steps and measures to prevent, control, mitigate, compensate and correct them.
- Identify the national, regional or local government plans for the area of the study in order to evaluate their compatibility with the project, work or activity.
- Determine the missing information that produces uncertainty in the estimation, sizing or evaluation of the impact.
- Design plans to prevent, mitigate, correct, or compensate the impact, and outline the environmental management required to implement the project, work or activity.
- Estimate the costs and prepare the schedule for investment and implementation of the works and actions for environmental management.
- Design environmental follow-up and control systems that will enable the user to evaluate the behavior, efficiency and effectiveness of the environmental management plan.
- Evaluate the estimated environmental performance of the project, work or activity and compare this to the environmental quality standards established by applicable national environmental norms; and assess the compliance of the project, work or activity with the international treaties and agreements ratified by Colombia.
- Define the technologies and actions for environmental preservation, and for mitigation, control, correction and compensation of the environmental impacts and effects to be used in the project, work or activity. (Rodriguez 2001)

It appears that, the cultural, social and economic aspects have been given a secondary role. Although the environmental impact assessments include socio-economic and cultural components, the technical environmental aspects take precedence over social aspects and impacts. The predominance of a strictly sectorial outlook in environmental and technical issues is precisely one of the major points of contention on the issue of consultation with Indigenous Peoples and Black communities.

In her thesis, Gloria Amparo Rodriguez (2001) analyzed the points of view expressed during the discussions that had taken place regarding consultation from an environmental perspective. She summarizes the consensus she found among Indigenous and Black communities about prior consultation as follows:

- Prior consultation is a collective right that is still in force.
- Prior consultation is carried out through a public, special and mandatory process.
- Prior consultation should be done before taking any administrative or legislative steps, and before deciding about projects that could affect the communities.
Prior consultation is an instrument for the defence of the right to ethnic, cultural, and territorial integrity, and the right of participation and autonomy of the Indigenous communities. It is important to take note of the sphere of application of prior consultation because, as can be deduced from the above definitions, prior consultation is only applicable to Indigenous and Black communities. (Rodriguez 2001)

8. Gender Perspectives

Gender among Indigenous Peoples in Colombia is a complex topic due to the diversity of social, family and political power systems found in these societies. To a certain extent, the consideration of gender issues has arisen through the efforts of Western feminine and feminist movements that correspond to a society based on a patriarchal nuclear family and a market and competitive system. However, not all these parameters for questioning discrimination, exclusion, inequality, and sexual, family or social violence are automatically and universally applicable.

Most Indigenous Peoples have family systems that include different forms of patriarchal power, but these families are extensive, with living and dynamic bonds of reciprocity and solidarity where women play fundamental roles that are different in each Indigenous society. In several cases, the lines of ascent, lineage and inheritance are matrilineal, but they can combine with matrilocal forms. In other cases, the system is patrilineal, while in still others it is parallel (that is, the men inherit from the men, and the women inherit from the women). Marriage systems are very diverse and, although they contain patriarchal symbols of authority, there is also a profound valuation of women in terms of the specific roles they play in the reproduction and re-creation of the culture, the group and humanity in general.

This is not to say there are no forms of discrimination, exclusion and violence. However, some of these situations are due to cultural conditions, and others arise from the loss and degradation of the culture and/or the appropriation, with negative effects and impacts, of Western schemes into Indigenous societies.

The participation of Indigenous women in decision-making, public affairs, and internal and external dialogue is different in each culture. That is why it is difficult to characterize the degree of discrimination and exclusion: it is necessary to analyze the culture of each People. In every Indigenous culture there are clearly differentiated spaces each of for the sexes in terms of the decisions and powers with which each sex is endowed. These distinctions are also related to the structure of authority (which varies among different societies), household tasks, agriculture and hunting work and, in general, tasks related to survival, handicrafts and spiritual, medical and political needs. Very often, in addition to being differentiated, these spaces and roles are inequitable or are used to exercise cultural gender-related violence.

The separation between the public and the private also has different connotations inside these communities. In these societies, the collective subject assumes many roles which in Western society are individualized and privatized in contexts of intimacy or domesticity. Additionally, one must realize that Indigenous Peoples consider a double public sphere: the collective subject vis-à-vis Western society, and internally vis-à-vis the Indigenous People.
On the other hand, many aspects of Indigenous cultures restrict or deny women’s participation — in public spaces of interaction with Western society, in representation or in cultural contact — as a strategy for cultural resistance and survival and not necessarily as a result of principles of discrimination and exclusion.

For most Indigenous Peoples, women are active participants in discussions and decisions about the future, although there are topics that are relegated exclusively to one of the genders. Women also participate in dialogues with those outside of their own culture and, in some cases, as with the matrilineal Wayu People, decision-making is primarily exercised by women (who may be supported by “nephews”, sons of the alaulayu or a maternal uncle).

Among the Wayu People, women participate equally in community events and can easily become the leaders of activities. There are no gender limitations for participating in meetings and making decisions because, culturally, women have functions as intermediaries and interlocutors within society and, for this reason, women’s opinions are heard and respected.

For the Peoples of the Sierra Nevada de Santa Marta — Kogui or Kaggaba, Arhuac or Bintukua or Ikja, Arzario or Wiwa — power and authority are very clearly defined along patriarchal lines and there is a high degree of social hierarchical organization that affects the spaces for dialogue and contact. In these societies, space for dialogue is primarily for men and only exceptionally do women participate. Internally, decision-making schemes and systems involve women in different ways and women have their own forms of recognition and freedom. There are spaces that are exclusively for women in everyday and social life. The cosmological understanding is based on a blended concept of creation, balance and harmony. Although the feminine and the masculine are highly differentiated, it is understood that there can be no creativity, equilibrium and harmony without an adequate relationship and interaction between these two poles, which are the basis for everything. Neither can be absent. This is the principle of natural, social and spiritual life.

During the workshops carried out as part of the INER/NSI project, these cultural peculiarities were discussed with the people from the Sierra Nevada, in the workshop with the Wayu and in the national workshop.

9. Case Study Summaries

9.1 Consultation with the Peoples of the Sierra Nevada de Santa Marta

The Kogui (Kaggaba), the Ikja (Bintukua or Arhuac People), the Wiwaa (Arzario or Sanka) People, and the Kakwamo People (Source: Field Report of Julio Barragan 2001)

Three consultation processes have been carried out in the Sierra Nevada de Santa Marta:

- Consultation for the construction of a coal port on the mouth of the Lagarto river in the Municipality of Dibulla, Department of Guajira (Company: Prodeco S.A.)

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Consultation about the final draft of the Sustainable Development Plan for the Sierra Nevada de Santa Marta (NGO: Fundación Pro-Sierra Nevada de Santa Marta)
Consultation about the construction of a power transmission line from Fonseca (Guajira) to Valledupar (Cesar) (Company: Interconexion Electrica S.A.)

There are other projects about which no formal prior consultation processes have been carried out but for which initial information is available. Of these, the following are related to mining activities:

- Construction of a steel mill and a multipurpose port in the Municipality of Dibulla (Company: a consortium that includes Mitsubishi-Exxon-Texaco, among others)
- Construction of two coal piers in the Papare region, Municipality of Cienaga, Department of Magdalena
- Construction of a power transmission line from Bosconia (Cesar) to Fundacion (Magdalena) (Company: ISA, S.A.)

For the purpose of this project, the research team analyzed the consultations that took place with Prodeco S.A. and Fundacion Pro-Sierra Nevada de Santa Marta.

9.1.1 The Prodeco Case

Location: North slope of the Sierra Nevada the Santa Marta
People: Kogui (Kaggaba) People
Mining project: Coal Port
Company: Prodeco

Context:

In December 1995, officials from the Prodeco company made the first contact with Indigenous authorities from the Gonawindua Tayrona Organization (OGT) in Santa Marta. By the end of January 1996, two meetings had been held with the participation of the traditional authorities from the settlements on the Jerez river and a first letter of agreement was signed according to which the Indigenous authorities expressed their agreement with the construction of the port. In return, the Indigenous schools located in the Municipality of Dibulla would be remodeled and furnished, the Mamas would be allowed passage to the beach for their payment rituals, a house would be built in the Rio Ancho district for Indigenous families coming down to the coast to do errands, and several lots within the resguardo would be purchased (not to exceed the amount of 60 million pesos).

After this letter of agreement was signed, the traditional authorities from the other settlements became aware of the agreement. With the support of the DGAI, they obliged the process to be reopened to follow the formal requirements mandated both by ILO Convention 169 and the Law of Origin of the Indigenous Peoples of the Sierra — requirements that had not been met during the previous meetings. This internal discussion was very important for the traditional authorities because they examined who had made the decision to agree on benefits, and why that
decision had been made without knowledge of the impact of the project on the people and their culture.

At that time, the Mamas saw that the traditional authorities who had been present during the previous consultation and agreement meeting were not the traditional authorities responsible for the particular sacred site — or Shibaks — on the “black line” (the line connecting various sacred sites around the territory of the Indigenous Peoples of the Sierra Nevada de Santa Marta) where the port would be built. That place, like all sacred places, had a specific traditional authority to take care of it, an authority with spiritual and material responsibility for the site.

The people then reconsidered how they were participating in meetings and processes that could affect them and, after some internal reflection, decided that for this and future consultations, it was critical to examine the responsibilities of each authority and the internal criteria to which they must adhere in dealing with specific places. Undoubtedly, this mistake allowed the community to regain control of an institution — a form of control that they had stopped exercising, perhaps because of a lack of experience in this area of consultation.

On the other hand, the people also noted that the way in which a series of benefits had been arranged followed a paternalistic line, a line of gifts, that was not compatible with the exercise of their autonomy and their government. That internal process of reflection started a maturation process which has resulted, for example, in the position currently held by the Territorial Council of the four Councils of the Sierra Nevada: at the moment they will not accept projects or investments within their territory until greater unity and clarity is achieved among the four Peoples of the Sierra. That position is very different from the paternalistic and unfair position they had almost accepted.

