

Consentimiento Libre, Previo e Informado y Evaluaciones de Impacto en Derechos Humanos: Lecciones de las operaciones de Repsol en territorio Wayuu en La Guajira, Colombia

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Mesa 4

"Experiencias de investigación en sostenibilidad integrando la perspectiva de cadenas globales de valor"


Free, Prior and Informed Consent (FPIC)

- FPIC has become *the* flagship human right pursued by indigenous peoples worldwide as it allows them to flourish on their own terms on their path to self-determination.
- FPIC empowers indigenous peoples to regain their autonomy in matters relating to their internal and local affairs, including control over their lands, territories and resources.
- Mere consultation is not adequate and consent should always be the objective of prior consultation.


Free Prior Informed Consent




The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.



The consent is sought sufficiently in advance of any authorization or commencement of activities.



The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.



A collective decision made by the right holders and reached through a customary decision-making processes of the communities.

Human Rights Due Diligence (HRDD)

- ***The*** buzzword in Business and Human Rights circles.
- Demands heightened respect for human rights during business activities.
- Is about identifying, preventing, mitigating, and accounting for how companies address their adverse human rights impacts (UNGP 17).
- ‘Assessing the human rights context prior to a proposed business activity’ (UNGP 18).
- Identifying potential and actual impacts to rights-holders based on meaningful consultation (UNGP 18).

Human Rights Impact Assessments (HRIA) ^{1/2}

- Need for ongoing, periodic analysis of changing contexts and impacts, and longitudinal impact assessments.
- Not to be confused with corporate risk mitigation and management strategies.
- Recommendations represent legal obligations for states and other duty-bearers and give rise to enforceable claims by rights-holders.
- Recognised as an important instrument to ensure corporate compliance with HRDD.
- ***The*** tool to be used when operating on indigenous lands and territories.

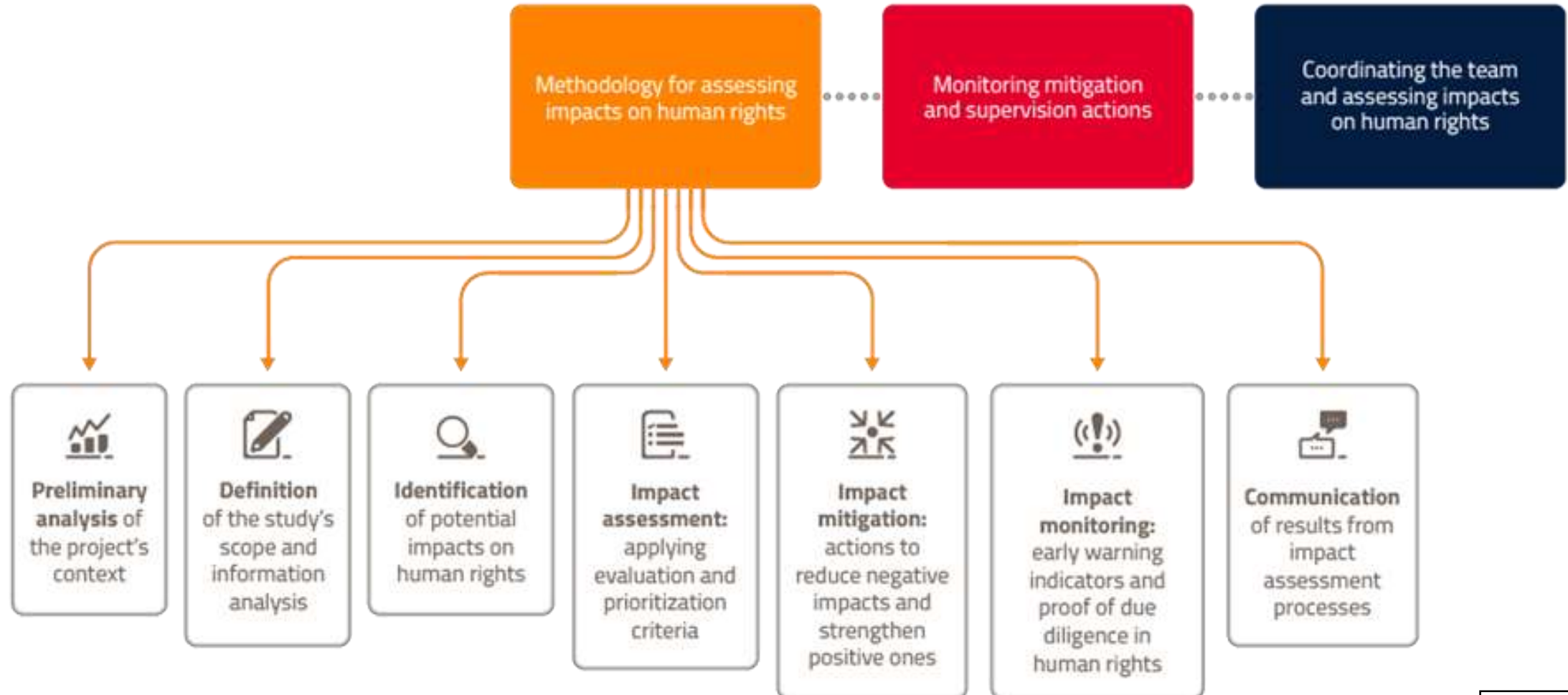
Human Rights Impact Assessments (HRIA) 2/2

