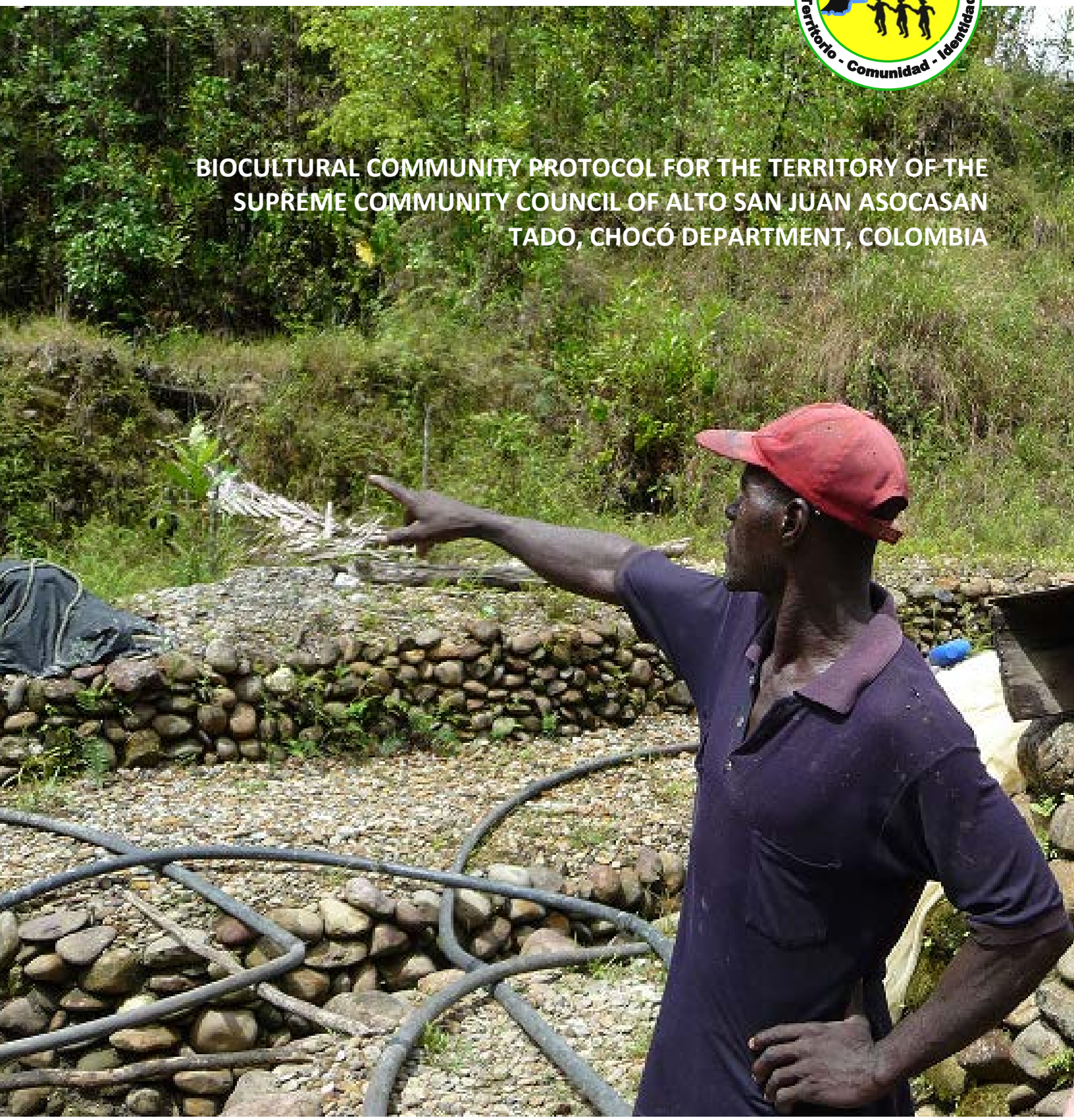
BIOCULTURAL COMMUNITY PROTOCOL FOR THE TERRITORY OF THE SUPREME COMMUNITY COUNCIL OF ALTO SAN JUAN ASOCASAN TADO, CHOCÓ DEPARTMENT, COLOMBIA



BIOCULTURAL COMMUNITY PROTOCOL FOR THE TERRITORY OF THE SUPREME COMMUNITY COUNCIL OF ALTO SAN JUAN ASOCASAN

Instituto de Investigaciones Ambientales del Pacífico

UNEP

NATURAL JUSTICE

BIOCULTURAL COMMUNITY PROTOCOL FOR THE TERRITORY OF THE SUPREME COMMUNITY COUNCIL OF ALTO SAN JUAN ASOCASAN ASOCASAN. TADO, CHOCÓ. COLOMBIA

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BIOCULTURAL COMMUNITY PROTOCOL FOR THE TERRITORY OF THE SUPREME COMMUNITY COUNCIL OF ALTO SAN JUAN ASOCASAN – TADO, CHOCÓ DEPARTMENT, COLOMBIA[1]

FOREWORD

Biological diversity, when considered broadly to include both nature and culture, requires the balanced use and management of natural resources and a holistic understanding of the concept of territory. It requires that we recognise the ways communities organise themselves, how they use their natural resources and the practices that contribute to maintaining natural and cultural heritage. Recognising and respecting these factors requires the inclusion of the community's endogenous processes, which have generated close links between nature and community self-development and ensured effective biodiversity management in their territories. Recognising how these communities are structured and managed is the starting point for designing projects, development activities, policy and legislative measures which affect the collective territories of ethnic communities. A renewed, sustained focus on the relationship between the community governance structure and institutional actors in both the public and private sectors is required in order to promote a process of development that respects and accepts the aspirations and rights of Afro-descendent communities in the Upper San Juan River Basin.

This Protocol was drawn up by Alto San Juan community representatives and members of ASOCASAN[2] (the Supreme Community Council of the Upper San Juan River)[3] over the last four months of 2010. During this time, workshops were run with community representatives and ASOCASAN council members, bringing together a range of men and women of different ages, occupations and levels of knowledge about traditional activities. This gave communities the opportunity to define their territory and their relationship with its natural resources, as well as define the main issues the Alto San Juan community faces.

The above activities, which defined the concept of territory as a 'living space,' helped identify the factors that support the community's aspirations. They express the community's concerns regarding its rights over collective property and propose procedures supported by the frameworks of national and international law to guide decision-making processes. These procedures should be acknowledged and followed by both locals and outsiders operating in the Alto San Juan collective territory. This document considers developments in implementation of the Convention on Biodiversity and, in particular, the Nagoya Protocol[4]. It puts forward guidelines that can be adjusted expanded to encompass other themes or to develop new biocultural protocols to strengthen the community's integrated territorial management.

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[1] This Protocol was translated from Spanish with the generous support of the Deutsche Gesellschaft fuer Internationale Zusammenarbeit (GIZ).

[2] Process jointly supported by the Environmental Research Institute of the Pacific, the United Nations Environment Programme (UNEP) and the international NGO Natural Justice (NJ).

[3] Contact ASOCASAN by emailing: asocasan90@yahoo.com or aristarco.mosquera@yahoo.es.

[4]" Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization" under the Convention on Biological Diversity adopted at COP10 Nagoya – 2010

INTRODUCTION

The concept of a 'bioculture' is an integrated method of recognising the links that exist between the community and the territory's natural resources. This concept is holistic and includes biological resources from the micro (gene) level to the macro (landscape) level, as well as ancestral practices based on traditional knowledge that contribute to the sustainable management of the territory.

In the last two decades, the Alto San Juan community has won a series of substantive and procedural territorial rights through national and international law. However, many concerns remain with regard to the use of the biological resources of ancestral territories without prior consultation, the low levels of protection for traditional knowledge of medicinal plants, the lack of recognition of traditional mining practices, the unsustainable use of forests and the constant threat of losing traditional knowledge and practices due to the imposition of economic growth, that fails to consider the objectives of endogenous development.

Against this background, the Biocultural Community Protocol is seen as a management tool that focuses on the close relationship between the community and its territory and the need to open up spaces for dialogue to guarantee the community's collective territorial rights. The document is based on the cultural principles that contribute to sustaining biodiversity over generations and supporting the community's own aspirations for development.

A constant concern for the communities of the Alto San Juan collective territory is maintaining the high environmental standards of the goods and services in their territory in the face of current national economic interests, particularly opencast mining.

'Our aim is that our own ways of managing and using our natural resources are recognised and that these form the starting point of any consultation process with third parties regarding development projects. We thus reduce the imbalance of power, promote a participative focus and ensure equitable distribution of the resulting benefits.'

- Aristarco Mosquera, Legal Representative of the Supreme Community Council of Alto San Juan, ASOCASAN

TERRITORY AND COLLECTIVITY

For the community, 'territory' is equal to the concept of 'environment,' as their territory encompasses the geographic area of the San Juan River, its cultural components, the relationship with the ecosystem, forms of land occupation and the relationship between the animate and inanimate.

The territory is our fundamental space for self-development (Appendix 5, paragraph 4.2); the good state of our natural resources and our community's ability to govern itself sustain our quality of life (Wilson Murillo).

The right to collective ownership of ancestral lands[5] was granted by the State to the Alto San Juan community by means of Colombian Institute of Agrarian Reform (INCORA) Resolution 27-27 of 27 December 2001. National legislation recognises this as a fundamental right that cannot be restricted by governments, nor can ownership be transferred into private hands. The territory belongs to the community and it shall remain so for generations to come.[6]

'Our territory is collective. This is the basis for our model of local development. It respects living spaces and family production areas, with ownership being defined according to inherited ancestral occupancy and community recognition. Collective territory is a strategy for preserving the resources and culture and a place where we, as an Afro-descendent community, can promote community production practices like small-scale mining, nursery gardening and mixed cropping systems to maintain a high level of diversity in our territory.'