As a consequence of this process, throughout 1996, different settlements were visited to ask the authorities of each Indigenous People in the Sierra about the convenience of building a pier for loading and transporting coal in the area between the Cañas and the Lagarto rivers. A group of Mamas headed by Mama Jose Sarabata from Bonga and Mama Juan Asencio Conchacala from Lwaka and Bonga, went to the location and, according to the traditional procedures, determined the cultural characteristics of the site. Thus, after two visits to the site selected for the port (visits which included participation of representatives of the company, the Ministry of the Environment and the General Directorate for Indigenous Affairs), the Mamas — in consultation with the zhatukwa \(^2\) — recommended that the other traditional authorities and the governing councils (which represent the Indigenous organizations before the state) not allow the construction of the port. In a meeting held in Mingueo in December 1996, the various state institutions and company representatives were told that the decision was made on the basis of the culture, and in order to safeguard the sacred place as a means of safeguarding the ecosystem of the Sierra. The appropriate document was prepared and the opinion from the General Directorate for Indigenous Affairs of the Ministry of the Environment was given.

**Results:**

On July 9, 1998, the Ministry of the Environment issued a resolution denying the environmental license to Prodeco for the construction of the dock.
In the Prodeco case, the presence of the state during the whole consultation process is noteworthy. In this case, it was the DGAI of the Ministry of the Interior who told the traditional authorities that, for that office, the initial process was not a real consultation and it should be annulled and started again. All this occurred because the results did not reflect the point of view of its authorities or the view of the National Parks Unit of the Ministry of the Environment (whose job it is to evaluate environmental impacts). In this consultation, these two agencies worked hand-in-hand with the Indigenous authorities and organizations, watching over the rights of the Indigenous Peoples and over the environment. It is worth mentioning that, during the process, some parties within the Ministry of the Environment and the Municipality of Dibulla were sympathetic toward the project and the company, while others expressed their doubts and disagreement. Precisely because of that divergence, the consultation required a joint and constant effort from all sectors of the Indigenous Peoples and their organizations.

The interesting aspect of this process was that it managed to place cultural criteria at the same level as any other criteria. This was important, given that traditional territory and cultural integrity of the affected People were at stake, in the form of access to and care for their sacred places. The port was going to be built at a site where, according to the culture of the People, the “mother of all diseases” is found. By destroying the hill and lagoon where the pier was going to be built, the door would be opened for the diseases to come up into the Indigenous settlements in the high part of the Sierra. It would no longer be possible to carry out the necessary rituals to cure these diseases.

One last aspect that also weighed in favour of the final decision made by the Indigenous Peoples was that some of the local political powers were not interested in supporting the port project. This no doubt reduced the pressure on the Indigenous Peoples and prevented confrontations between more powerful interests.

9.1.2 The Sustainable Development Plan for the Sierra Nevada de Santa Marta

Location: Sierra Nevada de Santa Marta: Departments of Magdalena, Guajira and Cesar
People: The four Indigenous Peoples of the Sierra Nevada de Santa Marta: Kogui (Kaggaba), Ikja (Bintukua or Arhuac), Wiwa (Arzario or Sanka) and Kankwamo
Project: Sustainable Development Plan for the Sierra Nevada de Santa Marta
Organization: Fundacion Pro Sierra Nevada de Santa Marta

Context:

Fundacion Pro Sierra Nevada de Santa Marta is an NGO founded in 1986 to conserve the Sierra massif. With funds from the Government of Germany, in the mid-1990s the Foundation started to prepare a strategy for the conservation of the Sierra. This strategy was prepared through interactive workshops, which included the various sectors with interests in the Sierra. The result was a document known as the Sustainable Development Plan for the Sierra Nevada de Santa Marta, published in mid-1997. That document was adopted by the Colombian state, through the Ministry of the Environment, the National Planning Directorate and the Governors’ Offices, as the government plan to foster development throughout the Sierra.
In December 1997, through an initiative of the Governing Councils of the four Indigenous organizations of the Sierra, the Foundation and the DGAI were invited to start a formal process of consultation about the plan. The Indigenous authorities did not feel — and still do not feel — represented in the plan or in the programs and projects it contains, or in the vision of the future for that territory that the plan intends to carry out.

As in the previous case (the case of the Prodeco coal port), the Foundation (the organization proposing the project) financed the consultation. The DGAI also contributed funds for the consultation. It was carried out through meetings with selected representatives, and other general information and discussion meetings with the Indigenous Peoples. The last one, where the four Peoples and their traditional authorities were represented, was held in Bonga in March 1998. There, the Indigenous authorities decided that the time allocated for consultation had not been enough to discuss the topic in detail, especially because, with support from the state and a considerable amount of resources to be invested, the project would, to a large extent, determine the future of the Sierra and the Indigenous Peoples.

The internal reflection has been very extensive. The conclusions of participants in the INER/NSI project workshop held in Santa Marta, were as follows:

The first question we ask ourselves is, how does a proposal made by an NGO become a state policy adopted as a Sustainable Development Plan for the Sierra Nevada de Santa Marta? And along the same lines: What is the relationship and the responsibility of the state and other agencies that are taking part in the Sustainable Development Plan for the Sierra Nevada de Santa Marta, to the Indigenous Peoples that live there?

Within this framework, the discussion should include putting into context the life perspectives of the Indigenous Peoples according to the Law of Origin, their relationship to national and regional development and, also, what this life model contributes to regional and national development.

In this analysis we are discussing the responsibility of the Indigenous Peoples, because they are part of the Colombian nation. This perspective is not limited only to the minute reality of the territory of the Sierra or the resguardos where Indigenous Peoples live, and does not simply weigh their own development against national development. Throughout the construction of the projects and activities that are part of the development plan, one can see the intention of incorporating the Indigenous Peoples into the dynamics of a market economy, based on concepts such as quality of life, poverty, etc., denying the existence of the Indigenous Peoples’ own traditional forms and economic models. Another characteristic of the development plan is the obvious ignorance of historical processes in reference to the social and cultural relations that have been taking place for over 500 years in the Sierra. The diagnostics prepared as a basis for the plan are limited to an examination of a moment in time, as if what is today has always been so. Additionally, the development plan uses previously defined ideas and components that do not leave alternatives for education or for agreement with the Indigenous authorities. These ideas and components are based on the need for technological intervention, leaving no basis for interculturalism or traditional knowledge, tested and refined over the centuries, that the Indigenous Peoples have, ignoring the urgent need to include flexibility as a guarantee for dialogue and interculturalism. The very conception of the development
plan fragments the dialogues and reproduces these sectorial forms used by the state, and prevents a holistic interpretation by the Indigenous Peoples. To this extent, the plan is an intricate network of projects that make confusing reading for the Indigenous Peoples. Therefore, the position of demanding from these Peoples the approval for proposals containing all these shortcomings and confusion is contradictory. In this scenario, and bearing in mind that no real agreement has been reached with the Indigenous Peoples on the Sustainable Development Plan for the Sierra Nevada, it is inconceivable that actions are already being implemented within the framework of the Sustainable Development Plan for the Sierra. The agreement and consultation with the Indigenous Peoples of the Sierra is still sizing the proposals and policies that lie behind the plan. Experience has shown that consultation has been limited to negotiating some resources, while the Indigenous Peoples look at integrated, traditional concepts, and the intervention of other sectors of society in the Sierra, state organizations, and therefore seek to clarify and define the policies that should be proposed for the future of the Sierra.

The participation of international agencies, either through donations or loans, makes the reality in which the plan and its implementation moves even more complex. Also, the violence that affects the Sierra has not been fully measured in terms of all its implications. Although, on the surface, negotiations take place between different subjects, including organizations and Indigenous Peoples with legal representatives, underneath the situation, there are dynamics and other factors that have a definite impact on the negotiations and the decisions made. These factors and pressures arise from the dynamics of violence and war in the Sierra Nevada, which blur the traditional culture of Indigenous Peoples and which, most of the time, are not recognized in the agreement or negotiation processes. In other words, these issues are not discussed in public fora, but they do affect the future of the Indigenous Peoples…

So far, consultation has not been a dialogue among equals. While the state defines policies on the basis of the investment of resources supported by programs and plans, the Indigenous Peoples begin the consultation from the inside. In many cases, interlocution has not been directly with those who make decisions, such as ministers, or dialogue had not been direct with those who make the decisions, and therefore require direct communication with decision-makers, such as the ministers or directors of national entities, or even with those who finance these projects. The time differences in consultations and agreements must no longer be a simple legal requirement and should look at the requirements of an ample and transparent discussion that will permit the creation of a common language and a consensus to actually think about the future of the Sierra. So far in the consultation processes, national legislation, constitutional mandates and international agreements which permit the Colombian state to carry out the appropriate adaptations for consultation and agreement with Indigenous Peoples, have been systematically ignored. The mobilization of the leaders is currently conditioned by the violence that affects the whole territory and prevents a real and effective consultation about each project and activity proposed for the Sierra. The violence that goes on in the Sierra and in Colombia forces people to negotiate when they have already lost. (INER/NSI Project local workshop, Santa Marta, May 12, 2001)

Finally, an intermediate solution was proposed to the Pro Sierra Foundation and the government. This involved creating a co-management committee comprised of authorities from the four Peoples and from the most representative institutions of the government: the Ministry of the Environment, the General Directorate for Indigenous Affairs, CORPES, and the Presidential Advisor for the Atlantic Coast. The Foundation would have a voice but no vote. The committee's
job would be to agree on the terms of implementing some of the projects included in the plan and, especially, to foster an Indigenous intercultural proposal to adapt the plan to the cultural, territorial and political reality of the Sierra and its Indigenous Peoples.

**Results:**

The consultation process lasted until the end of 1999 when the joint declaration of the four Indigenous Peoples of the Sierra was prepared and published. That declaration established the mechanisms and procedures for dialogue with the state and rejected the implementation of the Sustainable Development Plan in the protected areas within Indigenous territories, and in the ancestral territories outside the current reserves into which the Indigenous reserves will be expanded. In addition, the declaration notes that none of the projects included in the plan is accepted for the time being. One of the key points of the declaration is the creation of the Territorial Council of Councils (Consejo Territorial de Cabildos) as a forum to negotiate the problems and fundamental issues of the Indigenous Peoples of the Sierra in their dialogue with the state. The four Peoples also indicated that they do not consider the consultation to be concluded or fully carried out.