- The evaluation of potential and actual human rights impacts is approached from a participatory, intercultural, knowledge and rights-based perspective.
- Enable companies to be duly diligent concerning their human rights impacts,
- Put into practice the corporate duty to consult with indigenous peoples and seek their FPIC.
- Lack of case studies on corporate HRDD practices and successful HRIA.
- Assessment of policies rather than practices.

Repsol 1/3

- Human Rights and Community Relations Policy (2023).
- Dialogue is the cornerstone of Repsol's relationship with indigenous peoples.
- Repsol respects the rights established in UNDRIP and C169, regardless of whether these instruments have been ratified by states.
- In 2014, Repsol published a methodology for assessing human rights impacts that serves as a general framework for business units and consultancy firms to conduct HRIA.
- HRIA are now conducted every time Repsol's activities affect indigenous peoples.

Repsol HRIA methodology 2/3



Repsol Community Liaison Officer 3/3



Colombia 1/6

- Colombia Constitution (1991), Article 330: participation in the exploitation of natural resources on indigenous territories.
- Constitutional Court of Colombia: important sentences concerning prior consultation and FPIC.
- Presidential Directives 01 (2010) and 10 (2019): guidance on consultation stages.
- Decree 2893 (2011) strengthened the Ministry of the Interior by creating the Directorate of the National Authority for Prior Consultation and Decree 2353 (2019) further clarified and reinforced de Directorate's role.

Colombia 2/6

Consulta Previa

¿Qué Es?

Es un derecho fundamental y colectivo que tienen las comunidades étnicas para que a través de un diálogo intercultural se garantice su participación real, oportuna y efectiva en la adopción de medidas administrativas y legislativas o proyectos, obras o actividades cuya ejecución los afecte directamente, con el fin proteger su integridad física y cultural.



Source: Ministerio del Interior de Colombia, 2023

Actores de la Consulta Previa



Source: Ministerio del Interior de Colombia, 2023

Procesos de Consulta Previa

¿Cuándo procede? 3/6



Persona natural o jurídica que pretenda ejecutar proyectos, obras, o actividades, y la adopción de medidas administrativas y legislativas, de acuerdo con el criterio de afectación directa.

1 Solicitud de determinación de procedencia y oportunidad de la consulta previa.

- BASES DE DATOS:**
- Dirección de Asuntos Indígenas, ROM y Minorías
 - Dirección de Comunidades Negras, Afrocolombianas, Raizales y Palenqueras.
 - Agencia Nacional de Tierras
 - DANCP
 - Fuentes de información secundaria; Alcaldías Municipales, Ministerio de Cultura, Instituto Colombiano de Antropología e Historia ICANH, Instituto Geográfico Agustín Codazzi, Departamento de Estadística DANE.