– Wilson Murillo, former President of the ASOCASAN Board of Directors

Picture taken by Tatiana López

The soils and forests included in the territory retain a high level of biological diversity due, in large part, to our traditional management practices, that have created a productive and natural mosaic reflecting the use of areas according to ancestral knowledge and the configuration of natural resources.

The way our territory is regulated (Appendix 5, paragraph 7) reflects our relationship with its natural resources. It is the product of local knowledge, which regulates land occupancy in line with resource use, taking into account traditional production systems and the natural structure and condition of the areas. Therefore, it is critical to include, through effective participation, our regulatory processes and traditional use and conservation practices in municipal territorial development planning processes.[7]

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[5] ILO Convention 169 states that 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.'

[6] Article 7 of Law 70 of Colombia (1993): In Recognition of the Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands, concerning recognition of collective rights states that the area of land designated for collective use is inalienable, imprescriptible and immune from seizure.

[7] Colombian Territorial Planning Law 388 (1997) observes that it is important to 'reconcile social and economic interests.' This is achieved through the democratic participation of all inhabitants and organisations that exist

Collective ownership provides a framework to protect and conserve the integrity of a community's natural and cultural components.

Culture and community

The arrival of Afro-Colombian communities and the settlement of the Alto San Juan region dates back to 1530 and the establishment of the mining district of Monte Carmelo. With its rich seams of gold and platinum, mining defined the cultural conditions of the area and the region quickly developed through several trade routes with Carmelo, Andágueda, San Pablo and San Juan.

The history of the mining economy is steeped in the exploitation of Alto San Juan's Afro-Colombian communities. However, the industry gave rise to a culture which was the product of adaptation to environmental conditions, underpinned by principles of inter-ethnic relations, forms of land occupancy and work, and knowledge about the territory's natural resources that have been passed down through generations.

The construction in 1910 of the 'Camino Nacional' highway to Chocó shaped the community by placing it at the crossroads of two different concepts about the world and development: the so-called Coffee Belt which supplied leading Creole families with gold and focused purely on economic interests and the Pacific Basin with its great natural diversity that represented an opportunity for freedom to our Afro-descendent ancestors. This engendered close links with the area's natural resources, that developed into mutual adaptation of the culture and the landscape. Generations of resistance by black communities through social movements and their adaptation to the territory created an indestructible link that has remained to this day.[8]

> *'We have maintained our community's wellbeing, shaping our territory according to the sensible use inherent in our cultural practices, which helps preserve the integrity of our territory's natural resources.'*
>
> *Representative of the Board of Directors of ASOCASAN*

How the Alto San Juan community defines itself[9]

We, the Alto San Juan community, define ourselves as a group of Afro-Colombian families, neighbours and friends who share traditions (gastronomic, medicinal, musical), beliefs (spiritual, religious) and customs (in relationships, resource management and ways of working). These are

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in these localities. Furthermore, conditions of local cultural and ethnic diversity must be addressed by 'recognising pluralism and respecting difference,' in order to achieve the optimum use of natural and human resources to improve the quality of life and general wellbeing of the region's inhabitants.

[8] Mosquera, C. H. (2003), 'Conozca ASOCASAN' (Find out about ASOCASAN). Unpublished document. Playa de Oro, Chocó Department, Colombia.

[9] Relates to the definition of community set out in Article 2 on Black Communities in Law 70 (1993).

manifested in our traditional way of life and methods of mining, farming, forestry, hunting and tool and instrument manufacture. We share a common history rooted in mining and interwoven with family ties, which has engendered associative work practices. Of our own volition we are the permanent inhabitants of an ancestral collective territory in the Upper San Juan River Basin comprising 30 communities, each with its own local community council, grouped under the Supreme Community Council of Alto San Juan ASOCASAN. This 54,571 hectare and 4,625m^2 area is where we conduct our traditional way of life and govern our community territory.

A brief history of ASOCASAN

ASOCASAN is an ethno-territorial, non-profit organisation governed by private law, which currently functions in accordance with the National Constitution, Law 70 of Colombia (1993), its regulatory decrees and other regulations relating to Afro-descendent communities in Colombia. As a grassroots ethnic organisation, ASOCASAN is interested in involving state institutions, bodies and organisations in strengthening organisational processes and inter-institutional relationships, in order to promote integrated development of the territory.
It also aims to work with the State and relevant authorities to design development policies that seek to improve the quality of life of the region's inhabitants.

Governance structure

In accordance with Law 70 (1993), the Alto San Juan Community was constituted according to the requirements of community council legislation. As a legal entity it is the highest authority within the collective lands of the black communities as defined in legal mandates, regulations and other instruments that accord it its system of self-government.[10] The Supreme Council is made up of a Board of Directors comprising five coordinators and a legal representative and is elected for a period of three years at a general assembly of the community and local subordinate councils. The chief functions and core principles are set out in the *Rules of procedure for the Supreme Council of Alto San Juan ASOCASAN and its collective territory.* The local community councils are territorial community bodies which are similar to the Supreme Council and contribute to the general governance strategy for the territory.

The organisational structure (Appendix 2) is the framework for internal coordination and interaction with actors from outside the territory (authorities, institutions, public and private companies), and is the space where the conditions are established for implementation of interventions in the territory.

Statement of purpose

In the collective territory, biodiversity conservation and sustainable use have a longer history than the economic development activities implemented by the central government and external actors. However, our traditional practices are constantly ignored, violating our right to self-development[11] and to manage our territory's natural resources.

[10] In accordance with Article 3 of Decree 1745 (1995).

[11] Article 7 of ILO Convention 169 states that: 'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being

This document is a way of affirming our fundamental aims as expressed in property rights, customary laws and community development concepts, as well as our interest in recognising our differences with external actors, through a participatory process that allows the community to make decisions about their own development, while respecting principles of human dignity and pluralism.

This requires starting out with a rights-based focus, particularly regarding self-determination, recognition of our relationship with biodiversity and our territorial and cultural rights under national and international law.

OUR RELATIONSHIP WITH NATURAL RESOURCES


Picture taken by Tatiana López

Our relationship with nature corresponds to a historical-cultural process of obtaining knowledge about our territory's natural resources.[12] Our ancestral practices contribute to the preservation of natural resources and make community self-development possible. The traditional spatial pattern of land occupation and use works vertically up from the floor of the basin, that is to say, from the flood plain to the mountain ridges, a pattern traditionally maintained by the settlement landlord. The traditional system of community production is a *multi-option* system based on a combination of farming, fishing, mining, forestry, animal husbandry, hunting and crafts. These territorial use practices are grounded in traditional knowledge in line with what nature offers and the conditions of the landscape.

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and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.'

[12] According to the Inter-American Court of Human Rights, rights over resources are a necessary consequence of the right to territorial ownership. This is based on the fact that 'members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries.' Inter-American Commission on Human Rights. OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraphs 181 and 182.

Our production methods and systems

Traditional practices are passed down through generations and involve zoning and distinctive forms of use. They are consistent with community principles and the ecological aspects of our territory's natural resources that have been maintained for generations.

Production activities around the river basin are spatially distributed in accordance with traditional knowledge and the condition of the landscape: forestry and hunting on the high ground (the community forests[13]); agriculture (mixed cropping systems), mining and wood-cutting for domestic use in the middle zone (family units); and fishing and other productive activities on the low ground.

The family is the basis for production systems. The division of labour is differentiated for women, minors and men, and there are principles for the exchange of services between different families in the community.

OUR RELATIONSHIP WITH MINERAL RESOURCES

Gold and platinum mining is a traditional, ancestral practice of great importance for the community, given that up to 80% of the population works in small-scale mining. This mining is for the most part environmentally sustainable, contributes to family finances and maintains associative forms of work in the community.

Traditional mining

Traditional mining is recognised in Article 2 of Law 70 (1993) as a traditional practice. As such its work mechanisms are seen as part of our cultural identity.

It is now a practice internalised within the region's collectivity and is rich in techniques and knowledge about the art of mining and the natural environment. It is carried out without the use of contaminants and includes methods for reclaiming mined areas through planting a wide variety of crops, contributing food security.

This practice is currently certified in the region by the 'Green Gold' programme, a voluntary system which focuses on ten sustainability criteria (Appendix 4). The initiative supports, fosters and promotes sustainable small-scale mining in the territory which, in 2010, achieved the highest standard for fair trade and fair mining in small-scale mining.

Mineria Tradicional

Picture taken by Tatiana López

[13] Community forests are areas of communal use located within the collective land titled to the community and are for collective use and exploitation.

Picture taken by Johanna von Braun

Traditional mining is carried out in secondary forest areas and extracts superficial ore (approximately 15 metres below ground level) without permanently affecting the natural dynamic of the river or the daily activities of inhabitants in the river basin.

'We use natural materials to 'cut the gold' (the process to extract the gold from the Jagua granite). We use balsa wood, a forest species which is non-polluting and non-toxic for aquatic life.'

– Luis Fermín, small-scale miner

By using this plant there is no need to use mercury or cyanide. This know-how, which has been passed down through generations, requires knowledge of the use and maintenance of this particular species.

Waste material resulting from gold mining activities is deposited along the riverbed, creating rock terraces. These are topped with organic waste to encourage revegetation and, in the medium term, are used for complementary agricultural activities. Given that a small-scale mine is often worked over 15 years or even over generations, this system minimises the fragmentation of habitats and degradation processes in areas given over to mining. Today technological elements are being included to improve work efficiency in line with the community's principles for sustainable practice.

Picture taken by Johanna von Braun

Terraces of gold mine waste prior to revegetation.