Through the work undertaken for the consultation about the Sustainable Development Plan, the internal procedures and the ancestral unity of the four Peoples were consolidated. The hard work carried out for over four years (since December 1996) made it possible to obtain the clarity and basic knowledge to face the relationship with the state and defend territory and autonomy as pillars of Indigenous politics.

This was supported by the creation of the Territorial Council of Councils and a permanent work team with delegates from the four Peoples. This team is dedicated to the specific discussion of each project to be carried out within the traditional territory of the four Peoples. In addition, during 2000 and 2001, the important job of consulting with the traditional authorities of each people has taken place, giving new life to political, organizational and territorial concepts such as eswama.

In the words of leaders like Arregoces Conchacala (Governing Council of the Gonawindua Tayrona Organization), Jaime Arias (Governing Council of the Kankwama Indigenous Organization) and Danilo Villafañe (Director of the Gonawindua Tayrona Organization), there seems to be a certain mistrust of consultations with permanent results for each and every problem or proposal made by and to the Indigenous Peoples. Although the positive aspects are highlighted, it is argued that time is wasted by repeating the same procedures and giving the same reasons and proposals to reach of the interlocutors. They point to the lack of commitment by the state, especially with the disappearance of the Regional Directorate General for Indigenous Affairs and the weakening of the National Office, which is a government guarantor of the rights of Indigenous Peoples. This is the case with regard to the projects under the Sustainable Development Plan, which is funded by the World Bank with a loan to the Colombian government through the National Planning Department and implemented through a contract with the NGO Fundación Pro Sierra: only when the Indigenous Peoples of the Sierra and their four organizations decided to take a radical position in reference to the permanent absence of the state from the whole negotiation process, did the state institutions show up.
9.2 Prior consultation and agreements with the Wayu People

Lower Guajira or South (coal); Middle Guajira — Manauré (salt) and Chuchupa (gas); and Upper Guajira – Portete Bay (free ports)

The Wayu People live in the Guajira peninsula in two neighbouring countries: Colombia and Venezuela. There are approximately 300,000 members, of which some 130,000 live in Colombia. The Wayu have segmented social characteristics, with traditional family or clan authorities (without political centralism), which are matrilineal and defined by the maternal uncle or alaulayu. They are dispersed throughout their territory, are itinerant and have multiple residences that change according to the droughts and the rains. The Wayu economy is based on pastoralism (goat herding) and silviculture, with diverse and complex articulations with modern society and salaried work. Their social systems follow a rigorous scheme of reciprocity and redistribution and a cosmic vision that integrates their social and life systems with nature and the spiritual systems of the supernatural world. They have a clearly defined legal system where authority is exercised by the putchipu, or “word man”. The Wayu justice system constantly re-creates the concept of balance and well-being, or anaas. Anaas is a fundamental concept in the Wayu cosmic vision. Its prototypical figures, which underlie the interpretation of life, is Juya (“he who rains, he who fertilizes and is mobile”) and Mma, the Earth (“she who is fertilized and gives birth and is immobile”). The Wayu are segmented, and are stratified into large, matrilineal clans. A clan can usually cover several communities or partialities that live dispersed over the territory of the Guajira.

9.2.1 Case from the south of Guajira: coal mining

Location: Municipalities of Distraccion, Caicemapa Resguardo,
People: The Caimito, La Ceiba, Madre Vieja and Paraiso communities, with a total of 825 inhabitants over 504 hectares which they share with a non-Wayu peasant population whose culture is Guajira
Mining project: Coal exploration
Company: Carbones del Cerrejon (a consortium of companies: BHP Billiton (Australia), Anglo Coal (Switzerland) and Glencore (South Africa))

Context:

The company (a consortium of companies) needed an environmental license to start exploration in the Municipality of Distraccion. Because it was located inside an Indigenous resguardo, a process of prior consultation was started on September 17, 1998, with the participation of representatives from the state, the community and the company. Each actor supported their presence and interest with a legal framework until the expected agreements were reached. The process lasted 23 days, during which two meetings and three days of fieldwork took place.

Results:
The state (Ministry of the Environment, Indigenous Affairs Division) fulfilled its mission by verifying that the consultation had taken place. The company obtained authorization from the community for exploration activities within the resguardo. The community obtained, in exchange, a development program for basic services, which consisted of an infrastructure for education, health, agricultural production and re-creation.

After several years, the Indigenous authorities have reflected on the procedure used in this consultation. They have concluded that there was no conscientious consultation with the community because the leaders did not have any information. In addition, there were inter-generational conflicts within the communities — power struggles that turned out to act in favour of the mining company, as it got what it wanted without any objections.

9.2.2 Negotiation of the Manaure Salt Mines

Location: Municipality of Manaure, Department of Guajira

People: Six Wayu partialities and two Wayu sectors (the salt growers and the salt collectors in the parallel pools); 51 major household heads (alaulayu) and another 302 household heads from the Tawaya, Musichi, Yawaka, Jiru, Uraichi and Toronjomaana territories, the Indigenous resguardo of the Upper and Middle Guajira, Municipality of Manaure, Department of Guajira

Company: IFI — Concesion Salinas

Context:

This was a search for a solution to a decades-old conflict between the salt company (at the time, the IFI-Concesion Salinas) and the Wayu People who own the territory where the salt mining complex was established, and who traditionally gather and produce salt in that area.

Around 1920, the state exploitation of sea salt was established in Manaure. The Wayu have gathered salt traditionally. Between 1965 and 1970 salt exploitation became more modern, mechanized and industrialized. Production was increased and upgrades performed in over 200 hectares of two coastal lagoons, which were turned into pools to produce brine. This destroyed the special ecosystems of these coastal lagoons. Several clans had, and still have ownership rights (territorial domain the Wayu does not prescribe). The company came in as an enclave. The fact that the territory was not an Indigenous resguardo at the time led to the state arbitrarily appropriating the concession and the territory it needed for the industrial expansion. This resulted in the destruction of the lagoons and ancient cemeteries (dating back to the Tayrona), and produced changes in the fauna and fish. In addition, the state expropriated the territory from the Wayu families in the area. The industrialization process created a series of territorial, cultural, environmental, social, urbanization and Indigenous salaried labour impacts, which were added to those suffered by the Wayu in previous years.

Together with a major industrial production of salt, the company, as a concession to the ancestral work of the Wayu in the salt deposits, continued to engage in the manual production or collection of salt in two ancient pools (Shorshimana and Manaure) which span over 70 hectares. This production took place twice a year. Currently there are over 4,000 salt gatherers (at times they have reached up to 10,000) who come from many different places in the Wayu territory. At
the end of the salt harvest, the company paid these workers a ‘laughable’ amount per bag of salt collected. Often this money was the only money to which a Wayu could have access in the whole year, and the company did not provide any tools to gather the salt in the brine.

As a result of social and economic maladjustments, the Wayu slowly broke the state monopoly in the production of sea salt and began to produce salt in pools parallel to those owned by the company. Over time they became semi-industrial pools that claimed 40 and sometimes 60 per cent of the national salt market, illegally. The company almost went bankrupt. Wayu claims for recognition of their culture, improved working conditions for Wayu workers and salt gatherers, compensation for damages to the environment and the culture and recognition of the ancestral rights of the Wayu to produce and gather salt led to a negotiation between the national government and the affected Wayu Peoples. In 1991, IFI–Concesion Salinas negotiated a credit with the World Bank to modernize the industrial setup of the salt deposits. The Wayu Peoples of Colombia demanded compliance with Operational Directive 4.20 of the World Bank because the conflict was at its peak, and the minimum requirements of that operational directive were not being met. These requirements constituted another factor that led the government to negotiate with the affected Wayu who had been claiming their rights.

This negotiation took place in 1991, before the National Constitution that was approved that year, and fell outside the current framework being analyzed here in terms of prior consultation. However, it is one of the examples and precedents of negotiation between Indigenous communities and the Colombian state before the norm was established, and it culminated with the signing of an agreement providing an integrated solution to the problems. The agreement recognized ancestral rights and territorial rights, and offered reparations for the cultural, environmental, social, economic, and labour damage that had been caused. It also opened the salt mining complex to cultural diversification and equity measures in the company for the Wayu from Manaure. This was the result of a Wayu struggle that has been going on for decades.

**Results:**

On July 27, 1991, after a formal negotiation that lasted several months, an agreement was signed which recognized the Wayu rights and made a commitment to resolve the conflicts between the company and the community by meeting a series of requirements:

- Establish a fund for the social well-being and development of the Wayu community in Manaure.
- Establish a mixed capital corporation based on the current industrial exploitation, with 25 per cent equity participation for the Wayu community as compensation for the damages caused.
- Re-organize the manual salt harvest and including the parallel production in this new corporation.
- Diversify the production of industrial salts.
- Use the royalties for the benefit of the communities.
- Establish mechanisms to follow up and guarantee compliance with this agreement.
For several years after the agreement was signed there was strong opposition to its implementation, especially by the regional political sector of Guajira. This led to the postponement of its implementation, with the veiled support of the national government, who joined the opposition and agreed with the arguments being made: that Indigenous Peoples could not be allowed to be partners in a national industry, and much less that the control of this company should be taken away from the local and regional politicians.

In view of the systematic lack of compliance, the community appealed to the Attorney General’s Office, which in turn initiated a legal action for the protection of constitutional rights to enforce the agreement. The Attorney General’s monitoring of the level of compliance with the agreement was very lax and did not consider the context of the meaning and the criteria in the agreement. This allowed the company to continue with its slow, partial and biased compliance with the agreement.

