

Colombian Constitutional Court
SU-039 of 1997
February 3rd, 1997

In 1992 an oil extraction company filed with the INDERENA (former authority) the necessary arrangements for obtaining the environmental permit required in order to conduct seismic surveys for a mining project with the purpose of discovering wells or oil fields in an area within some National Parks and with native inhabitants (Ethnic Group U'WA). At that time, the company obtained the viability for the exploration project, but with the condition that the areas of the National Parks of "Tamá" and "El Cocuy" must be excluded from any seismic activity.

In 1994, the Environmental Department (Ministerio del Medio Ambiente) acquires authority over the project and approves its viability. However, they cautioned the need of conducting a "prior consultation" in order to obtain the U'WA Community's consent. In doing so, the Environmental Secretary assumed as "consultation" a preliminary meeting held with a few members of the Ethnic Group U'WA on January 10th and 11th of 1995 and proceeded to issue the authorization, so the environmental license was granted.

This was a violation of their native rights because by granting an environmental license without the U'WA Community's consent, their fundamental rights of participation and of due process got affected, and their ethnic, cultural, social and economic integrity and identity got swayed. Those constitutional rights are guaranteed and made effective through the exercise of another fundamental right, which is the community's right to get involved in the decision making in order to approve if the exploration or exploitation is possible.

The Court stated that if there is no community agreement, the authority's decision must devoid all arbitrariness and authoritarianism. Consequently it should be objective, reasonable and proportionate to the constitutional protection of the social identity, cultural and economic life of the native community. In any case, they must find alternative mechanisms to mitigate, correct or restore the effects of the authority's measures upon the community or its members. Therefore, ways of consultation with the community are absolutely necessary in order to achieve an agreement or consent and to specify how the project affects their ethnic, cultural, social and economic identity.

The Court pointed out that the meeting that took place on January 10th and 11th of 1995, doesn't represent the community consent required for the environmental license. This consultation should have taken place before issuing the license, so those subsequent actions have no legal value and significance. The Court believed that the procedure of issuing the environmental license is irregular because it occurs disregarding the Ethnic Group U'WA's fundamental right of due process and the right to receive a formal consultation.

As to the merits of the claims, although there is another legal mechanism available, the Court explained that the irremediable injury to be avoided is that with a positive result of the exploratory mining work, the following operative phase (exploitation) would be developed without major drawbacks, creating an obvious danger to the integrity of the U'WA Community, which may reach a point of no return: its destruction as an ethnic-human group.

Taking everything in account, the Court ordered the Environmental Department to proceed with the consultation in order to ensure the fundamental rights of the U'WA Community. This protection is granted under the condition that the U'WA Community must pursue the Invalidity Action of the environmental license, in the contentious jurisdiction.