Picture taken by Johanna von Braun

Activities associated with traditional mining

Mining as a traditional method of production[14] is integrated with a process of agricultural reclamation, which helps restore soils, fosters exchange practices between families and also maintains considerable gene flow in native crop species that are cultivated for personal consumption. Crops are planted on routes to the mines as well as in reclaimed areas and guarantee a continuous supply of all varieties of banana, peach palm, maize, yucca, taro, sugar cane, borojo, ginger and others, so this system provides a long-term source of family subsistence. ASOCASAN's community farm project maintains nurseries for native species in order to promote community knowledge and practices related to the sustainable use of biodiversity.

> *'Working the land using the production techniques of our culture means we can rotate activities and generate income for years. We understand that the territory is our source of income and wish to keep it that way for our children.'*
>
> - Belarmina, small scale miner

[14] As recognised in Article 2, paragraph 7 of Law 70 (1993).

OUR USE OF THE FOREST

Densely wooded areas are recognised as community conservation areas where the forest is exploited for domestic purposes. In Alto San Juan, people commonly use forest timber to build their homes and craft canoes, stakes, paddles, punts, mining pans and a variety of home utensils, as permitted by the ministry in Article 19 of Law 70 (1993), according to criteria related to traditional practices using tools and cutting methods that permit the forests to regenerate (Appendix 4).

Logging activity depends on the external timber market, which determines the profitability of this extractive activity. Although logging has experienced some periods of intense activity, good forest cover has been maintained through internal agreements on access to forest resources.

Timber and non-timber forest exploitation

The forest or mountain is understood by the community in two different ways: Monte Bravo/Biche and Monte Jecho. Monte Bravo refers to zones of low intervention, dense mixed forest that serve as a community resource for collective use, public amenity and social interest. These zones are also culturally important for traditional healers who know that the plants used for magic-religious purposes are found in well-preserved areas of forest. As such, and in the context of community autonomy, we consider that commercial forestry must take into account property rights over natural resources (Appendix 5, paragraph 6), comply with legal permits for these types of extractions and obtain prior authorisation from the community council.

The community council has the authority to manage its own forest resources − a process that must be recognised in the regulations, which according to the law must be developed in concert with the environmental authorities. This is a precondition for undertaking any type of exploitation.[15]

Community forests contain important areas that must be preserved to ensure the autonomy of the community. The community itself identifies these areas, which are used specifically for low intensity

[15] The Constitutional Court has stated that only communities are authorised and empowered to use forest resources in their territory without any limitation on their right to involve third parties. Benefits must remain within the communities, and there can be no commercial exploitation until resource regulations guaranteeing sustainable and culturally sensitive use have been drawn up or are in place. See Judgement T-955 of 2003.

production that adheres to traditional criteria and is in line with internal and inter-ethnic use agreements with indigenous communities. These areas are considered to be mining exclusion zones (Appendix 6, paragraph 2).

Forests have enormous potential to help regulate the world's climate. This fact has led to the development of alternative systems of use for non-timber-yielding species. As a community we are happy to consider proposals for sustainable use of community forests in ways that help reduce the effects of climate change and operate within the framework of community recognition and participation and equitable distribution of benefits.

TRADITIONAL MEDICINE

Traditional medicine is a practice rich in ancestral knowledge and, as such, is part of our community's culture. This practice, using plants and their derivatives, was the main health strategy in a region with scarce medical services and where knowledge about the medicinal properties of natural resources was respected and revered. Traditional healers came to be seen as the highest authorities in traditional medicine, with the community the keepers of this knowledge.

Picture taken by Tatiana López

Traditional healer Angostura Alto San Juan

The practice of traditional medicine

One of the factors which promotes the reproduction and maintenance of traditional medicine based on non-forest plants is the *zotea.* While the *colino* is a large-scale mixed-cropping form of production, the small-scale, mixed-farming *zoteas* would be described by conservationists as small, locally maintained gene banks. The *zotea* is a cultural mechanism by which households collect knowledge about the cultivation and use of various species of plants with medicinal properties for the body and spirit (Appendix 7).

Zoteas provide inputs for traditional domestic healing practices and other cultural practices related to gaining protection from the spirit world. Both men and women maintain the *zoteas* in accordance with the lunar calendar, meaning that cultural rhythms and the perception of time tend to differ between the communities and outsiders. The women are responsible for sowing and maintaining the *zotea,* while the men, in general, are the keepers of knowledge related to preparing the potions.

Picture taken by Johanna Von Braun

All this suggests a wealth of common knowledge about plant species and their uses, prompting third party scientific research and development in this area. Such research must, however, be carried out in consultation with communities and take into account the guidelines for access, compensation and equitable sharing of any benefits arising (Appendix 7, paragraph 1).

CHALLENGES FOR THE TERRITORY

With all the above in mind and taking into account the link between community, knowledge and natural resources, it is necessary to regulate access to our territory in order to: maintain the traditional systems of knowledge that form our identity; manage the factors for physical and cultural cohesion that ensure our survival as a community (Appendix 5, paragraph 1); and uphold our aspirations regarding future development.

We want development to consider our vision, principles and methods of community organisation (Appendix 5, paragraph 7), including our traditional practices of natural resource use and management in the territory.

The Alto San Juan area is open to the threat of partial or full displacement of its inhabitants, which has been mainly caused in recent years by the generalised violence that accompanies economic interest in the territory's natural resources. Practices that focus on economic growth degrade our territory's natural resources, autonomy and community government, and also harm our traditional forms of organisation and systems of production.

The environmental challenges are related to the total failure of the responsible government bodies to control economic pressures on our natural resources. There needs to be sustained coordination between community interests and roles and the responsible agencies in order to monitor and control natural resources.

To reaffirm our customary rights, it is necessary to be familiar with national legislation related to natural resources, culture and territory, such as mining legislation, land law, forest law, the draft law on royalties and international developments which are applicable to our rights and which contribute to resolving the challenges expressed herein.

Illicit mechanised mining[16]

Illicit mining is conducted primarily by people from outside the community using heavy machinery (hydraulic excavators) and is increasing substantially in the territory. It is changing our traditional way of life, introducing external values that lead to a progressive loss of our traditional knowledge and practices associated with managing natural resources and environmental balance.

Even though regulations require environmental permits (Appendix 6, paragraph 3) from the exploitation phase onward, the environmental authorities are not able to carry out their duties to evaluate, monitor and control actions which harm the territory's natural resources.[17] Effective, consistent legal regulation is required from the various authorities responsible to monitor and control natural resources (Mayor's office, the Autonomous Regional Corporation for the Sustainable Development of Chocó [CODECHOCO] and the Colombian Institute of Geology and Mining [INGEOMINAS]) during every stage of extraction and also commercialisation of gold illegally mined in the territory.

Picture taken by Gino Cocchiaro

This type of extraction, even though it is both an administrative infraction and a criminal offence, goes uninvestigated and unpunished, and its environmental impacts are neither measured nor compensated. Consultation is not the only requirement for mining in collective territories (Appendix 8, paragraph 2): free, prior and informed consent of affected communities is also essential.

[16] By illicit mining we mean that which is undertaken without permits or permission and, as such, is not registered with the National Mining Register and operates outside the law (for example, failing to register with the mayor's office, or to gain environmental permits and permission from the community).

[17] The Constitutional Court has indicated that an environmental impact assessment is a precondition for any mining work (no matter what stage or phase of development the project is at) and has also clarified that prior consultation must be undertaken for the environmental licence, for any decision liable to affect communities (as mining concessions, by nature, do), and even as a requirement for prospecting activities. See Judgement C-339 of 2002.

Picture taken by Gino Cocchiaro

High impact mechanised mining

"When we allow in the hydraulic excavators (illegal mechanised mining), the gold is gone in a year. What's left is useless land and the remaining money must be shared out between all family members. In the end, the money, like the land and our children's inheritance, is gone. What we are left with is problems: polluted watercourses, holes in the earth and lagoons of contaminated water. So the remaining land cannot be worked, either for mining or agriculture, and we are left without way to generate income. We are then obliged to change how we work and must search for gold behind a machine. This does not permit associative forms of work; each person must always look after him or herself. When the machine operator allows a person to descend into the pit to work at high risk alongside the machine, each person has to look after his or her own safety, without any thought about whoever is working at their side. Small-scale miners do not live this kind of life.

- Belamina, small-scale miner

Illegal logging

The Alto San Juan community forest areas are threatened by illegal logging driven by external demand. This type of extraction, which ignores the dynamics of nature and of timber and non-timber resource management, is a major cause of deforestation. Forest-dwelling populations are diminished as loggers fail to consider the technical and community management criteria, which impacts on natural resources, local autonomy and ethno-territorial governance.

All types of commercial logging that fail to comply with our principles or gain authorisation or are unregulated undermine ethnic rights to manage and control the territory and our forms of resource use.

Logging in community forest areas must be regulated by our government structure. As set out in Article 6 of Law 70 of Colombia (1993), the National Congress endorsed the understanding that forests and soils form part of the collective property of black communities. As such, regular forest use must be regulated by local communities (Article 24, Law 70) who can undertake forest extraction directly and exclusively or through partnership, on equal terms, with public or private bodies. However, a necessary condition for any such use is close cooperation and consultation between the environmental authorities and the community to define resource regulations.

Illegitimate use of traditional medical knowledge

Access to and appropriation of traditional knowledge by third party research into traditional medicine threatens our culture and leads to a loss of knowledge. Communities do not know the nature of research outcomes or how community knowledge may be contributing to developing potential uses for the forest's flora and fauna (Appendix 7, paragraph 1.2).

Another challenge in this area is that young people are no longer interested in learning such an exacting tradition. The sacred traditional healers, finding no suitable candidates in younger generations, are no longer passing on their lore. This has led to a crisis in traditional medicine as imposters posing as healers for personal gain step into the breach, which harms the reputation of this occupation and results in the loss of knowledge associated with traditional medicine.

The loss of forests through illegal mining and logging and the lack of interest of young people to learn an exacting tradition and of the healers to teach mean that the knowledge and practices of traditional medicine are being progressively lost. The issue is further compounded by the loss of species of flora and fauna with medicinal potential.