- REQUERIMIENTOS:**
- Nombre del proyecto.
 - Descripción del proyecto.
 - Coordenadas geográficas.
 - Plano CD con los shapes.
 - Área de influencia.
 - Actividades a realizar dentro y fuera de polígono.

2 Concepto geográfico, cartográfico y espacial



3 Verificación



✓ Requiere visita:
 Cuando la Información Disponible no es suficiente y se requiere precisar en terreno.

✗ No requiere visita:
 Cuando la información disponible es suficiente para determinar si el proyecto es susceptible de ocasionar posibles afectaciones directas sobre una comunidad étnica.

4 Resolución / Acto administrativo



Actos administrativos en **15 días hábiles**

30 días hábiles (prorrogables) cuando se requiere verificación




5 Notificación



10 días hábiles

En caso de determinarse la procedencia y oportunidad de la consulta previa, se deberá solicitar el inicio de la CONSULTA PREVIA

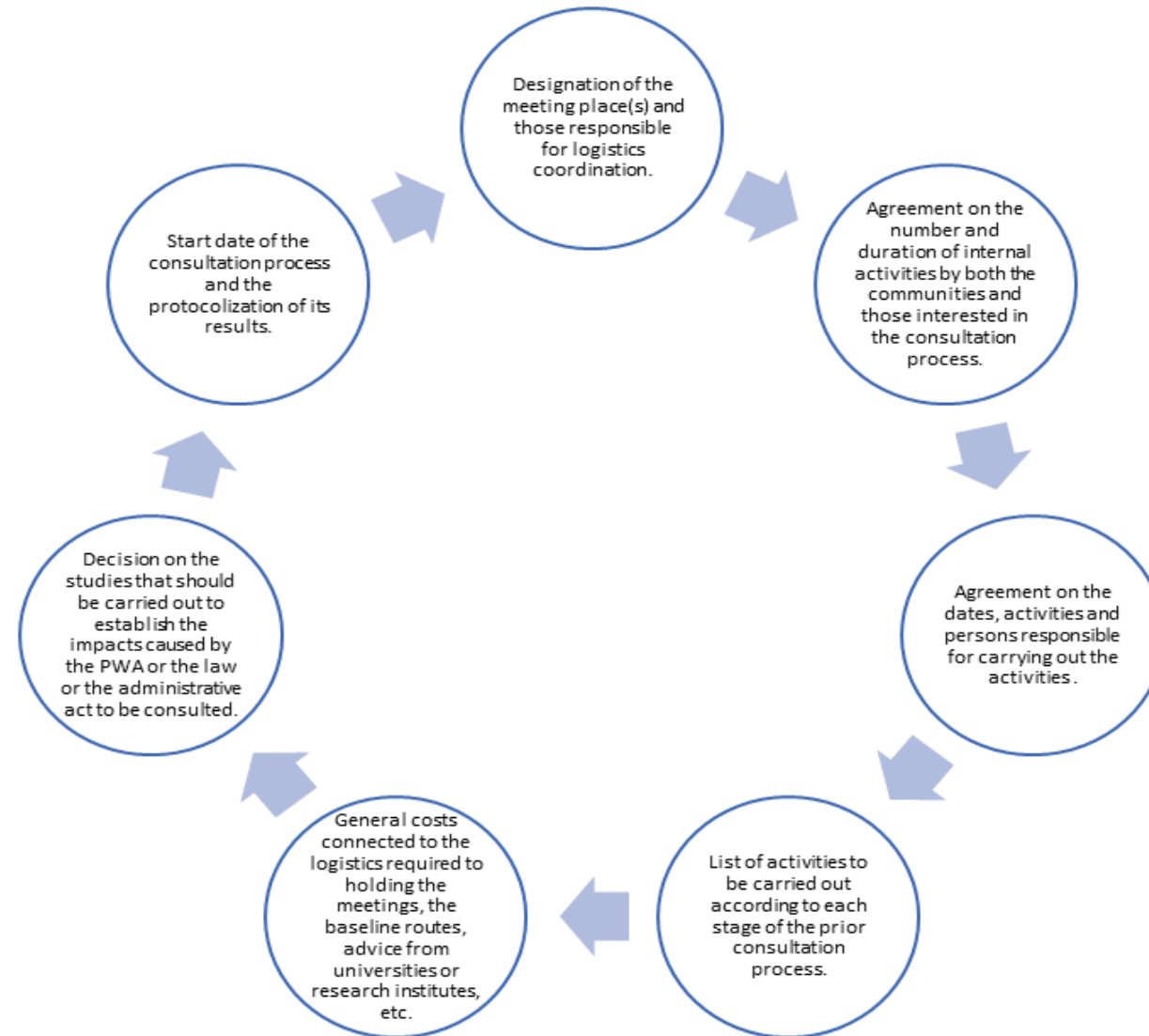
En caso de no notificarse personalmente o vía correo electrónico, se notifica por aviso.