The new corporation does not exist yet. There are bills in Congress to create it, although using a different concept than was originally agreed. These bills were introduced 10 years after the agreement was signed, during which time the industrial facilities were abandoned, were not maintained, and were not subject to reinvestment or marketing policies. This created a favourable situation for competing salt companies, which has led to the industrial capacity of the Manaure salt mines being reduced to a minimal level, producing amounts barely higher than those of manual production. The capital invested was therefore destroyed by neglect and failure to implement the agreement. The company that today or tomorrow will be partially handed over to the Wayu is not even a shadow of what it was when the agreement was signed on July 27, 1991.

In spite of this, the Wayu community has gained in the recognition of rights; the capacity to engage in dialogue and negotiate locally, regionally and nationally; and the recovery of territorial rights and principles of intercultural respect. It keeps alive the agreement schemes learned during this process although it is not yet a partner in the company.

9.2.3 Portete Bay

**Location:** Portete Bay, Guajira  
**People:** Wayu communities from Bahia Portete: Wawariou, Liani and Tooshai, Waritpantui, Parasamana, Los Cocos, Iwasai and Waietalu, Suuna-Aljunao (Puerto Nuevo), Media Luna

**Context:**

The intra-ethnic conflicts among Wayu families located in Portete Bay intensified after 1994, and new intra-ethnic conflicts developed over the construction of piers or ports to unload merchandise that supplies the trade in Maicao (a border town that has been a free port, and from which different types of merchandise enter the country). In addition to this legal movement, there is also circulation of forbidden goods.

However, the piers built for unloading are still illegal. Over the years, these ports have been established at different spots in the Wayu territory. First they were located in Puerto Lopez,
then in Puerto Estrella, and later in Bahia Portete and Puerto Nuevo — places that are far closer to Maicao. These are all natural ports where large ships can reach the shore and it is only necessary to build small unloading docks. This activity is capital-intensive and is carried out by Wayu entrepreneurs.

After the piers were defined for Bahia Portete, the entrepreneur of the ports at the time (in the 1970s and 1980s), a distinguished Wayu who enjoyed cultural recognition, decided to leave the business and hand over operations to his administrator. In 1995 the new Wayu entrepreneurs tried to legalize the ports and territories as their own (although they had arrived there to work on the docks and not because they owned the territory). The port, like any other port around the world, has been the site of all sorts of social decomposition, including drugs, teenage prostitution and violence. This compounded the cultural, social and economic effects of the port activity on the Wayu families who own the territory. Those families found themselves trapped and terrified by the owners of the ports.

These families realized that if the Wayu entrepreneurs were able to legalize the ports, they would be victims of expropriation and would have to leave or face a clan war. They decided to go to different state agencies and petition for recourse. They requested the intervention of the state to ensure Wayu territorial rights were recognized, and to prevent the violation of these rights in the case that the nation went ahead to legalize the port. The Wayu also requested that measures be implemented to control the social decomposition in the area.

The Alaulayu Juan Epinayu summarized the process as follows during the meeting for consultation and agreement held in July 1995:

If God created the earth and used a doll made out of the same earth to create people, then we as Wayu were modeled by Maleiwa, who put us in each place, in each territory. Every Wayu, through their eirruku [Wayu clan or basic family unit], has a given ancestral territory and is known by all the Wayu. That is the Wayu right of ownership.

Maleiwa gave us the means to subsist in each one’s land through animals: that is why we’re shepherds and hunters. Every Wayu knows who everyone is and what is his territory. But things have changed now: Today there are Wayu who don’t want to be Wayu and they want to be what is convenient for them.

Why does this situation come about? Because there are some docks in my territory that are not owned by my family and whose owners are not owners of my ancestral territory. The Wayu have a way to be social, through the eirruku. XX came over and asked permission to use my territory, because Puerto Estrella was too far away and he told us: “I will give you money so that you can work and earn something as well, because I am going to be making money there. I will give you a truck if you let me work in this land of yours.” I let him and I didn’t ask for anything in exchange, because I am a shepherd. The foreign merchant tax is traditional and XX paid for it, but after him came the other ships and XX left for that reason, because of the disorder created by the transporters, and YY stayed here to work, and I let him stay. Then ZZ came.
Later came the problems and my obligations as owner of the land, and I asked for them to leave my territory alone because, additionally, they had already made money. There had been people killed. I insisted on my claim because already the old Wayu had made me see it …

This process of consultation and agreement with regard to the legalization of the ports has been very difficult and slow. It is still not over, although the Wayu community in the area has recovered some of their rights. The (intra-ethnic) conflict requires that controls, agreements and arrangements be used, perhaps for years, because there is a high probability that this will lead to a situation of violence or intra-ethnic war.

This consultation applied the criteria established in ILO Convention 169 and the frame of reference for prior consultation given by the DGAL. Since the last meeting, which took place three years ago, this has not been discussed because violent acts have occurred that make it dangerous to continue with the agreement. However, it has been possible to thwart the entrepreneurs who use the docks and who wanted to appropriate these for themselves through the national ports legislation, intimidation and force (even though these docks are located in areas that belong to other Wayu families). Negotiations have come to a halt, although progress has been made in the clarification of Wayu rights and territoriality in the area. The ports have not been legalized in favor of the current entrepreneurs and it is a fact that the process of legalization will include an internal process with the Wayu People, followed by the state as guarantor of rights.

9.2.4 Chuchupa B

**Location and People:** 16 Wayu partialities in the area of influence of the project: in the Aritayen zone, the Indigenous *Resguardo* of the Middle and Upper Guajira, the subdivisions of Pajaro and Mayapo, the Municipality of Manaure, the Department of Guajira and a peninsula located to the northeast of Colombia

**Company:** Association Ecopetrol — Texas Petroleum Company

**Context:**

This case involves construction of an offshore gas platform, and the use of easements on Indigenous territory required for the development of the project.

Through a prior consultation process and a socio-cultural and ethnic study that included Indigenous and institutional participation, it was determined that 16 Wayu partialities would be affected. In addition, the traditional authorities (the *alaulayu* or maternal uncle) and traditional lands of each of these partialities were identified. Many years prior to this project, the company had constructed Chuchupa A, and had consistently ignored Wayu systems and processes of consultation, participation and negotiation. Instead, the company negotiated only with representatives of one Wayu partiality, and followed private criteria. This generated serious internal conflicts that involved confrontations and war (following Wayu law) among clans and families in the area — conflicts which pervaded relations between the Indigenous authorities and the company.
To carry out the prior consultation for Chuchupa B — essentially an expansion of Chuchupa A to set up a maritime platform to exploit gas and transport it by pipeline to the storage and commercialization plants — the following steps were taken which had the validation and/or participation of the partialities (consultation carried out under ILO Convention 169, Law 99 of 1993, and the DGAI frame of reference):

- Joint study (with the government’s Indigenous Affairs Office (DGAI) of the Ministry of the Interior) of the cultural matrices of the Wayu People, their social, territorial and authority structures and other cultural characteristics
- A census of the Indigenous partialities within the project’s area of influence
- Identification of the family authorities \((alauyayu)\) in each partiality and their territoriality in order to determine the legitimate representation of the interlocutors during the prior consultation
- Identification of the inter-institutional public actors who have responsibilities in the process
- Environmental impact study
- Socio-cultural impact study
- Research about proposed projects to mitigate and compensate the impacts produced
- Mutually agreed timetable to carry out the prior consultation and all other necessary conditions

The following steps were taken during the consultation process, before the environmental license was issued, to verify and guarantee that Wayu ethnic and cultural integrity was not affected:

- The 16 Wayu partialities were informed, through their representatives, about the Chuchupa B project and its components and about all the studies carried out on impacts, effects, alternatives and other issues.

- The matter was discussed with the representatives of the Wayu partialities.

- The Wayu and their authorities reflected internally, in their territories and rancherias, on: the project, its implications and effects; the proposals for participation, mitigation and compensation of impacts; the participation of the Wayu partialities during the project implementation; and their participation in social benefits.

- There was a covenant between the Wayu representatives and the company, validated by the public entities present, of the agreements on each issue. The public agencies present were the General Directorate for Indigenous Affairs of the Ministry of the Interior, the Ministry of the Environment, the Ministry of Mines, and the Attorney General’s Office.

- A document was signed indicating the end of prior consultation. In addition to issues about impact mitigation, this agreement includes mechanisms for participation throughout the project, methods of monitoring and controlling compliance with the
agreement, and an intercultural regulation for the operation of the oil easements in the Wayu partialities of the Aritayen area of the Wayu resguardo in the Middle and Upper Guajira. These regulations include in their objectives the following goals:

- Attempt to achieve harmonious development throughout the operation of the project.
- Ensure respect for the ethnic and cultural integrity of the participating Wayu partialities.
- Encourage the application of intercultural criteria and forms of social regulation and control in the area of influence.
- Implement criteria for coordination with the various Indigenous private and public social actors during the project.
- Follow special rules for using the different areas of the easements.

In spite of the many difficulties that had to be resolved, this consultation achieved its main objectives and applied intercultural criteria to all the topics discussed. The prior consultation with the Wayu concluded with the signing of a pact involving several agreements and an intercultural set of rules for managing and resolving future conflicts.

**Positive implications:**

There are many positive implications in the Chuchupa B case:

- An intra-ethnic conflict was resolved that had emerged years earlier in the first stage of the project and had led to an intra-ethnic war between two clans who owned the lands affected by Chuchupa A. That conflict had led to the death of many members in each caste or family, and even the migration of the caste that lost the war. This series of conflicts was resolved because, during the consultation process, the rights of all affected partialities were recognized. The social balance was restored, the emigrants returned and the benefits were shared among all people affected. The conflict had arisen because at that time the company (Texas Petroleum Company) recognized as the only interlocutory representative and sole beneficiary of the project only one caste or family out of all the Wayu partialities that had been affected. The company ignored the social fabric, the territorial aspect and the traditional modes of representation, and broke all the balances of the Wayu culture.

- It was possible to establish a sound basis (although with some conflicts remaining from the previous process) for restoring more harmonious relationships and mutual social and economic benefits for the Wayu, the municipality or the municipal government, and the company.

- It was possible to establish a framework for respectful intercultural relations, and to adapt the project to the intercultural requirements.
• A mutually satisfactory agreement was reached on different programs for the 16 Wayu partialities for compensation, impact mitigation and methods for Wayu participation throughout the operation of the project.