Failure to comply with participation mechanisms

Lack of participation in administrative decision-making processes regarding development and exploitation proposals for the territory's natural resources causes conflicts and adverse impacts. These could be reduced by properly collectivising projects and implementing suitable prior consultation processes[18] to identify and assess the impacts and alternatives for control, management, mitigation and compensation in an effective, integrated and participatory way.

Currently there are few guarantees that the government will ensure participation and compliance with: 1) the right to free, prior and informed consent in relation to natural resource extraction in the collective territory, 2) the right to be informed and consulted during formulation of national policy which significantly impacts on our territories and way of life.

Community participation must be guaranteed in the different phases and stages of planning and decision making related to development projects or measures which affect the community (Appendix 8, paragraph 1), as well as during implementation and monitoring of said projects and measures.

[18] The community has a right to consultation. The Colombian Constitutional Court has confirmed that prior consultation is a 'fundamental right' in relation to projects involving the exploitation of renewable and non-renewable natural resources in collective territories. See Judgement C-620 of 2003.

Local knowledge must be factored into project evaluations and, when the go ahead is given, projects must respect community needs to the greatest possible extent.[19]

OUR EXPECTATIONS FOR THE FUTURE

We want the activities taking place in our territory to be based on: collective property rights (Appendix 5, paragraph 3); the right to control the territory's existing natural resources; the concept that collective lands are inalienable, imprescriptible and immune from seizure; and the community's right to free, prior and informed consent (Appendix 5).

Picture taken by Gino Cocchiaro

We want extractive activities in the territory to operate in ways that are technically, environmentally, economically and culturally sustainable and appropriate. We, therefore, call on the State to recognise, protect and promote small-scale mining as a culturally and environmentally viable production method.

We want guaranteed, genuinely participative and appropriate participation processes. Therefore, the Board of Directors of the Supreme Council must be consulted regarding all proposals, actions, intervention activities and legislation that affect our territorial integrity, to ensure that the conditions to guarantee community participation are met. This means defining the process, terms, territorial scope and locations for consultation meetings so communities are able to set decision-making criteria in relation to proposed initiatives.

[19] Article 44 and 49 of Law 70 (1993), and Article 7, paragraph 3 and Article 33, paragraph 2, line (a) of Law 21 (1991).

The following points detail our requirements for all processes, projects, programmes and activities taking place in our territory:

- This document must be adopted as a fundamental tool to provide knowledge and understanding and to support negotiations with national, departmental and municipal authorities and social, political and economic actors, without prejudice to the other tools, regulations, protocols and guidelines of the communities that require consideration or compliance.
- Sufficient controls must be put in place for activities which threaten ethno-territorial rights, such as the current problems with illegal natural resource extraction and processing.
- The State must act effectively and with cultural sensitivity to control and manage violence and conflict.
- Our right to prior consultation (Appendix 8) and free, prior and informed consent must be respected and should conform to the individual requirements of the measure, project or initiative and the impacts these have on our physical, cultural and territorial integrity. The authorities representing the communities and the established procedures must be respected at all times.
- Consideration must be given to how the community shares in the benefits resulting from the research and use of the territory's natural resources and the associated knowledge, in accordance with community council guidelines.
- The right of pre-emption[20] (Appendix 6, paragraph 1) must be adjusted to community council administration and management approaches,[21] as well as to the realities of rights on the ground.
- It is important to define the levels of responsibility and the linkages among institutional actors in the territory, between the communities and the municipal authority, the regional and national environmental authorities and the United Nations High Commissioner for Refugees (UNHCR).
- Activities affecting our territory will be governed by our ancestral values and standards and will respect our internal instruments for territorial management, such as the internal regulations for territorial administration and management, the regulations for the use and management of natural resources and the Biocultural Community Protocols, which contribute to the community governance strategy.

[20] The Mining Code states that communities have the right of pre-emption in relation to third-party applications for mining concessions to exploit seams and mineral deposits located in black community mining areas.

[21] The Constitutional Court has indicated that 'the State must undertake corresponding positive actions including economic action,' (such as 'development loans, technical assistance and administrative and marketing training,' etc.), 'to ensure the viability of mining for local groups' or ethnic communities. See Judgement C- 892 of 2002.

- Our representative authorities and institutions and residents of the region must be guaranteed genuine opportunities to participate in projects being carried out in the territory and in all their stages of design, evaluation, implementation, monitoring and control.
- State institutions must respect, protect and promote traditional practices, including those associated with small-scale mining operations, forest management and traditional medicine, which contribute to the sustainable management of resources and ensure the survival of the communities in the territory.
- The community must be able to veto a project that negatively and significantly affects the territory and its people, as laid down by the Inter-American Court of Human Rights and other international authorities (Appendix 8, paragraph 2)

Free, prior and informed consent

We want social and environmental development that guarantees our right to free, prior and informed consent for activities affecting our territory.[22] There is already international consensus on a whole series of issues for which the free, prior and informed consent of the communities must be obtained. This means that the community has the power to make decisions and veto projects to develop, use and exploit mineral, forest or water resources where such activities may impact significantly on the rights of use and enjoyment of ancestral lands.

We know that the outcomes of consultation exercises vary according to the extent of the potential consequences of the activity in question. However, there are issues and cases where, due to very high levels of potential impact on the community, the State is obliged to make a ruling or express a position.[23] In any case, mechanisms must be put in place to mitigate, counter or make reparations for any negative outcomes for the community or its members that may result from an authority's interventions. See T 652 of 1998.

Working with the authorities

As a community accorded Constitutional rights and legal safeguards for the development and protection of our culture, we require the following from our work with local and national authorities:

- **THE MUNCIPAL LEVEL**

MAYOR'S OFFICE: The municipality must recognise, adopt and validate the community's way of governing itself and its aspirations for development in municipal planning and development processes. Municipal authorities must coordinate with community authorities and provide appropriate support where necessary to control illicit activities within the territory.

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[22] Article 76 of Law 99 (1993) stipulates that 'The exploitation of natural resources must be carried out without detriment to the cultural, social and economic integrity of indigenous and traditional black communities in accordance with Law 70 of 1993 and Article 330 of the National Constitution, and decisions to this regard will be taken with prior consultation of said communities.'

[23] The Constitutional Court has indicated that 'the authority's decision must not in any way be arbitrary or authoritarian; it must be objective and reasonable and in line with the constitutional requirements for the State to protect the social, cultural and economic identity of the community.' Judgement T-652 of 1998.

ENVIRONMENTAL AUTHORITY: The environmental authority must work with the Supreme Community Council to review applications for projects, works and activities in the Alto San Juan collective territory, including mining, forestry and other natural resource exploration and exploitation. They must also expedite the required monitoring and control of legal and illegal activities.

- **THE NATIONAL LEVEL**

THE MINISTRY OF MINES (COLOMBIAN INSTITUTE OF GEOLOGY AND MINES – INGEOMINAS[24]):

- The Ministry of Mines must consult with the Supreme Community Council ASOCASAN on the mechanisms to deliver a legitimate consultation process and to secure prior and informed consent for third-party mining concession applications. It must also guarantee community participation in the design of investment projects financed by royalties from mining activities in the territory.
- The conditions for pre-emption with respect to the exploitation of mining resources must take into consideration the capacities of community councils and be adjusted accordingly, so that they differ from the stringent requirements that multinational companies must meet.

THE MINISTRY OF THE ENVIRONMENT, HOUSING AND TERRITORIAL DEVELOPMENT:

- The Ministry must monitor how well the Autonomous Regional Corporation for the Sustainable Development of Chocó (CODECHOCO) is carrying out its legal duties, particularly in relation to the control and penalisation of illicit activities. It must also ensure measures are put in place to reclaim land that has been degraded by the illegal extraction of renewable and non-renewable resources.
- The cultural strategies that have helped preserve the territory and internal community agreements must be recognised, protected and promoted as effective measures for managing biodiversity, and they must be included in the guidelines for conducting environmental impact studies.
- Mining exclusion zones must be set up in concert with the community and ASOCASAN in specific areas with a social and ecological function. These exclusion zones must be zoned in line with community uses and cultural practices.

THE MINISTRY OF THE INTERIOR:

- The Ministry must guarantee that the authorities or bodies relevant to the measure in question respect the process of prior consultation with the Supreme Council and local councils. This should include an ongoing process of support and capacity development for our community leaders to enable them to master this important tool and to assert the fundamental right of ethnic communities to prior consultation.
- The Ministry must supervise processes to ensure that there is adequate consultation of affected communities in the presence of persons authorised to sign agreements.

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[24] The Ministry of Mines has delegated several of its functions to the Colombian Institute of Geology and Mines (INGEOMINAS) and six departmental governments (Antioquia, Bolívar, Boyacá, Caldas, Cesar and Norte de Santander) – see Resolution No. 180074 of 2004.

- The decisions taken in community consultation exercises must be taken into account when deciding to reject or request modifications to any project which threatens the community's physical and cultural survival.
- Where the right to prior consultation is violated, either through insufficient consultation or no consultation, the Ministry must be actively involved in the reparations process for any impacts engendered.

