Want to complete a consulta previa?

In most countries the process isn’t always clear or direct. Who does it, how to do it and how long it can take varies from country to country—a reflection of the vagueness of ILO 169 and the uneven development of government regulations across the hemisphere. To compare, here are the steps you would need to take in Chile, Colombia, Guatemala, and Peru.
CHILE

While decrees and regulations have been approved in Chile, they are still being tested, especially as they involve the role of the government as mediator and guarantor. There has also been some confusion between the narrower process of community consultation on environmental impacts—and the estudio de impacto ambiental (environmental impact study—EIA)—as well as the scope of the consultation within the community.

1. Planning

**What is done:** 1) Company or organization proposing project must turn in information to the Servicio de Evaluación Ambiental (SEA) on measure to be consulted with Indigenous populations; 2) Indigenous community and petitioning organization jointly determine methods, agreements to be decided, how to distribute information, and logistics.

**Who does it:** Company or organization proposing project submits application to SEA, which then coordinates with affected communities.

**What’s produced:** A description of methods used. If there is no agreement, petitioning party must record what occurred and methods it will use to protect principles of consultation.

2. Education and Information Dissemination

**What is done:** Petitioner provides information to Indigenous community on: measure to be consulted; objectives of investment or project; and expected area of impact of measure. If necessary, information must be given in the Indigenous language, using culturally appropriate methods.

**Who does it:** Company or organization proposing project. Ministry of Social Development and National Corporation of Indigenous Development maintain information for project and its proposed implementation.

**What’s produced:** Information on the project and its expected impact.

3. Internal Deliberation by Indigenous Communities

**What is done:** Designated Indigenous communities analyze, study and determine their position on measure to develop consensus for dialogue that follows.

**Who does it:** Indigenous communities, though the government can assist communities in understanding the matter being consulted.

**What’s produced:** Consensus among the community for dialogue that follows.

4. Dialogue

**What is done:** Discussion of measure to be consulted between affected parties—petitioning organization and Indigenous community—using culture, language and tradition of the community.

**Who does it:** Petitioning organization and community, with SEA serving as mediator and directing process of consultation.

**What’s produced:** Agreements and disagreements are recorded, as well as mechanisms and methods to follow up, monitor and, if necessary, continue process over points of disagreement.

5. Communication of Results and Terms of Consultation

**What is done:** Develop a detailed account of the consultation process, evaluate the consultation, the agreements reached and the disagreements. If a legislative measure is required, the president of Chile must initiate the process.

**Who does it:** Petitioning party, with the government.

**What’s produced:** Final report detailing process, agreements and disagreements. Petitioning party can modify deadlines during planning stage, with agreement of the Indigenous communities.

Relevant norms, decrees, laws and regulations: Constitución de la República de Chile (artículo 5); Decreto Supremo N°236/2008, Ministerio de Relaciones Exteriores; Ley N°19.253 (artículos 34 y 35); Ley N°19.300 (artículo 4); Decreto Supremo N°40/2013, Ministerio del Medio Ambiente (artículo 85); Decreto Supremo N°124/2009, Ministerio de Planificación; Decreto Supremo N°66/2011, Ministerio de Desarrollo Social.
COLOMBIA

The government assumes a more central role in the process in Colombia, with the specially created Dirección de Consulta Previa (Office of Prior Consultation—DCP) in the Interior Ministry making the determination of when the norm and process should be applied, convening the communities, conducting the consultations, and guaranteeing that the agreements will be upheld.

1. Request

What is done: Investor or organization proposing a project that may require consulta previa presents request to Dirección de Consulta Previa (DCP) in Interior Ministry.

Who does it: The investor or organization proposing project. DCP receives and verifies the request.

What is produced: DCP verifies whether request contains all relevant information to identify location of the project or activity (coordinates). Should this not be enough, DCP, within three days, should request further information from investor to fulfill this duty.

2. Review

What is done: Government studies request a determination whether project requires consulta previa, including if there are ethnic communities in project area. If necessary, government conducts field visit.

Who does it: DCP.

What is produced: An administrative act that includes: when certification was submitted; brief description of activity; identification of affected areas; information-gathering methods; identification of certified communities and legal representatives; and the decision on whether consulta previa is required.