• Specific benefits were negotiated and agreed upon according to the differential rights of each partiality, according to the work or the easement carried out in each partiality’s territory, and respecting the Wayu forms and structure of authority and representation.

• Social benefit programs were agreed upon (in health, education and other areas) both for the rural Wayu partialities and for the urban area of the town of Pajaro.

• A committee was set up to follow the agreements reached during the prior consultation, and intercultural rules for the operation of the oil easements were established, including general mechanisms for conflict control and regulation.

9.3 Consultation with the Awa People

The Awa Indigenous People has approximately 20,000 members (DANE–UNIPA census, 1993, updated in 1999), settled in the municipalities of Barbacoas, Ricaurte and Tumaco, in the Department of Nariño.

The areas they inhabit, according to the IGAC classification, belong to the pre-mountain rainforest (bp-Pm) and tropical wet forest (bmh-T) and constitutes a transition ecosystem in which life forms from the high plains and the Pacific coast converge. It is characterized by a large genetic biodiversity, multiple interrelations among the species, and competition among them for the scarce nutrients derived from the decomposition of vegetable matter deposited on poor soils. In this respect, there is a hypothesis which states that a tropical jungle is not regulated by the minerals in the soil but rather through the recycling of nutrients contained in the jungle’s own biomass (organic phase).

Historically, the Awa community has developed techniques and knowledge that have enabled it to make use of the fauna and flora and the fertile lowlands for production, without destroying the large areas they inhabit.

The Awa have several principles, some defined by them:

“The Awa are not farmers, we are gatherers. The root of all the Awa is in the jungle, in the ‘Barbacha’ (mythology) tree. There are rules or norms in the mountain that must be followed. The mountain talks to us in different forms and teaches us and reminds us how we should behave.”

Their right over the land is an element that structures the Awa society. The number of people who live in a community, the co-operation between groups, the alliances and the unions of groups of brethren are established according to the capacity of the land and in order to establish greater rights over it. The settlement pattern is characterized by houses spread along the river banks and the tops of some mountains, surrounded by large plots of land of which only small areas are fit for cultivation. In fact, the distance between houses is determined by the lack or abundance of arable land (Awa pit or tit pit: good earth,
black earth). The amount of good earth owned by Indigenous families is variable and, according to the location, can be between 1 and 12 hectares. The land that is unfit for cultivation is not for free access because it is also related to family nomenclatures.

Based on ancestral techniques and practices, they plant different crops, raise some animal species and gather and hunt species of flora and fauna to establish a production-gathering system … (UNIPA 1999; delivered in the Santa Marta workshop of the INER/NSI project, 2001).

**Location:** Road from Tumaco to Pasto, Department of Nariño

**Project:** Construction of a road between San Jose de Payan and Kilometer 80 of the Tumaco–Pasto highway, passing through Awa territory

**Organization:** Mayor’s office, Municipality of Roberto Payan, Nariño

**Context:**

The design of the highway project went through the upper part of the Gran Rosario Awa resguardo, created in 1996 by the Calibi, Rosario, Peña Lisa, Palay, Salto Palay and Guanapi, with a population of slightly over 1,200 Indigenous people. The DGAI was not present as a government office; it had already decided to leave these processes aside, and the consultation was carried out autonomously by the Indigenous people, with the participation of the regional environmental unit, Corporacion Autonoma Regional de Nariño – Corponariño.

The internal consultation carried out by the Awa was very extensive. Transcribed below are some excerpts from the last meeting, in which the Awa People made their decision:

Gathered in council of traditional authorities and Indigenous councils from the municipalities of Barbacoas, Tumaco and Roberto Payan, during May 14–16, 1999 in the town of Diviso, Barbacoas, Nariño, the authorities and leaders of the Awa People listened to the advice of the elders and the authorities to make the decision that would later be submitted. The following were the most important pieces of advice given:

“We believe that the road goes through the headwaters of several rivers and they’re going to be damaged. Other Indigenous Peoples live below. The rivers are going to be dry and the people who arrive are going to throw garbage in and contaminate the water. And we’re going to get sick, the bellies are going to swell and it’s going to affect everything else. The trees will be knocked down, and with the smell of the people the animals will be scared away. In the springs the goblins live, as do the astaron and the vision. Everything is going to be scared off by the road and the whole of nature is going to be damaged. We believe that with all the people will also come crops that are not for eating, so slowly we will fail. It is going to be so; we don’t want any difficulties.

Let’s talk about the road. The Indigenous law gets together and the road is a very big problem. The issue of water is affected and a lot of law from outside comes in: the violence, the danger, the robbery. White and brown people abuse and cut down the forest. Even death can come, offering money with tricks so that we sell land. And if we don’t want to sell, the
threats start… That road passes through the headwaters of the streams and is going to pollute the water that the people in the lower parts drink, the Indigenous Peoples, the Black community and the ethnically diverse communities. If they build the road they’re going to exhaust all natural resources — first the lumber and the water — and there’s going to be violence, robberies.”

…

“We agree that we don’t need the road and we do not give permission to build the road. That is where the streams are born, where ethnically diverse communities and Blacks live. It is not only Indigenous people; it is for ethnically diverse s and Black peasants too. It is damaging because of the exploitation of lumber. The wood is living. In the old times they spoke about trees that are Awa People and they said that we are drinking their blood. If we kill them (the trees), the Indigenous Peoples and Black peasants are going to die: that is our wood and land, the trees are ancient Awa People. Those who come are going to cut down a lot of wood. That is why the trees live — because we have taken care of a lot of wood in the headwaters of the streams. Those are the sacred places for the Awa. Those trees are alive and if the road knocks them down Mother Earth is going to make us pay. There are many medicinal plants for us there, and if we damage sacred places we are going to get sick more, and that is why we don’t agree. Over there we still live in palm houses without full walls. If the road comes, they will steal the chickens, the pigs, whatever. We’re going to be badly off.”

…

“The Awa believe we know Awa wisdom, that there are some trees that are going to be cut down with power saws and that tree the root is poison that is going to poison the water. Trees are like people: some give blood water, others are poison root that is their angry spirit. It is strong. They are looking at us and if we don’t touch they are OK. If we touch them they get angry like a person. They live like that: a tree that has a strong spirit, poison, and it poisons the earth. They have spirit, we do not look. They also have another good spirit and another bad spirit.”

…

“For the Awa the big tree shows where there is a cemetery for grandfather. Grandfather lives there, grandfather lives in big trees in the jungle. In the cemetery we have crops inside the mountain; that is why we cannot kill the mountain. It is sacred place. Let them plant corn, let them live and eat, but let them respect grandfather and leave the big tree. In the past we buried some here, others there, far away and others there, far away. The big tree is cemetery that cannot be cut down, the grandfather won’t let that tree be cut down. It is a very big signal” (UNIPA 1999; delivered in the Santa Marta workshop of the INER/NSI project, 2001)
Corponariño, as the regional environmental authority, “gave a negative opinion for the construction of the road in question due to the damage [that would be caused] to natural resources, especially to the hydrographic star where many rivers and streams are born which are extremely important for the region” (UNIPA 1999; delivered in the Santa Marta workshop of the INER/NSI project, 2001).

The Awa also analyzed the expectations of the neighbouring communities and the possible inter-ethnic conflicts:

Everyone in the Awa region is aware of the expectations that ethnically diverse and Black people have about large-scale exploitation of the virgin forests of native species that our Awa communities have cared for in the headwaters of the rivers and streams through which the proposed road would pass. Many people have offered to buy the lands from the Awa of the Gran Rosario resguardo and we already know about death threats against the authorities and leaders if they don’t authorize the construction of the road. (UNIPA 1999; delivered in the Santa Marta workshop of the INER/NSI project, 2001)

It is especially interesting to see the way in which the Awa made a decision using their governmental and territorial autonomy, which shows that prior consultation among Indigenous Peoples is more than a simple instrument for citizen participation:

**DECISION:**

The authorities of the Awa People from the municipalities of Barbacoas, Roberto Payan and Tumaco, using the public administrative and jurisdictional functions recognized for our benefit by the political Constitution in articles 7, 204, 329 and 330, based on the judicial pluralism that has been constitutionally acknowledged, and on the Awa normative system and the norms of the National Indigenous Legislation, we hereby make the following decision in reference to the prior consultation about the construction of the road between San Jose Payan — Kilometer 80 of the Tumaco-Pasto highway, passing through the territory of the Awa People.

First: [We decide] not to authorize the construction of the San Jose Payan — Kilometer 80 of the Tumaco-Pasto highway, passing through Awa territory in the Gran Rosario resguardo because the work would affect deeply and negatively the cultural, social and economic integrity of the Awa People because it interferes with and destroys a sacred place like the headwaters of rivers and streams, and the forests of ancient Awa tree-people where live the spirits that protect us from disease, and produce the clean water for our health and the cemetery trees for the grandparents — great signs of our culture.

Second: Send a copy of this decision to the Ministry of the Environment, to the Director of Corponariño and to the Mayor of Roberto Payan so they are informed of our decision and accept it in compliance with the state’s duty to guarantee and protect the ethnic and cultural diversity of the Colombian nation, a fundamental principle established by the Constitution for our benefit.

Third: Should the Colombian state or the national government decide to approve the construction of this road, grant the environmental license for that purpose, or start the
respective works, ignoring our decision and affecting our cultural, social and economic integrity, we would bring legal action against the Colombian state before international organizations such as the United Nations and the Organization of American States, multilateral organizations dedicated to the protection of nature, and foreign governments, to ensure our cultural and social survival and the preservation of our territory and natural resources.

In witness whereof, this decision is signed in Diviso Barbacoas Nariño the seventeenth of May, 1999. (UNIPA 1999; delivered in the Santa Marta workshop of the INER/NSI project, 2001)

Results:

The environmental permits or licenses for building the road were not given.