Consultation stages 4/6



Colombia prior consultation route 5/6



Etapa de Consulta 6/6

Se analizan e identifican los impactos del proyecto, obra o actividad - POA que puedan afectar directamente a la comunidad étnica y se determinan las medidas de manejo adecuadas para prevenir, corregir, mitigar o compensar las potenciales afectaciones que generará el desarrollo del proyecto o la implementación de la medida.

A partir de las medidas de manejo identificadas, se establecerán los acuerdos y se definen los plazos, condiciones de tiempo, modo y circunstancia, así como los indicadores de cumplimiento.

Una vez se llegue a acuerdos se consignan en el acta de la reunión y se procede a la protocolización de los mismos.

Con la protocolización de los acuerdos se define el comité de seguimiento.

Medidas de Manejo

Preacuerdos

Seguimiento o Comité

Análisis e identificación de impactos

Protocolización de acuerdos



CASE STUDY



Map RC-12 Block 1/11

72°0'0"W

71°0'0"W



Mar Caribe



RC 12 E&P

RC 12 E&P
SECTOR OCCIDENTAL

SECTOR MEDIA LUNA

CABO DE LA VELA

MEMORIAS CIVILIZARIAS
CORTE INTERAMERICANA
Guajira

UPALIHA
TAROA

PALAALU
PUERTO ESTRELLA

RC 12 E&P
ORIENTAL

TAWAIRA
TAGUARIA

AMURRULU
NAZARETH

WALEPAA
GTARETTA

JACHITUMA
PUNTA ESPADA

SAPALA
SIAPANA

NEIMALLU
PUERTO LOPEZ

WARRUIA PALIWOU
CASTILLETES

N. 00° 0' 0" E

N. 00° 0' 0" E

PROYECTO RC-12
DATUM: Magna Sirgas Origen Bogotá,
DEPARTAMENTO DE EXPLORACION
SEPTIEMBRE DE 2019