Community commitments

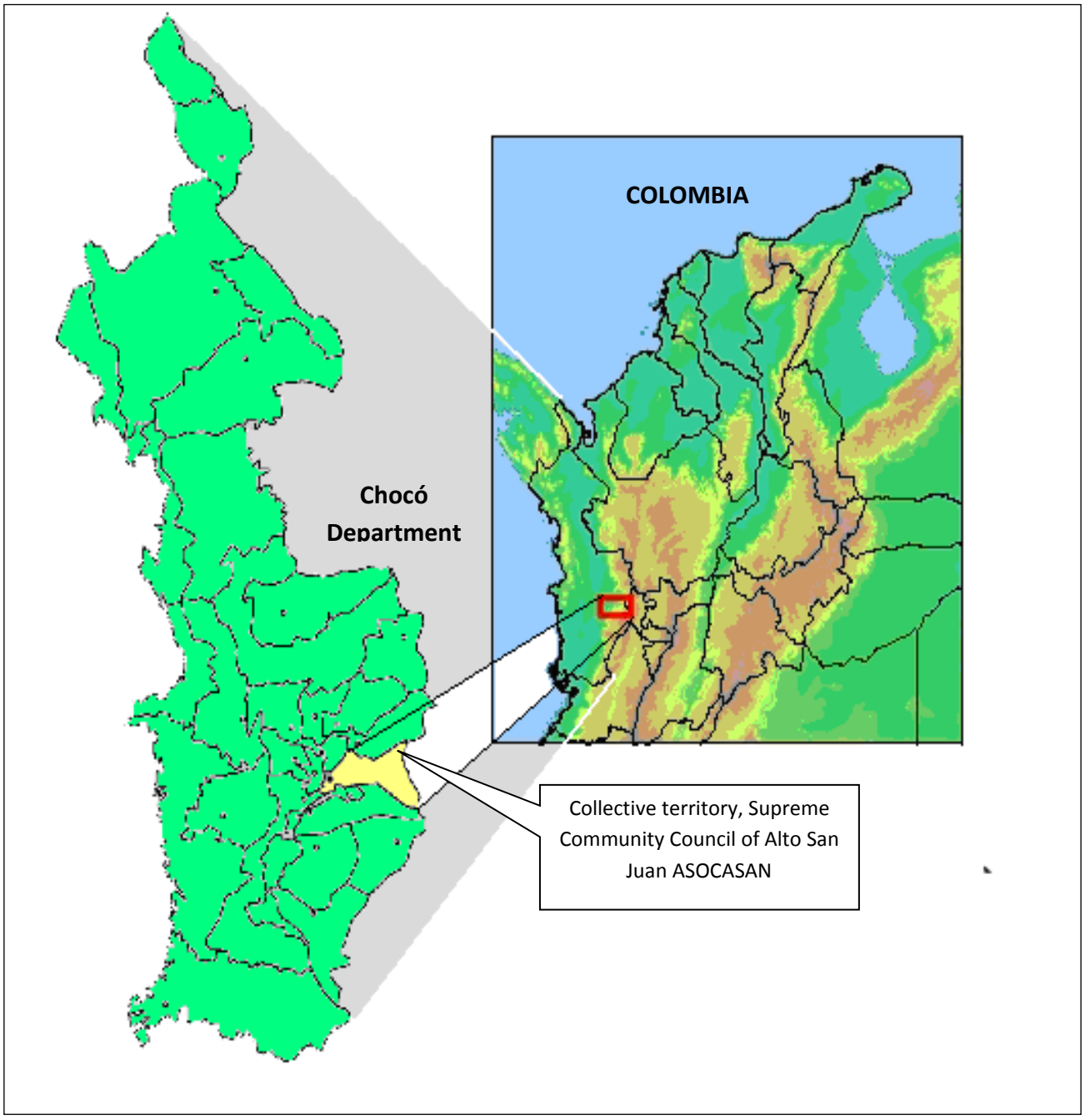
The Alto San Juan community is conscious of its rights but also of its obligations, and we commit to disseminate and apply the provisions of this Protocol. We commit to:

- ✓ Sustainable development based on cultural practices that promote the preservation of resources and the associated knowledge;
- ✓ Openly establishing relationships with external actors to implement development activities in the territory within the framework of environmental and cultural sustainability established by the community;
- ✓ Seeking to create coordinated mechanisms and tools that enable us to comply with and monitor the sustainability principles agreed by the community and other actors involved in the territory and thereby ensure community governance over the management of natural resources;
- ✓ Stand up for our territory and future generations by defending and safeguarding the non-negotiable principle of sustainable forestry and water use in any activities affecting the territory.

Picture taken by Johanna von Braun

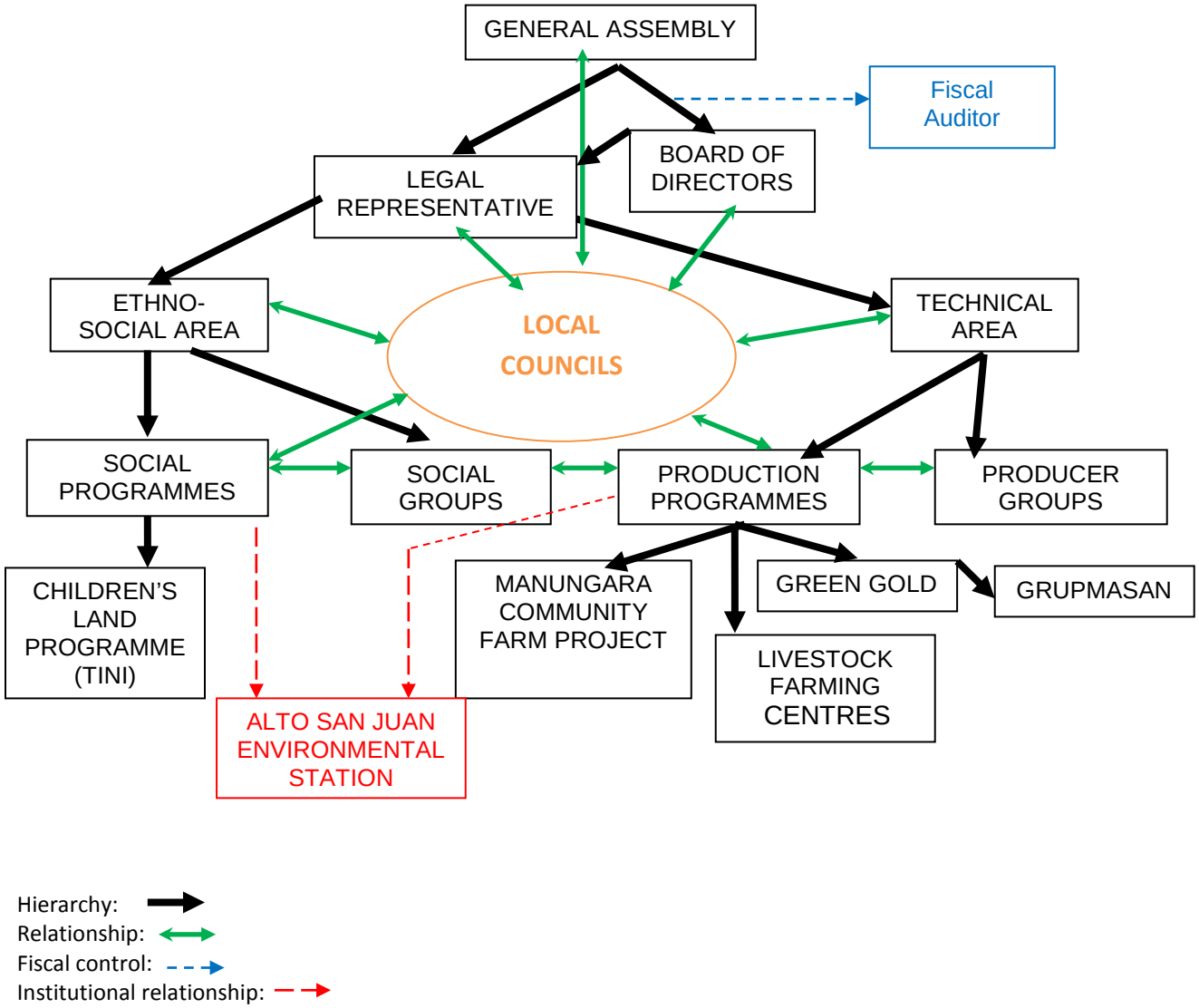
APPENDICES

APPENDIX 1: Location of the collective territory of Alto San Juan.



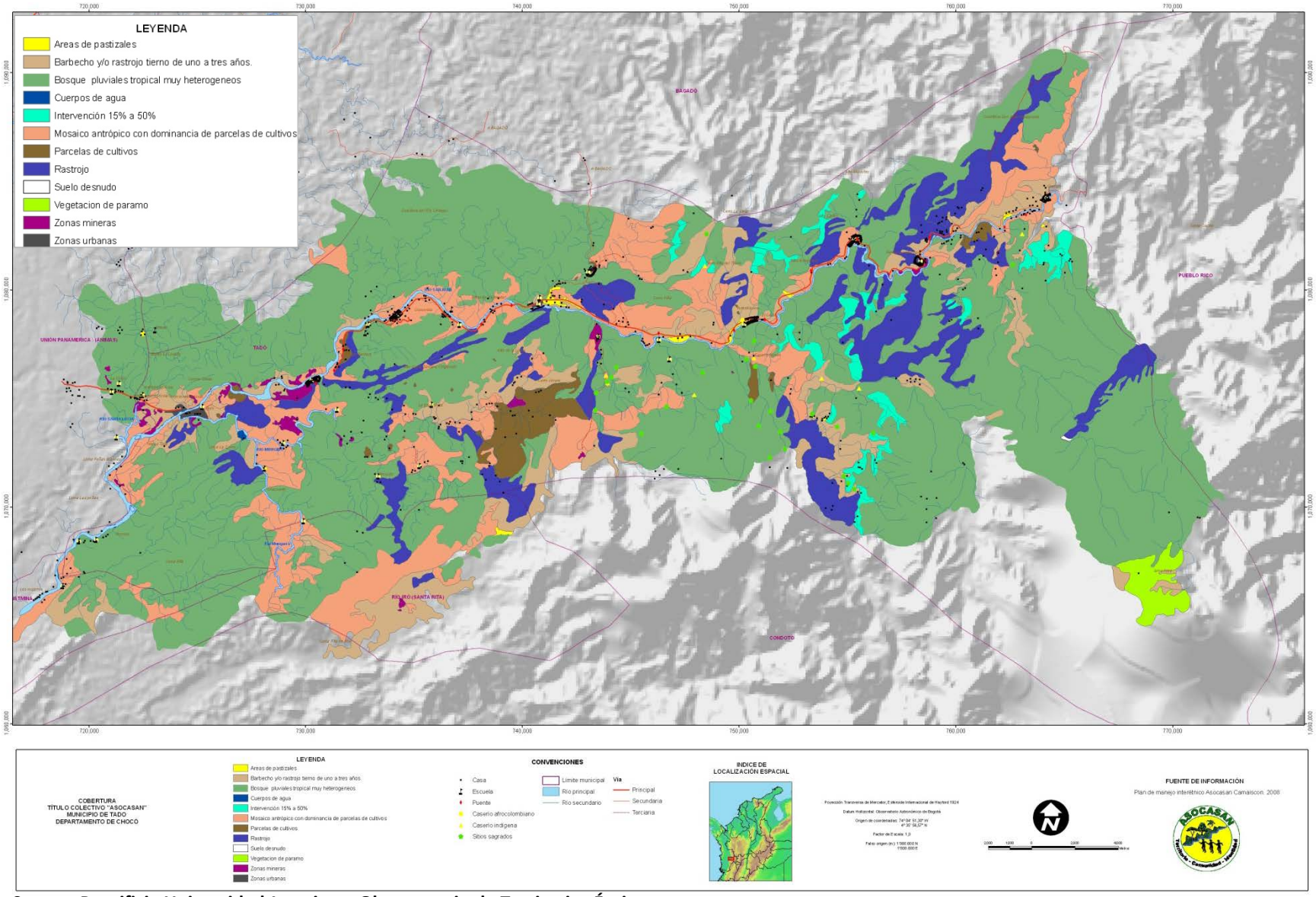
APPENDIX 2: Internal structure of the Supreme Community Council of Alto San Juan ASOCASAN