10. Project Development

10.1 Some concepts seen from the Indigenous point of view

Development

The dominant parameter in this concept has been the relationship with the market as the single space for social and economic relations and the force that determines the policies and priorities of development followed by the state. The concept of sustainable development attempts to complement this concept with the ideas of diversity, multiculturalism, participation and conservation. It incorporates ecology and environmental controls as parameters for national and international regulation — parameters to be taken into consideration as priorities within a framework of respect for the rights and environmental systems of local populations. However, the “developmental” trends and the offer of monetary resources are still present in the debate about the relations between the state and the Indigenous Peoples. These issues also affect private entities, development agents and the life models of the Indigenous Peoples. These various “developmental” trends produce a loss of culture and generate internal conflicts among Indigenous Peoples. Conflicts are also generated between these Peoples or communities and local, regional or national societies. “Developmental” trends encourage relationships with these communities from an unfair perspective that undervalues the management ability of the Indigenous Peoples, usually submitting criteria of cultural inferiority vis-à-vis the national development model or regional and local models.

One of the fundamental collective rights recognized for Indigenous Peoples is the right to decide their own future according to their own criteria of harmony, well-being and equilibrium on the basis of the holistic concept of life which joins the natural, the social and the human to the spiritual.

An example of the Kogui concept of development is given by the Indian Santos Sauna from the Sierra Nevada Santa Marta:

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We, the Indigenous Peoples, are not going to invent development models; the development model that we call *shibalamma* and which means “History of Indigenous Peoples” has been given. *Shibalamma* was born with the origin of the Indigenous Peoples, we are ordered to do that by our father *Seruanka* and our mother *Senaludlam*. They ordered the Indigenous laws, health, education and environmental management so that we could have development with Mother nature. That means that it is necessary to know every important thing that exists in nature, each history, each thing has its history. For us, this, the development of life — that there is good water, that there are birds, that there are good lagoons that we find in the lower parts (because those lagoons are connected to snowcapped mountains and they are the mothers of the plants and animals), that we respect all these principles of the laws of origin — for of us that means that we are in good development. Also, if we don’t carry out all the activities according to the history of the Indigenous Peoples, we will not be managing the natural resources properly. That is why we, the Indigenous Peoples of the Sierra, have our own internal organizations. In health, in education, in environmental management, in justice and in economy, we apply our customs and mores. When there are, in our sacred places, close to Indigenous territory, or within the Indigenous territory, projects for coal mines, docks or others, such as Termoguajira in Mingueo or others in other Indigenous areas, those projects affect how the *Jaxleka* (*Mamos*, traditional authority) interpret. Why does the younger brother think that for better development it is necessary to extract mines, coal, oil, business projects, bananas? For us, those projects mean taking blood from the mother, taking bones from the mother, taking thoughts from the mother; and for this reason everyday health problems crop up, conflicts, disorganization among the people, and nature becomes weaker if we don’t take that into consideration. We are here for our relationship with her. We are also affected in our access to, for example, sacred places and to do the spiritual work on the black line. The black line, those are the places, the ancestral limits where you make payment to the Sierra Nevada. Spiritually we go to those places; because now there are people living there, we sometimes don’t go there physically but spiritually. When the state imposes projects (for example, the health program now) we think it is very difficult to handle these projects in Indigenous territory because we’re not going to be able to manage them as required. The state has not understood what the Indigenous people want and need within Indigenous territories and, in relations with the nation, [the government] is disrespectful toward the autonomy, the recognition and the rights of Indigenous Peoples. The same goes for the projects in education and lands — for example, the state does not fully recognize that our territory goes to the edge of the black line; it does not understand the cleansing of the *resguardo*, which is acknowledged as our own, but which we still have to cleanse. It has been hard for us to cleanse spiritually and restore the balance as it was before. We have to cleanse everything that has been contaminated.

If we do not handle all these principles, we will not exist. But as long as we have this strength, the culture, the languages, the customs, the *Jaxlekas* (*Mamos*) and our principles with which we live, we will never be extinct. We continue to defend ourselves. We in the beginning, from the origin, to the Kogui, Arhuac, Arzario, the mother has asked us to sustain the world and that is why we continue to live and implement our internal projects with the *Jaxlekas*, this means to sustain life. (Santos Sanua 2000)

**Territory**
The thinking of the Ikja, Kogui and Wiwa People of the Sierra Nevada has been expressed in many ways. One of these expressions follows:

The knowledge and millenary cultural memory of the Indigenous communities of the Sierra, the Ikja, the Kaggaba and the Wiwa, all say that the Sierra Nevada was left to us from the beginning as our house, as our body which we have to inhabit, which we have to take care of as a sacred being. This is why we must live in balance and harmony with the water, the wind, the sun, and the earth, in peace with nature, which is our own nature.

If we do not live in peace with nature we cannot live in peace with ourselves.

We know how to take care of our territory, we know and respect the Law of Origins. When the Sierra is inhabited by people who do not know or respect our laws, by people who do not live the Indigenous tradition, then the holy places are damaged, the Sierra is damaged and that takes away part of our force; thus, it is increasingly difficult to take care of the world which is our law and mandate of origin …

A hearth without firewood produces no fire and firewood without fire does not burn, just like an Indigenous tradition without a place to live it is like a hearth without firewood or fire. This is why the Indigenous Peoples of the Sierra, the Ikja or Arhwacs, the Kaggaba or Kogi and the Wiwa or Arzaris, in the voice and words of Mamos, demand the right to our land, to our body in which to develop our spirit, our tradition and law. Thus speak our wisdom and cultural memory, thus we think and say. (cited in DGAI 1998b)

In terms of territorial organization, the Kogui stated in 1994:

To order the territory it is necessary to organize your thoughts. What we understand by territorial organization is not only marking or delimiting a piece of land. It goes much deeper: it is organizing your thoughts to be able to live well on that piece of land. This means that territorial organization has two parts: the spiritual part, which refers to thought, and the physical part, which refers to the land. For us those two parts cannot be separated, they always go together, because the territory is one. It is necessary to cleanse the resguardos, but it is also necessary to cleanse people’s thoughts.

Cultural identity

This concept goes beyond the conception of individual identities and proposes cultural identity on the grounds of recognizing the whole ethnic group as a special collective subject. The Yanacona (Indigenous people who live in the Colombian massif in the Department of Cauca) have said:

Culture is alive, like a river, it moves constantly even if for centuries it remains in the same course. Culture is the ability to change without losing your course and your foundations. Culture is articulation. When two rivers cross, their waters grow but their courses do not disappear — a new one is created. Culture is not a bag full of things. Culture is the current of the river, what allows us to advance. A culture is not finished if there are people because they do damage, repair, create and live off of that. Culture is not only in the things made but also in the hands and the minds of those who make them, in
the people who work, believe and dream. Without people there is no culture, nor are there cultural products. (Yancona Declaration, Mancitara Manifest, 1994)

10.2 Proposals and opinions of the Indigenous communities and organizations that participated in the project

Opinions about the consultation process for the Indigenous Peoples in the Sierra Nevada de Santa Marta

(Source: field report from Julio Barragan)

As a result of participation in consultation processes in the Sierra Nevada, a continuous construction and revaluation of the definition and use of the concepts of “consultation” and “agreement” (and the way these concepts view the state and, in general, the non-Indigenous society) has taken place. The people of the Sierra consider consultation as a process that is still under construction, especially by the state. For the Indigenous Peoples, the state’s commitment is the major issue when they have to face a consultation process. In that respect, the Indigenous Peoples of the Sierra are defining in detail the territorial criteria on the basis of which development projects can be proposed — specifically, mining projects or projects related to mining.

At present, more than consultations, the concept of agreements has arisen as the most urgent concept to be developed in the present stage of the relationship among the four Indigenous Peoples and the state. Consultation is currently much more common in the internal relations among the four Peoples, because the Peoples of the Sierra are going through intensive internal consultation processes that have been considered indispensable for any consultation with the state or with private agents. It is on the basis of those internal consultations that their relations with the state will be more clearly defined, as well as the specific points of meeting and divergence with the other society.

A traditional concept that had been forgotten (and which relates directly to the definition of legitimacy in the representation of the Indigenous Peoples of the Sierra Nevada) was revived as a result of these processes of consultation and internal reflection. That concept is eswama, the sacred places, tied to the concept of zhatukwa, a guiding principle that has been explicit for several years. These two concepts have enough force to define, on the basis of tradition and of their own culture, the issues, aspects, moments, places, actors and representatives with whom the agreements are to be made.

The eswama are places in the high part of the hydrographic basins, from which the communities that settled along the rivers are organized. The Mamas who take care of the eswama are spiritually responsible for the existence of the inhabitants in the basin and the ecosystems found there. The eswama are also places of power, the places where the history of each person is written. That is where the important meetings that define the pathway for each individual (and, especially, for the Indigenous organizations that represent these Peoples) must be held.
To this extent, the problem of representation is clarified — especially the internal responsibility, procedures, times and places where the relationship to the state must be defined in any given situation, and specifically, the viability or appropriate adaptations for each project.

Right now, the Peoples of the Sierra Nevada have entered a stage which could be called a pause, because it is necessary to revive the _eswama_ internally so that the concept can become an active part of Indigenous life once again, before continuing to establish definitions or agreements with the neighbouring society. This is what happened to the this project, which was “abandoned” by the Indigenous Peoples of the Sierra (they stopped coming to workshop) while they reviewed their thoughts and the profound decisions to be made for the future of the territory. Meanwhile, Indigenous representation for intercultural contact is being reaffirmed through the heads of the organizations of each of the four Peoples. However, the general concept underpinning this type of representation is the “unity” of the four Peoples (there is no balance if the four are not together and, until a very short time ago, there were only three). This is achieved through internal consultations, decisions and representation of the Territorial Council of Councilors, through delegation from the _Mama_ (high priests).

In the Sierra Nevada, the role of the state and the legal implications of equating Indigenous authorities to public authorities are key concerns when it comes time to dialogue — either in a prior consultation process or in the formation of an agreement. In this context, some of the issues observed during these processes can be summarized:

- The Colombian state is present but ignores and does not claim its role as a public authority (for example, National Planning has never attended a meeting).

- The role of the state has lost importance since the regional offices for Indigenous affairs were closed.