0 5 10 20 30 40 km

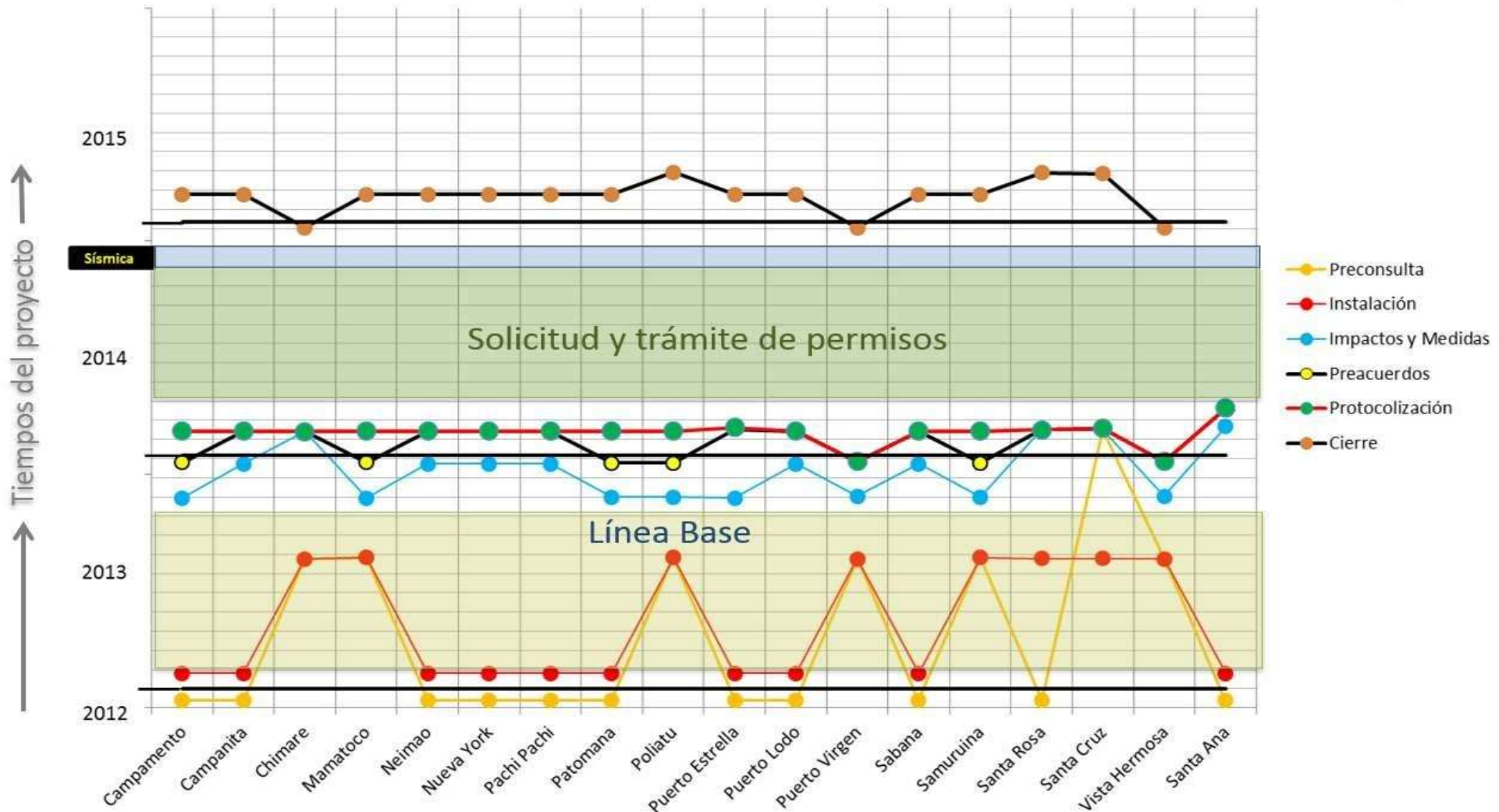
72°0'0"W

71°0'0"W

Consultation and HRIA processes 2/11

- 2011-2015: Prior consultation east block
 - 2014-2015: First HRIA west block
- 2017-2018: Second HRIA west block
 - 'NO-GO DECISION'
- 2019-2020: Third HRIA east block
- 2020: Repsol retrieves from the region

Prior consultation timeline 3/11



Prior consultation 4/11

- ‘Even though the consultation lasted for three years, it really only lasted for about ten months’ (informant).
- Repsol’s community liaison officer engaged with the concerned communities during eight months prior to starting the consultation.
- Throughout the consultation process, Repsol displayed great flexibility in its engagement strategy with the Wayuu.
- Initially, only traditional authorities were invited, but then fishermen, women, teachers and children were also invited.

Consultation highlights 5/11

- Over 120 meetings and workshops with 18 communities.
- 17 agreements signed.
- Economic compensation packages negotiated directly with the fishermen and women.
- Capacity building activities.
- Repsol assumed 14 commitments and complied with them 100%.
- Repsol contributed to improving the relationship between the Government and the Wayuu.
- Investment in water infrastructure.