ORGANISATIONAL CHART



Hierarchy:
Relationship:
Fiscal control:
Institutional relationship:

APPENDIX 3: Map of the collective territory of the Alto San Juan community



Source: Pontificia Universidad Javeriana, Observatorio de Territorios Étnicos

APPENDIX 4: Community criteria for managing natural resources

TRADITIONAL MINING CRITERIA (Green Gold Certification)	**FOREST MANAGEMENT PRINCIPLES**
1. There must be no large-scale ecological destruction that affects the ecosystem to the extent that land reclamation becomes impossible.	1. Trees located in community reserves must not be felled for commercial purposes.
2. Toxic chemicals such as mercury, cyanide and other contaminants must not be used in extraction and refining processes.	2. Forest reserves must not be leased out by any member of the local council or by community members.
3. Mined areas must become ecologically stable in the following three years.	3 Species considered to be at any degree of risk or under threat of extinction must not be cut, even for domestic use.
4. Organic surface soil removed for mining must be replaced.	4. Timber located outside the designated collective areas must not be used without prior agreement.
5. The sterile gravel and shafts produced by mining activities must not overwhelm the capacity of the local ecosystem to regenerate itself.	5. Reports on the species and quantities cut must be provided to the local councils, who will forward them to the Supreme Council.
6. The frequency and quantity of sediment disposal in streams, rivers and lakes must be controlled to ensure that the aquatic ecosystem does not deteriorate.	6. Culturally important dates, times of the day and lunar phases must be respected when felling trees.
7. Operators must have obtained consent from community councils for their mining activities.	7. Loggers and timber dealers who enter our collective forests without authorisation from the community council are committing an offence.
8. The certification of gold provenance must state the municipality in which the gold was mined.	8. Logging must not take place in headwater areas.
9. In wooded areas only 10% of each hectare can be exploited in any two year period.	9. The lowest impacts possible must be ensured to guarantee the survival of forest fauna and non-forest species which have cultural value for the community.
10. There must be compliance with national, regional and local regulations.	10. Sufficient forest cover to promote the abundance of woodland fauna must be maintained.

APPENDIX 5: The territorial rights of Colombian black communities

There are a series of nationally and internationally recognised rights that can be generically labelled as the 'territorial rights' of the world's indigenous and tribal peoples, which include the black communities in Colombia. These rights are grounded in the special relationship such communities maintain with their land and resources and in the need to protect them.

1. The special and complex relationship with the territory[25]

The unique relationship between indigenous and tribal peoples and their territories has been widely recognised in international human rights legislation and in national law through Law 70 (1993) on the Black Communities in Colombia.

Article 21 of the American Convention on Human Rights and Article XXIII of the American Declaration of the Rights and Duties of Man protect the close connection communities maintain with their ancestral lands and natural resources, and this forms an important bedrock upon which other human rights for such peoples are based.[26]

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have both reiterated that the special connection between indigenous communities and their lands and resources is integral to the very existence of these peoples and, as such, 'warrants special measures of protection.'[27]

The Inter-American Court of Human Rights insists that 'States must respect the special relationship that members of indigenous and tribal peoples have with their territory in a way that guarantees their social, cultural and economic survival.'[28]

1.2. Lands versus territories

In the ILO Convention 169, States also recognise the importance of this relationship and commit to ensuring the possibility of exercising a range of human rights related to aspects which transcend the physical or land occupancy dimensions of a community's relationship with the lands over which they have been given ownership.

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[25] Referenced in this section are elements of the Inter-American Court of Human Rights document 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources – Norms and Jurisprudence of the Inter-American Human Rights System,' 2010.OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraphs 55, 56 and 57.

[26] 'The use and enjoyment of the land and its resources are integral components of...the effective realization of their human rights more broadly,' IACHR, Report No. 40/44, Case 12.053, Indigenous Mayan Communities in the Toledo District (Belize), 12 October 2004, paragraph 114.

[27] IACHR. Report No. 75/02, Case 11.140, Mary and Carrie Dann (USA), 27 December 2002, paragraph 128.

[28] Inter-American Court of Human Rights. Case of the Saramaka People vs. Surinam and Case of the Mayagna Community (Sumo) Awas Tingni vs. Nicaragua.

Article 13 states that 'In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.'

The Convention also states in relation to the application of several of its provisions that 'the concept of territories…covers the total environment of the areas which the peoples concerned occupy or otherwise use.'

3. Property and ownership rights

The IACHR has been emphatic in clarifying that 'recovery, recognition, demarcation and registration of lands represent essential rights for cultural survival and for maintaining the community's integrity.'[29]

ILO Convention 169, meanwhile, states that 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.'

In relation to the above, 'Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.'[30]

4. The basis of property rights

Inter-American jurisprudence characterises the property of indigenous and tribal peoples as 'a form of property whose foundation lies not in official state recognition, but in the traditional use and possession of land and resources.'[31]

Indigenous and tribal peoples' territories 'are theirs by right of their ancestral use or occupancy.'[32] 'The right to indigenous communal property is also grounded in indigenous legal cultures, and in their ancestral ownership systems, independent of state recognition.'[33]

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[29] IACHR. Second Report on the Situation of Human Rights in Peru. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2009, chapter X, paragraph 16. Taken from document: OES/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 56.

[30] Article 14, (1).

[31] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 68.

[32] IACHR. 'Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia.' Document OEA/Ser.L/V/II, Doc. 34, 28 June 2007, paragraph 231.

[33] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 68.

'Territorial rights "exist even without State actions which specify them" or without a formal title to property.'[34] 'Territorial titling and demarcation are thus complex acts that do not constitute rights, but merely recognize and guarantee rights that appertain to indigenous peoples on account of their customary use.'[35]

4.1 The scope of property rights

As indicated by the Inter-American Commission on Human Rights (IAHCR), 'Indigenous and tribal peoples' property rights over their territories are legally equivalent to non-indigenous private property rights.'[36] These rights can even be seen to hold greater importance in that they are linked to the exercise of other vital community rights. Thus, in Colombia community, land ownership rights are recognised as fundamental rights.[37]

Therefore, 'states must establish the legal mechanisms which are necessary to clarify and protect indigenous and tribal peoples' right to communal property, in the same way that property rights in general are protected in the domestic legal system.'[38] 'Thus, any legal distinction that privileges the property rights of third parties over the property rights of indigenous and tribal peoples is incompatible with Articles 21 and 2 of the American Convention.'[39]

'States violate the rights to equality before the law, equal protection of the law and non-discrimination when they fail to grant indigenous peoples "the protections necessary to exercise their right to property fully and equally with other members of the population."'[40]

4.2 The right to self-development

'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.'[41]

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[34] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 69.

[35] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 69.

[36] IACHR. Document OEA/SER.L/V/II.Doc. 56/09, 30 December 2009, paragraph 61.

[37] Constitutional Court, amongst other rulings: Judgement T-188 of 1993.

[38] IACHR. Document OEA/SER.L/V/II.Doc. 56/09, 30 December 2009, paragraph 61.

[39] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, footnote 164.

[40] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009. Paragraph 61.

[41] Article 7 of ILO Convention 169.

5. The right of ownership over natural resources

The Inter-American Commission on Human Rights states that 'The property rights of indigenous and tribal peoples thus extend to the natural resources which are present in their territories, resources traditionally used and necessary for the survival, development and continuation of the peoples' way of life. For the Inter-American human rights system, resource rights are a necessary consequence of the right to territorial property.'[42]

The Inter-American Court bases this right on the fact that 'members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries.'[43]

Some Constitutional Court rulings expressly recognise the right to ownership of renewable natural resources[44] or at least certain kinds of such resources, such as flora and soils.