- At the same time, there has been a progressive internal strengthening among Indigenous Peoples. Different Indigenous organizational forms have become revitalized and renewed.

- There is the threat and the fear that this unity might be broken because of internal corruption due to external pressures and outside invitations. So far, this unity has not been broken.

- There is also the armed conflict, which is serious in the case of the Kankwamos. Nobody can move or go up to the territories. The human rights of the Indigenous Peoples of the Sierra are being seriously violated and their leaders are being threatened and murdered. Internal forced displacement has increased; the freedom to circulate and organize is restricted; and the traditional authorities or _Mamas_ are being pressured by the armed sectors to take positions in their favour to the detriment of their cultural and spiritual autonomy.

- The NGOs that work in the Sierra, such as the Fundación Pro Sierra, have also started to reorganize. These entities are beginning to ask about concepts and demand explanations.
There seems to be a strengthening of internal politics among the Peoples of the Sierra. This means that prior consultation is not only demanded for projects coming from the outside; it is also a requirement for internal projects. This is the current trend among the Peoples of the Sierra, whose dynamics has been affected by the armed conflict that is going on in their homeland.

In a document entitled *For the Unity Between the Intercultural Effort and Understanding: Speak Clearly to Us, Please!* prepared and gathered by the Bintukua (Arhuac), Cayetano Torres in September 2000, Torres says:

The decision by the four organizations to set up a team of delegates to dialogue with institutions from the outside is a political alternative to respond critically and constructively to the dissatisfaction we feel in our communities and at the leadership level. This is because who knows how many times we have been “mis-handled” through accidental participation in social events for the camera. The cameramen, the attendance sheet and the signature of the Indigenous people who have been converted play an important role as the logical justification, saying that an agreement has been reached with the consensus of the Indigenous Peoples. These are situations that are still taking place shamelessly.

…

The voices of the Indigenous people, in a just claim to recover their autonomy over their territorial spaces, have been doing this for many centuries, and what we’re saying today (September 14, 2000) is that we cannot remain in a simple stage where everything is “yes, yes” for external institutions when … paradoxically, the problems of the Indigenous Peoples continue to be the same or worse. But in this case, you should understand perfectly clearly what we mean: We are questioning and criticizing the imposition of outside administrative systems on ours.

It seems that these people forget to recognize and respect our nature as different Peoples or cultures, with a unique nature, and governed by customary laws from their origin, which we have been saying since our ancestors. But what we’re seeing today we believe are the remnants of yesterday, which was defined in history as the process of submission, which now is not done with guns but with a wad of dollars …

We cannot ignore that the dollar sign is indispensable. But, in our case, the ideology must never make the mistake of believing that the cultural structure of the Indigenous Peoples is supported by the meaning of a fistful of dollars. We have to be very explicit on that point to see if you understand us — that you should recognize and respect the hierarchy of difference.

We do not pretend with our presentation to impose anything. We simply want to clarify what is ours and that is why we demand it: territory, autonomy, culture, unity …

We must never forget the “notion of country”, but by the same token, in the political will of the state (if there is one) in the public institutions and government officials, there must
be strict respect for and compliance with the norms for recognition and protection of the multi-ethnic reality — principles which regulate the new structure of Colombian politics.

The constitutional principle in reference is one of the first to be taken into consideration as a prerequisite before starting projects, plans, or programs that have to do with Indigenous territories (the Sierra Nevada in this case) where the legitimate representative is the traditional Indigenous authority.

... Let us try to understand this matter better: When there is an increase in the Mamos, with a stronger traditional base, an increase in traditional centres, an increase in traditional students, fewer external interferences, cleansing of sacred places, respect and recognition for traditional authorities, recovery of the special management of the holy places that the Mamos have, this would indicate the cultural strengthening of our Peoples. Here we repeat that the people have not wanted to understand, or that there has been no will to interpret it in this simple way.

The weight of experience leads us to mistrust and doubt the offers of support and help for the culture. But how can they help us if they don’t let it sprout. “For the seed to become a plant it has to be let free, not interfered with in its evolutionary cycle.” Let the culture sprout according to its traditional space: that is the first principle of cultural recovery and strengthening. (Torres 2000)

**Fundamental concepts in the consultation process for the Wayu and Ette Ennaka (Chimila) Indigenous Peoples**

(Sources: Field reports from Julio Barragan and Claudia Puerta, INER/NSI workshop discussions, document presented by the Wayu of southern Guajira)

Reflections on some key questions are summarized below, in the voices of the Indigenous people:

**What is consultation with Indigenous Peoples?**

- “It is to discuss specific issues with the legitimate representatives, that is, the traditional authorities, without people from outside the community.”

- “Is a dialogue to reach an agreement for the benefit of the whole community. It is an obligation to carry out any required activity. On the basis of consultation, agreements or pacts are signed. This is a prerequisite to reach an agreement. This dialogue is a proprietary process which will make it easier for the elder to make decisions, within the framework of his own culture, to be able to determine whether the proposal will benefit the people or not. It is also necessary to observe the strengthening of each People and its culture to evaluate the project.”

- “Existing regulations mandate consultation. Although there are protection laws, it has been a violent process of imposition by the state, which has sided with the multinationals.
So far, consultation has been an unequal and unfair negotiation process, with the state on the side of the companies. Thus, times and persons are ignored, corruption is encouraged and the sacred places are violated. Today, the communities with mining or natural resource exploitation projects are poorer than before the exploitation.”

How do you want consultation to be done?

• “Let it be done according to the uses and customs of the communities, inside the communities.”

• “It should be with the whole community, including the elderly, the leaders, women, children, youth, teachers, health promoters, officials and the Chimilas in the case of the Sierra Nevada. The following steps and procedures must be followed throughout the whole consultation process: First, information is provided to the whole community. After the project is known comes the second phase, which would be with the traditional authorities, who have their own ways (times and spaces) to make decisions and internal consultations (through dreams, meetings of elders in specific places, etc.). Time is needed for these internal processes, time which involves certain costs, and it is necessary to decide who is going to pay for those costs.”

• “Consultation should be transparent, a sincere process, based on the true word, participative, respectful of the times and spaces of the Indigenous Peoples, free and conscientious, taking into consideration the legitimate interlocutors. The spiritual conception of each People must be respected. Internal spaces of reflection must be respected to allow for the exercise of autonomy and the People’s own structures of authority and power. The state is expected to fulfill its function of representing the rights of the Indigenous Peoples, making sure that those rights are respected. Also to allow the community to participate at the stage of formulation, design and planning of the consultation itself. Each community will define the participants, the times and the places, and there must be a guarantee that the decision made by the community will be respected. There should also be consultation to decide whether they go into the negotiation process. The cost should also be considered and who is going to pay. Consultation should be prior, written and spoken in our languages, with visual aids (mechanisms to visualize the negative and positive aspects of the project); therefore, it should inform about everything involved in the project.”

Conditions

• “Time availability according to each Indigenous culture, because the Indigenous people have their own occupations which must be respected. The transition must be done by some reliable person from the region.”

• “It should be in their own language (ette taara in the case of the Chimila) so the information can be complete, and to make it possible to consult with the full knowledge of our elderly. That way the information will not be manipulated when it is time to make the decision. There are times to do things. For example, for some Peoples the night is the
important time to decide and it is even possible that foreigners can be present at some important moments in our spaces. In our People, the governing council informs the elderly at night and they authorize any decision, after consulting the holy places where they communicate with Yao. Then the whole community receives information from the Council and the pathway is adopted.”

- “The first condition of the consultation should be to strengthen the autonomy of the Peoples to decide about their future. To revitalize their own structures, spirituality and the integrity of their own practices such as dreams. Another condition is that it be bilingual.”

With whom?

- “With the oldest. The elderly make the decision for the well-being of the community. The decisions are accepted by all.”

- “Consultations with the whole community. The Governing Council goes to the elderly and the elderly are the ones who make the decisions. When this comes out of the thoughts of our ancestors, the Council goes back to the place and consults with the community, with the approval of the elderly. Many people will not believe and will go and ask the elderly whether they were told and consulted. (Internal control.) It is necessary to go to a sacred place and consult with Yao to see if it is good for them or not. Council — elderly (13 among the Chimila) but there is one Elder among them. When they consult, they tell the community what to do. The children are witnesses to the social processes of the Chimila.”

- “Who: according to our experience, those present should include the legitimate representatives of the community based on power and authority structures for each People), the interlocutors such as the Council and the leaders, officials, teachers, representatives from regional Indigenous organizations, Indigenous Affairs of the Ministry of the Interior, Indigenous national organizations, companies, the Attorney-General’s Office, the People’s Defender, international observers as guarantors of the process, international representatives for human rights, and the community at large.”

Internal/own and external procedures

- “Their own customs and laws, internal assemblies, mutual agreements for the good of the whole community. Always with the oldest.”

- “As we said in the above item when we spoke about the conditions and the people with whom the prior consultation must be carried out.”

- “Different spaces. Unlimited time. Consultation should not be limited to a specific time. All the time necessary to think about the decision that will affect them for the rest of their lives must be allowed. There should be places and times to talk, to agree. Below we propose how this process should be carried out.
First stage: a public, open stage. There should be training, sensitization, reflection, background information, references and points of view about benefits and risks. It should be financed by the state. It should provide enough illustration and the necessary time and space so that the whole community can understand and be aware of the issue.

Second stage: a stage for internal reflection. This would be an internal process of analysis, without pressure from external agents, involving only the community in its own spaces and times. Contrary to Decree 1320 of 1998, we reject Decree 1320, which regulates prior consultation, because it imposes time limits and limits the scope of the constitution; and we reject Law 21/91 (ILO Convention 169), which imposes an agenda and a procedure ignoring interculturalism, and which was established without prior consultation, is organized by sectors and is limited to environmental issues.

Third stage: a stage for presenting the results of the internal consultation and decision-making. This involves the whole community. All the parties mentioned must participate, including the media. Two alternatives can result here: negotiate or not negotiate.

Fourth stage: negotiation when accepted.