First HRIA 6/11

- La Guajira is the first post-pilot HRIA for Repsol.
- The HRIA is not successful due to the lack of knowledge and experience of both the consultancy firm and Repsol.
- The HRIA is conducted mostly as a desktop exercise with two consultants being dispatched to the territory for a short amount of time.
- Surveys are applied with communities, but no true dialogue takes place.
- The HRIA does not identify the 'Jepira' and is later criticised by indigenous peoples.

Second HRIA 7/11

- Same part of the block, builds on the lessons learned from the first HRIA.
- The most relevant impact identified is the effect the project would have on the 'Jepira', the Wayuu's most important symbolic, spiritual, and cultural reference to death.
- The high spiritual impacts that the project could potentially have on the 'Jepira' would trigger the FPIC requirement.
- Repsol decides not to move forward with the proposed exploratory project: 'No-Go decision'.
- Repsol negotiates the return of this part of the block.



Good practices 8/11

- Wayuu consultants integrate the interdisciplinary team of consultants.
- They assume all the logistical support, such as catering and sleeping arrangements, in coordination with the local communities.
- The Wayuu consultants support the construction of an intercultural and highly participatory methodology.
- The consultants arrive in the communities, ‘insert themselves into the depths of Wayuu society’, apply surveys and conduct interviews.
- ‘If it were not for the trust we built, we would never have known about the Jepira’ (informant).

Third HRIA 9/11

- The National Indigenous Organisation of Colombia (ONIC) becomes the face of the HRIA.
- The ONIC hires the local and international consultants: Repsol signs a contract with the ONIC.
- It is the first time in the history of Colombia that an indigenous organisation has the control over the co-design of the methodology for an HRIA.
- 'It was a conceptual and ethical matter of applying international standards to the rights of indigenous peoples to the maximum' (informant).

Third HRIA 10/11

We did not work the eight hours of a normal working day, but we did the interviews and focus groups with the fishermen from three to six in the morning because during that time the fishermen got ready to go out and fish and we spoke to them again from two to five in the afternoon. And we engaged with the women between nine and 12 in the morning, depending on the day. (informant)

Good practices 11/11

- By applying a collaborative approach to HRIA, indigenous peoples and companies can work together to jointly investigate, measure and respond to the human rights impacts of projects, thereby building trust and coming to agreements on key issues.
- Focus on collective decision-making among participating stakeholders, who co-design and co-conduct the HRIA.
- Position indigenous peoples at the centre of the HRIA process:
 - ✓ understand the local context;
 - ✓ establish an evidence-based, socio-cultural, and economic baseline to address potential impacts through prevention or mitigation measures and actual impacts;
 - ✓ process of capacity development on human rights, allowing communities to better comprehend the impacts of the project.

Conclusions 1/3

- Oftentimes states do not have the capacity to carry out consultative processes.
- Companies can proactively contribute to the realisation of human rights and support states in fulfilling their human rights obligations.
- Companies can assume the ‘collective and political responsibility’ of being co-guarantors of human rights (Karp, 2023).
- Companies should not substitute the state but they can bring the state closer to local communities and establish direct communication channels between the parties.

Conclusions 2/3

- HRDD is not only about avoiding harm, but about a more holistic commitment to human rights.
- Time and resources are needed to ensure compliance with HRDD.
- Investment in continuous, good faith, intercultural and consent-based dialogue is key.
- Capacity development activities, institutional support to the communities, and investing in community projects are essential.
- Companies must hire experts in the field of HRIA and indigenous peoples, not just IA experts.

Conclusions 3/3

Repsol is a company that had the courage to fulfil its moral and political duty, its duty of intercultural connection. This type of bond, in the framework of human rights due diligence studies, is an opportunity for all companies and indigenous peoples to change the method of communication and interaction and embark on a new stage of life where we understand each other from different economic, political, social and organizational perspectives.

Armando Valbuena Gouriyu, Wayuu leader

GRACIAS

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