Article 6 of Law 70 of 1993 considers 'the soils and forests [to be] included in the collective titling,'[45] but the same Article also goes on to reject collective awards for natural, renewable and non-renewable resources. This ambiguous provision was analysed by the Constitutional Court, which reached the following conclusions:

> The National Congress confirmed the inclusion of forests and soils in the collective property of black communities as set out in the Constitution, and reaffirmed the social and ecological role of such property, in accordance with the following provisions:
>
> a) The soils and forests are considered to be included in collective titling (Article 6)
>
> b) 'The administrative entity of natural and renewable resources, in agreement with the Black Communities, will regulate the collective use of forestal areas referred to in the present Law for the preservation of the forest.' (Article 24)
>
> c) Commercial forestry activity requires the 'authorization of a competent entity to handle forestal resources,' and to these ends 'the community may partner with public or private entities.' (Articles 6 and 24).
>
> d) 'The State, to ensure economic success and sustainable development for the members of the region, will guarantee and facilitate technical training for community members in

[42] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 182.

[43] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 182.

[44] See Constitutional Court Judgements T-380 de 1993 y T 955 de 2003.

[45] All the following translations of Law 70 are from 'Law 70 of Colombia (1993): In Recognition of the Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands;' translated by Norma and Peter Jackson of Benedict College, Columbia, South Carolina.

practices adequate for each phase of the production process.' It will give priority to proposals related to the exploitation of forest resources put forward by 'members of the Black Communities.' (Article 24)

e) 'Black Communities which are part of the groups receiving collective title will continue to maintain, preserve, and favour the renewal of the vegetation that protects the waters, and to guarantee, through adequate use, the preservation of particularly fragile ecosystems such as mangroves and wetlands, and to protect and preserve species of wild fauna and flora that are threatened or that are in danger of extinction.' (Article 21)

'The National Government will provide the necessary funds in order that the communities can comply with what has been stipulated in the present Article.' (note)

h) 'Use of the resources should be done taking into account the ecological fragility of the Pacific Basin. Consequently, land grantees will develop conservation and handling practices that are compatible with ecological conditions. To this end, appropriate models of production should be developed, such as agrosilvopasture, agroforestry, and the like, designing suitable mechanisms to stimulate them and to discourage unsustainable environmental practices.' (Article 6)

According to the Court the above provisions regulate in detail the collective property rights of black communities over the lands they traditionally occupy, as initially recognised in Law 31 of 1967 and endorsed by ILO Convention 169 and Article 55 T. of the Constitution. As such, black communities are the sole owners of the flora present in their territories and have sole rights to extract and use the products of their forests.

As a result the Colombian authorities, especially the environmental authorities, are required to i) support black communities in their efforts to stop the use of land and the exploitation of their natural resources by people from outside the community, and ii) penalise those who use the products of the soils and forests in their collective territories.

These mandates cover tree cutting for domestic purposes and for potential commercial uses, because black communities are solely entitled to use the forest resources in their collective territories without prejudice to their right to form equal partnerships with public and private bodies for sustainable use of forest resources. (Articles 18 of Law 21 of 1991, 211 and SS C R N, and 6, 19 to 25 Law 70 of 1993).

5.1 Administration and resource control

Article 15 of ILO Convention 169 states that 'The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.'

However, the Inter-American Court of Human Rights and the Colombian Constitutional Court go much further than a simple right of participation in administration, speaking instead of actual powers of administration and control which, although still subjugated by State authority, determine control over resources:

'Indigenous peoples have the right to legal recognition of their diverse and specific forms and modalities of control, ownership, use and enjoyment of their territories "springing from the culture, uses, customs, and beliefs of each people."'[46]

'The Inter-American Court has also reiterated that the right of indigenous peoples to administer, distribute and effectively control their ancestral territory, in accordance with their customary law and communal property systems, forms part of the scope of the right to property encompassed by Article 21 of the American Convention.'[47]

6. Instances where the State reserves property rights over certain natural resources

Article 15 of ILO Convention 169 states that 'In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands' communities have the following rights:

- Right of consultation:

'…governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.'

- Right to share in benefits arising:

'The peoples concerned shall wherever possible participate in the benefits of such activities.'

- Right of compensation:

In such cases, communities also have the right to 'receive fair compensation for any damages which they may sustain as a result of such activities.'

The Inter-American Commission on Human Rights agrees with the above and goes further still (incorporating the right of prior, informed consent), stating that:

'In several countries in the region, constitutional or legislative provisions assign ownership of sub-surface mineral and water rights to the State. The Inter-American human rights system does not preclude this type of measure; it is legitimate, in principle, for States to formally reserve for themselves the resources of the subsoil and water. This does not imply, however, that indigenous or tribal peoples do not have rights that must be respected in relation to the process of mineral exploration and extraction, nor does it imply that State authorities have freedom to dispose of said resources at their discretion. On the contrary, Inter-American jurisprudence has identified rights of

[46] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 72.

[47] IACHR, Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 76.

indigenous and tribal peoples that States must respect and protect when they plan to extract subsoil resources or exploit water resources; such rights include the **right to a safe and healthy environment, the right to prior consultation** and, in some cases, informed consent, **the right to participation in the benefits** of the project, and **the right of access to justice** and **reparation**.' [48]

7. Respecting internal distribution and modes of transmission

Communities are entitled to:

- Respect for their internal systems and approaches to land distribution and transmission:

Article 17 of ILO Convention 169 states that 'Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.'

- The right to consultation on transfer of rights:

'The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.'

In Colombia, the alienation of lands is prohibited as these are listed in Article 63 of the Constitution as inalienable, immune from seizure and imprescriptible. Nevertheless, this provision is relevant for interpreting and guiding cases of transmission (or similar modalities like transfer or association with third parties) of other types of territorial rights, such as the use of natural resources.

8. Other guarantees

According to Article 17, paragraph 3 of ILO Convention 169, 'Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.'

8.1 Penalties for intrusion or unauthorised use

Article 18 of ILO Convention 169 states that 'Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned and governments shall take measures to prevent such offences.'

[48] IACHR. Document OEA/SER.L/V/II.Doc 56/09, 30 December 2009, paragraph 180.

APPENDIX 6: Mining in black community lands: relevant issues and legal concepts found in regulations and legal doctrine

1. The right of pre-emption or first refusal

The **right of pre-emption** must be based on: the right to collective ownership; the right to control a territory's existing natural resources; the concept that collective lands are inalienable, imprescriptible and immune from seizure; and the right of free, prior and informed consent of the communities in relation to the extraction of natural resources from their territories.

2. Mining exclusion zones

Article 34 of the Mining Code establishes that there are certain areas of the country where mining can be prohibited. These comprise: national park land; regional parks; protected forest reserves and other forest reserves; and moor and wetland ecosystems which are included in the Ramsar List of Wetlands of International Importance.

However, the Constitutional Court defined mining exclusion areas more broadly than above. Some other areas or zones are protected by the Constitution and can be designated as mining exclusion zones even though they are not regulated or declared as such in any specific legal instrument.

Black communities have the option to define 'special nature reserves' in their territories which can be designated as total or partial mining exclusion zones (Article 25 of Law 70 of 1993). In mining areas they also possess the power to define 'the places where prospecting and mining cannot be carried out due to the special cultural, social and economic significance for the community of the site in question, in accordance with their beliefs, practices and customs.' (Judgement C-891 of 2002)

3. The requirement for an environmental licence

Mining activities require a prior environmental licence from the relevant environmental authority, such as the Ministry of the Environment, Housing and Territorial Development or the Regional Autonomous Corporation, depending on the scale of the proposed project – see the parameters set out in Articles 8 and 9 of Decree 2820 (2010). The only exemptions are 'uses by operation of law,' that is to say, uses that satisfy basic family needs and traditional mining using panning techniques.

The Constitutional Court has indicated that environmental impact assessments are a prerequisite to any mining activity (no matter its stage or phase of development). It has also made it clear that prior consultation must be carried out when seeking an environmental exploitation licence and for any decision liable to affect communities (as mining concessions, by nature, do); it is also a requirement for prospecting activities.

Relevant regulations and legal doctrine

The Political Constitution of Colombia The Mining Code – Law 652 of 2001, partially amended by Law 1382 of 2010 Constitutional Court rulings, amongst others: Judgement C-892 of 2002

APPENDIX 7: Rights related to valuing, protecting and controlling traditional knowledge

Traditional knowledge in its broad sense includes 'intellectual and intangible cultural heritage, and practices and knowledge systems of traditional communities.'[49]

'Traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions/expression of folklore (TCEs), including distinctive signs and symbols associated with traditional knowledge.'[50]

All of these elements are today valued, recognised and protected by international legal instruments and the Colombian Political Constitution; in terms of protecting not only the content of knowledge,[51] but also the conditions for its creation, reproduction and maintenance,[52] and from the perspective of the community's rights over its knowledge.[53]

Following we briefly describe some of these international instruments.

1. The Convention on Biological Diversity[54]

This Convention has three main objectives: 'the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resource use.' This recognises the profound and traditional dependency of many local communities on their resources.

Article 8(j) of the Convention states that each Contracting Party to the Convention must: 'Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.'

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[49] World Intellectual Property Organisation (WIPO) document: WIPO/GRTKF/IC/17/INF/9 of 5 November 2010. 'List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May Be Found.'

[50] World Intellectual Property Organisation (WIPO) document: WIPO/GRTKF/IC/17/INF/9 of 5 November 2010. 'List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May Be Found.'

[51] For example, recovery, registration and documentation measures.

[52] For example, communities' rights to territory, to access and control of natural resources, etc.

[53] For example, the right of ownership and the right to decide on matters of use and access to knowledge, etc.

[54] Adopted into Colombian law in Law 165 (1994).

The following guidelines and principles should therefore be highlighted: 1) the need to protect knowledge, 2) the promotion of wider application with the permission of knowledge holders, and 3) the fair and equitable distribution of any benefits arising.