3. Preparing for Consultations

What is done: When community groups cooperate, DCP provides assistance to initiate consultation.

If they do not cooperate, the DCP sends three notifications during preconsulta stage and then two more during consulta stage. If communities still do not attend, consultation concludes, and DCP notifies Defensoría del Pueblo, Procuraduría General de la Nación, Instituto Colombiano de Antropología e Historia and others to discuss if activity should proceed.

Who does it: DCP, community representatives, petitioner, procuraduría, and ombudsman.

What is produced: Notifications and strategies for consultation process.

4. Preconsultation

What is done: DCP defines team, convenes communities in a series of preconsultations in which they determine how consultation will be carried out. DCP presents information regarding rights of consulta previa and details of the project to be discussed.

Who does it: DCP

What is produced: The methodology and protocol to guide the actual consultation process.

5. Consultation

What is done: Meetings held to identify and analyze impact of proposed project, develop means to address or mitigate them, and reach agreement on how to resolve potential conflicts.

Who does it: DCP convenes meetings and oversees consensus-building process.

What is produced: A set of written, formal agreements between community and petitioner; in absence of agreement, a document detailing disagreements.

6. Guaranteeing Agreements

What is done: Consultation is closed, and parties agree on follow-up and monitoring.

Who does it: DCP with petitioner and community, as well as environmental authority, procuraduría, and defensoría.

What is produced: Requirements for periodic follow-up on agreements reached.
In the absence of defined national regulations governing consulta previa in Guatemala, the existing processes have taken place under the municipal code with the local government, raising the complication of national coordination on the topic.

The Guatemalan Supreme Court ruled in 2009 that community consultations are not binding, even when 90% of voters rejected a project.

Relevant norms, decrees, laws and regulations: Constitución Política de Guatemala (Artículos 66 al 69); Acuerdo sobre Identidad y Derechos de los Pueblos Indígenas; Código Municipal. (Artículos 17 y 20). Capítulo 2 Información y participación ciudadana (Artículos 63, 64, 65 y 66).
PERU

Of all the countries in the study, Peru has made the most advances in defining the steps to request and conduct a consulta previa, what qualifies as a potential reason for consulta previa, and the state agencies responsible for defining, convening and negotiating the consultation with the communities. That has not meant, though, that the process is free of questions, concerns and even conflict.

1. Identification of the Need for a Consultation

What is done: Identification of legislative or administrative issues that require consultation based on collective rights, for example of language, land, water, or culture.

Who does it: Relevant government agency (for example, Ministry of Mining and Energy, Infrastructure, or Environment) consults with Vice Ministry of Intercultural Affairs (VCIM) to see if consulta previa is necessary. If determined that people affected are Indigenous and/or entitled to consulta previa, relevant government office carries out next steps of the consultation process with community or group, with technical assistance from VCIM.

What’s produced: A decision on whether measure requires consultation.

2. Planning

What is done: Relevant government office meets with representatives of Indigenous groups to inform them of measure for consulta previa and determine methods, rules and responsibilities, how to distribute information, and logistics.

Who does it: Relevant government office with assistance from VCIM.

What’s produced: Consultation plan, including obligations and responsibilities of all parties in process, deadlines, method, access, transparency and publicity, and places and languages in which meetings will take place.

3. Information Dissemination

What is done: Indigenous people receive proposal of measure to be consulted from the government in a culturally respectful manner and in appropriate languages.

Who does it: Relevant government office or agency.

What’s produced: Documents are published on website of government agency responsible for consultation and disseminated through radio, TV and word of mouth.

4. Information about the Measure

What is done: Information is provided to affected community about measure: motives, implications, impact, and consequences of project—if necessary, using local language and customs.

Who does it: Relevant government agency with technical assistance of VCIM.

What’s produced: Community understanding of proposal to be consulted.

(OR AS IS ESTABLISHED BY THE RELEVANT GOVERNMENT AGENCY. ALSO FROM THIS POINT TO DIALOGUE STAGE CANNOT TAKE LONGER THAN 120 DAYS.)
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*Relevant laws and regulations: Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT), y el Reglamento de la Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT).*