Fifth stage: a stage for control and follow-up of the decisions made in stage three and perhaps in stage four. This should involve a committee of guarantors to guarantee compliance with the decision or the agreements.”

Internal/own and external norms

• “Considers mores and customs, the protections, the points against, the dreams, the spirituality. The external or the external law is the Constitution and its norms. Let them be respected and obeyed. It is necessary to articulate the internal and the external laws and demand compliance with international agreements.”

• “To prevent what has been taking place, it is necessary to do preliminary work with the community and reach internal agreements about the procedures for consultation and how the representatives and councils are going to be controlled. Internal organization should be strengthened to reach an internal agreement. Therefore, training is necessary on internal norms with the young and to prevent them from breaking internal norms. It is necessary to strengthen the internal because, due to the armed conflict, the laws are being broken more and more. It is necessary to build intercultural mechanisms to articulate the internal and external norms.”

• “We reject Decree 1320 because time limits are set and it limits the international scope of the consultation (ILO Convention 169). It imposes foreign agendas and procedures. It ignores interculturalism as a principle of prior consultation. It is unconstitutional. No prior consultation was done for the decree itself. For example, internally, the representative must alert the community and seek the participation of everyone to analyze the situation or the project. Unfortunately, the leaders also lend themselves to negotiations without the community, and they even take money.”
Strategies

• “Find out who the traditional authorities are and make sure that is not the institutions who look for those whom they know and these people wind up deciding for the community. When it times to make agreements, it is basic for the community to be united.”

• “Under the current conditions of armed conflict, the Ette Ennaka (Chimilas) People are surrounded and others have been displaced and exiled outside the resguardo, so we must demand that the state protect and guarantee the rights and the life of the Indigenous Peoples. We have to seek national and international support. The state is not performing its function as guarantor and protector. That is why strengthening the capacity of the organization from the basis of the culture itself is so important.”

• “We have to rescue the thoughts, the systems for internal control, because there are many young people who have no traditional training. Below are some conclusions about their current situation:
  
  • There’s the problem of the Wayu self-control over their representatives.
  • The company fosters weakness.
  • Multinationals are very large monsters.
  • It is necessary to strengthen the internal self-control systems to avoid corruption.
  • Decree 1320 is rejected.
  • There should be internal unity based on tradition, from the inside to achieve internal strength.”

10.3 INER/NSI project conclusions and recommendations

a) With regard to the social and political elements that flow from the analysis of Phase I:

• Indigenous organizations have identified a clear political trend of weakening the rights, guarantees and claims won and recognized at the legal and constitutional level over the last 150 years. These rights constitute a good judicial framework for the protection and defense of Indigenous Peoples. These organizations call on all Colombia’s Indigenous organizations, the government and the state to stop the judicial pressure to proceed with reforms that cutback or violate rights that have already been recognized, reforms which set back Indigenous Peoples by decades. These Indigenous organizations also call for legal and political revisions to those reforms that have already been undertaken with regard to the Mining Code, the Penal Code and others.

• The Attorney General and Ombudsperson’s offices responsible for the protection and defense of human rights and the rights of Indigenous Peoples should activate their role of checking the Government and this trend to reform existing laws and regulations in violation of the rights of Indigenous Peoples.
• The Government of Colombia and national, multinational or international natural resource extraction companies operating in Colombia should reactivate and fulfill their obligation to implement prior consultations with Indigenous Peoples and communities who own, possess or use the territories where proposed developments will take place. In addition, they should ensure that the instrument of prior consultation -- which is highlighted in ILO Convention 169 that Colombia has ratified – embraces free, informed and prior consent. Prior consultation has been abandoned by the government and by companies, and the government agencies responsible for monitoring its implementation have also not fulfilled their responsibilities.

• The national government and the state should develop a public policy targeting the protection, enforcement and implementation of the rights of Indigenous Peoples. There is an urgent need to develop a public policy that confronts the humanitarian catastrophe in which Indigenous Peoples live, a crisis that is exacerbated by the extraction of renewable and non-renewable natural resources on Indigenous territories, exploitations that have a direct influence on the dynamics of violence and expropriation against Indigenous Peoples and communities.

• The government and natural resources and mining companies operating in Colombia should fulfill their international obligations outlined in ILO Convention 169, as well as those in the Draft OAS and UN Declarations on the Rights of Indigenous Peoples. In this context, it is particularly important to respect in a very real and effective way, Indigenous rights to self-determination or self-government, territory, identity and culture.

b) With regard to Phase II of the project:

1. It is necessary to clarify and reflect more deeply on the concept and legal definition of prior consultation and free, informed and prior consent. For this purpose, it is necessary to examine international instruments and debate on the matter, and their implications and consequences for national instruments. In addition, a review is warranted of the original text of ILO Convention 169 to determine whether it corresponds to the official Spanish version which has been approved as a national law. It is also necessary to detail the concept of free, informed and prior consent.

2. It is important to deal with consultations and agreements and free, prior and informed consent in a holistic manner, not by sector. By fragmenting these processes, it is possible to corrupt and confuse the type of instrument that consultation and agreements represent for protecting the rights of Indigenous and Black communities, and as guarantees for their ethnic and cultural survival.

3. Together with the Indigenous organizations and Peoples, there should be deeper reflection on the scope of these processes and legal instruments for the protection of specific rights, and clarification of the terms that Indigenous Peoples must establish with the national government to exercise their self-determination.
4. It is advisable to expand the reflection on consultations, agreements and free, informed and prior consent among the Indigenous Peoples and Black communities who have also had enormous experience and share an arbitrary regulation which did not involve consultation of either group.

5. It is necessary to establish different spaces for dialogue and go into deeper reflection with the various actors involved: the various ethnic groups, the state and business community. The second phase of work should try to develop and strengthen scenarios for dialogue so that the accumulated experience is not lost and rights cannot be violated in the future for lack of application. The design of the second phase should include national spaces for reflection and action on this topic.

6. Spaces for reflection and exchange of experiences and perspectives among the Indigenous Peoples and organizations at the international level are required so that the trends, concepts and scopes of the instruments for international human rights and mining policies can be clarified.

7. Educational spaces should be created for Indigenous Peoples and their internal organizations to enhance the processes of reflection. In the project workshops, it was observed that a deeper level of reflection also involves training spaces on different topics for Indigenous Peoples and their internal organizations. Key topics include the national and international context, legal and constitutional issues, and environmental and human rights concerns.

8. This participatory research project should be continued. The project will support the actions of Indigenous Peoples and their organizations to re-examine the topics of consultation and free, informed and prior consent, and to clarify and re-position these processes again as valuable instruments for the protection and defence of ethnic and cultural rights. This involves decisions to act by the Indigenous organizations themselves.

11. Acknowledgements

In a collaborative approach to research many people are involved, each with a role to play in the final outcome, which in turn will contribute to future work. In this case, each person involved was part of the process toward mature reflection on the vast experience of the Indigenous Peoples of Colombia with consultations and agreements.

This first phase of the investigation was supported by the effective participation of the Indigenous communities of the Wayu People in Bahía Portete and Manaure, and in the resguardos of Mayabangloma, Caicemapa and Barrancas Indian; the Ette Ennaka or Chimila People; and the Ijka, Wiwa, Kaggaba and Kankwamo Peoples (especially during the initial stage), who gave their full support to the local and regional workshops. In addition, the project benefited from the fieldwork of co-researchers Julio Barragan and Claudia Puerta. With regard to
writing this final report, the members of the research team — Omaira, Julio and Claudia — provided invaluable comments and contributions.

Also, members of the National Indigenous Advisory Committee contributed with their experience on the subject, and their dedication and support for this research. The Committee consisted of: Armando Valbuena, President of the National Indigenous Organization (ONIC); Arregocés Conchacala, Governing Council of the Gonawindua Tayrona Organization (OGT); Gabriel Bisbicus, President of UNIPA of the Awa People and representative for the Indigenous Authorities of Colombia (AICO); Victoria Ballesteros, representative of the Wayu traditional authorities in Bahia Portete; Oscar Uriana, Governing Council of the South of Guajira; and Luis Miguel Carmona (Chimila leader).

We also wish to express our sincere thanks to those who contributed in other ways to the implementation, funding and total management of the project: the International Development Research Centre (IDRC) of Canada, represented by Gisele Morin-Labatut; the Institute of Regional Studies (INER) of the University of Antioquia, with its incoming and outgoing directors, Jesus Maria Alvarez and Diego Herrera; the first coordinator of the Colombian component of the project, Cristina Echavarria; and the North-South Institute (NSI), represented by Viviane Weitzner in the coordination with Colombia.

We would like to give special recognition to Cristina Echavarria who arranged this study with IDRC and NSI, and who, we hope, will be satisfied with the results of this project, which she strongly supported.
Endnotes

1 *Mama* or *Mamo*: A traditional authority of the Indigenous Peoples of the Sierra Nevada de Santa Marta that has social, political, governmental and spiritual responsibilities.

2 *zhatukwa*: A traditional consultation process by means of *totumas* (containers made from gourds) filled with water in which semi-precious stones are placed. The information requested through the consultation is read through the types of bubbles that are emitted.

3 *Zhatukwa*: “Divination” undertaken by the Mamas. Each People of the Sierra has its own forms of divination, such as the reading of bubbles in water, accompanied by meditation, advice and spiritual communication with the *Law of Origin*.

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**Appendix 1**

### RESGUARDOS CONSTITUIDOS DESPUÉS DEL 31 DE JULIO DE 1991

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**Totales**

|                | 117                      | 542577,5459        | 32244      | 5881     |
MAPA No. 1
DEPARTAMENTALIZACIÓN
ZONAS CRÍTICAS
A partir de Valores Absolutos

Gráfica No. 1
DEPARTAMENTALIZACIÓN
Zonas Críticas
A partir de Valores Absolutos

UTIA- MSD Colombia, 20 de noviembre de 2001
Appendix 4

Colombia - Territorios Indígenas y Minas
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<th>PROYECTO</th>
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- **Susp**: Suspendido
- **Sep**: Septiembre
- **Des**: Desistido
- **IR**: Intergubernamental
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