By means of the framework and promotion of the Convention, there has been a progressive consolidation, both internationally and in national legislation, of *prior informed consent* and *mutually agreed terms* as conditions for accessing and using the genetic and biological resources of traditional knowledge holders. These requirements are stated much more explicitly and forcefully in the CBD Nagoya Protocol (2010).

1.2 The Nagoya Protocol of the Convention on Biological Diversity[55]

The Nagoya Protocol comprises a series of rules and measures to ensure the fair and equitable sharing of benefits arising from access to and use of genetic resources and related traditional knowledge.

It specifically recognises the contribution traditional knowledge makes to the sustainable use and conservation of biological diversity in collective territories in:

> Article 5 (5), which requires governments to 'take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.'
>
> Article 12 (1), which establishes that governments when 'implementing their obligations under this Protocol…'shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.'
>
> Article 12 (3) (a), which requires governments to support the development of 'Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilisation of such knowledge.'
>
> Article 7, which obliges parties to 'ensur[e] that traditional knowledge associated with genetic resources...is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.'

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[55] Adopted at the COP10 (Conference of Parties) for the Convention on Biological Diversity in Nagoya, Japan in October 2010. Colombia signed the Protocol at the headquarters of the United Nations in New York in February 2011. However, its incorporation into Colombian law requires prior consultation and approval by the Congress of the Republic, followed by review for constitutionality by the Constitutional Court, exchange of letters and ratification.

Provisions are also being considered to strengthen and monitor compliance with access regulations and mutually agreed terms, as well as surveillance, monitoring and capacity development measures to support countries and communities in their negotiations on access, benefit sharing, financial issues, etc.

2. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003)[56]

'The purposes of this Convention are: (a) to safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance.'[57]

For the purposes of this Convention, 'intangible cultural heritage' means 'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage.'

And the term 'safeguarding' means 'measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalisation of the various aspects of such heritage.'

3. Law 70 of 1993

Law 70 of 1993 was developed as part of Provisional Article 55 of the Constitution and 'The object of the ... Law is to recognise the right of the Black Communities that have been living on barren lands in rural areas along the rivers of the Pacific Basin, in accordance with their traditional production practices, to their collective property ... Similarly, the purpose of the Law is to establish mechanisms for protecting the cultural identity and rights of the Black Communities of Colombia as an ethnic group and to foster their economic and social development, in order to guarantee that these communities have real equal opportunities before the rest of the Colombian society.'[58]

Its provisions contain several different types of mandates which recognise and protect the differences and special cultural characteristics of black communities and, therefore, their traditional knowledge and forms of cultural expression. An example of this is the recognition and protection of 'traditional production practices' meaning 'the technical, agriculture, mining, forestal extraction, grazing, hunting, fishing, and general harvesting activities of natural resources, customarily used by

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[56] Adopted into Colombian law in Law 1037 of 2006. Declared enforceable by the Constitutional Court in Judgement C-120 of 13 February 2008. Instrument of ratification deposited on 19 March 2008. Came into force on 19 June 2008.

[57] Article 1 of the Convention.

[58] Article 1 of Law 70.

Black Communities to guarantee the conservation of their lives and their self-sustaining development.'[59]

Also of note is the community's right to be recognised as 'possessors' [of natural resource knowledge], when appropriate, and to share in the benefits that arise, directly or indirectly, from their knowledge and creative, adaptive and domestic processes involving natural resources.[60]

[59] Article 2.

[60] Article 54: The National Government will design adequate mechanisms in order that the Black Communities or their members who develop vegetable varieties or knowledge about the medicinal, alimentary, handicraft, or industrial use of animals or plants from their natural environment, first, that they be recognised as the possessors of that knowledge and, second, that they obtain the economic benefits as have other individuals or legal entities who develop products for national or international markets.

APPENDIX 8: THE RIGHT TO PRIOR CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT

1. Consultation

Black communities have a right to prior consultation every time legislative or administrative measures (e.g. policies, plans, standards, authorisations, permits, licences or concessions) are put forward that will impact directly on the community, whether positively or negatively.

2. Consultation as a right

Consultation is a community right. The Colombian Constitutional Court has stated that prior consultation is a fundamental right in relation to projects that exploit the renewable and non-renewable natural resources of collective territories, and this right can be legally demanded by means of *acción de tutela* (legal protection).

2.1 Requirements that must be met

The State must supervise and ensure compliance with the following conditions during processes of consultation:

1. Consultation must be undertaken prior to drawing up measures or decision making and any intervention in the territory.
2. Consultation must be carried out in good faith, using appropriate procedures.
3. Consultation must be conducted using means that ensure the community is fully informed and cognisant about projects and the mechanisms, procedures and activities required for their implementation.
4. The community must be well-informed about the implications of executing the projects in question, and the possible harmful effects they may have on their social, cultural, economic and political cohesion.
5. Community members and their representatives must be afforded the opportunity of forums to freely and conscientiously evaluate the advantages and disadvantages of a given project, to air their concerns and aspirations, to defend their interests and to state opinions on the viability of a project.
6. The community must be involved in designing project impact studies, which must be prior; integrated or multidimensional; consider the possible effects on community rights, carried out by technically competent bodies and under state supervision.
7. The community must be involved in defining the procedures, terms, geographical areas and locations for consultation meetings; in other words, they must be consulted to determine the appropriate means of consultation.
8. The consultation process must be 'culturally appropriate,' that is to say, it must respect the practices, customs, traditions and laws of the community. This implies, among other things, taking into account traditional decision-making methods and the time the community requires, along with internal regulatory instruments and tools, such as the present Protocol.

9. Actions to select representatives for consultation and decision making are the sole right of the communities themselves.

2.2 The consultation procedure

The consultation procedure changes according to the measure under review.

The national government, by means of Decree 1320 of 1998, has set regulations for the conduct of prior consultation with black and indigenous communities regarding the exploitation of natural resources in their territories. However, the Constitutional Court and international bodies like the ILO consider these to be unconstitutional and contrary to ILO Convention 169. This is not just because there was no prior consultation on these regulations, but also because they ignore many of the conditions and guarantees set out above.

For this reason, the Constitutional Court has ordered the national government to refrain from enacting the Decree, and the ILO Administrative Council has demanded modifications to harmonise the Decree with Convention 169 in consultation with community representatives.

As stated above, the procedure that must be followed is one which is defined in concert with legitimate community representatives, and which complies with the parameters set by ILO Convention 169 (Law 21 of 1991) and the Constitutional Court. This process to define procedures has been called 'pre-consultation' and precedes the actual consultation.

2.3 Consultation outcomes

Consultation outcomes (whether or not the opinions and decisions put forward by the community are treated as obligatory by the State) vary according to the scale of impact of the measure under review.

In general terms, consultation must be undertaken with the aim of securing consensus or agreement with communities. If no agreement is reached, the Constitutional Court states that 'the authority's decision must not in any way be arbitrary or authoritarian; it must be objective and reasonable and in line with the constitutional requirements for the State to protect the social, cultural and economic identity of the community....In any case, mechanisms must be put in place to mitigate, counter or make reparations for any negative outcomes for the community or its members that may result from an authority's interventions' (Judgement T-652 of 1998 and others). The Inter-American Court of Human Rights has added that, in these cases, communities have a right to reparation.

However, there are issues and cases where, due to very high levels of potential impact on the community, the State is obliged to make a ruling or express a position.

To this end, in recent decades, the community's right of free, prior and informed consent has been considered, consolidated and made a requirement in the framework of international and also national law for legislative and administrative measures and projects which especially impact on communities and their territories, for cases which concern the community's fundamental rights and for stand-alone provisions (such as access to and use of traditional knowledge).

3. Free, prior and informed consent

As stated, there is already international consensus on a whole series of issues for which the free, prior and informed consent of the communities must be obtained. With these types of issues, communities have the power to make decisions on or veto the measure or project in question. These issues are:

1. All plans for development, investment, exploration or extraction which significantly impact on the community's right to use and enjoy its ancestral territories and resources, in particular, projects related to the development, use or exploitation of mineral, forest and water resources;
2. Projects planned to take place in or that may affect areas considered sacred or of special biological or cultural significance for communities;
3. Development or investment plans or projects that require the displacement (i.e. permanent relocation) of communities from their traditional territories;
4. The deposit or storage of hazardous materials in community lands or territories, as set out in Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples. These types of hazardous materials are often associated with the extraction of gold and other minerals;
5. Access to and use of the community's traditional knowledge.

In addition to these general issues, the State is obliged to assess if the type and scale of impact of each concrete case is such that community decisions become obligatory and binding.

Relevant regulations and legal doctrine

The above is laid down in or based on the following regulations, rulings and national and international standards, including:

- ILO Convention 169 adopted in Colombia in Law 21 of 1991
- American Declaration on Rights and the Duties of Man
- American Convention on Human Rights
- International Convention on the Elimination of All Forms of Racial Discrimination, 1969
- United Nations Declaration on the Rights of Indigenous Peoples, 2007
- Convention on Biological Diversity (CBD)
- The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
- The Akwé: Kon Guidelines – voluntary CBD-related guidelines
- Andean Community Decision No. 391, 1996
- The Political Constitution of Colombia
- Rulings of the Inter-American Court of Human Rights, including: Saramaka vs. Surinam; Sawhoyamaxa vs. Paraguay
- The Expert Commission to the ILO Administrative Council. GB282/14/4.61
- Recommendations and observations of the Committee on the Elimination of Racial Discrimination

- WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
- The Inter-American Commission on Human Rights, document OEA/Ser. L/V/II. Doc 56/2009 and others
- Constitutional Court Judgements, including: T-380 of 1993, T-349 of 1996, SU-039 of 1997, T-523 of 1997, T-652 of 1998, T-737 of 2005, C-410 of 2002, C-418 of 2002, C-891 of 2002, T-955 of 2003, SU-383 of 2003, C-208 of 2007, C-030 of 2008, C-461 of 2008, C-175 of 2009, T-769 of 2009

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