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Article

Application of Convention No. 169 in Latin America

1. Introduction.

On June 27, 1989 the International Labour Organization (ILO) adopted the Convention No. 169 concerning Indigenous and Tribal Peoples of independent countries (the "Convention"), in order to give recognition to the "aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live".

Along with the United Nations (UN) Declaration of Rights of Indigenous People adopted in 2007, the Convention is the most important document of international indigenous law, and establishes basic principles like the recognition of the indigenous and tribal people, and the right to self determination and autonomy in relation with their culture, religion, education, communications, health, and several other matters.

More than half of the countries that up to now have ratified the Convention correspond to Latin America and the Caribbean region (the "Region"): Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, México, Paraguay, Peru and Venezuela. The high level of ratification of the Convention in the Region is a consequence of multicultural countries with a significant component of indigenous population. This interest in the Convention is explained by common factors like democratic consolidation processes by constitutional reforms, the concession of privileged legal status to international human rights treaties and the adoption of new principles like the constitutional recognition of indigenous peoples which facilitate its application.¹

In some countries like Bolivia and Colombia, the human rights treaties are part of the "constitutionality block," which gives such treaties the same rank of their Constitution, and other countries like Ecuador and Guatemala, give those treaties a rank below their constitution but above their ordinary legislation.

The ILO supervises the effective implementation of the Convention particularly through the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR is in charge of examining the reports submitted by ILO's state members regarding the measures adopted to give application to the Convention, and in this context, the CEACR may address comments to the local government to guide the implementation of the same in two different ways: Observations or Direct requests.²

Regarding the effective application of the Convention, this has been impelled not only by the indigenous peoples and communities, but also by other private and public actors by means of judicial actions, using the Convention as a strong support of their claims and defenses. Almost all of the cases concern conflicts regarding the ownership of indigenous lands and territories, the exploration or exploitation of their natural resources, the lack of consultation and participation in processes regarding decisions that may affect indigenous peoples or their way of life, and the recognition of an indigenous jurisdiction and the customary indigenous law.

2. Consultation and Participation Processes.

According to Article 6 of the Convention: "In applying the provisions of this Convention, governments shall: (a) **consult** the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can **freely participate**, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them."

In addition, Article 7 establishes 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 and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall **participate** in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

The articles referred above have been considered the most important articles of the Convention because they set up the core of the same, i.e., the consultation and participation process for the recognition of self determination of the indigenous peoples.

The consultation process ("Consultation Process") shall be undertaken prior to the final decision with the representative entities of the indigenous peoples, in good faith and in an appropriate way regarding the particular circumstances, with the goal of achieving the agreement or consent to the proposed measures.

This Consultation Process has been the most conflictive issue that the ratifying countries have faced in the application of the Convention.

Together with the Consultation Process, the participation process ("Participation Process") reflects the idea of respect to the autonomy of the indigenous peoples, and allows them to determine their own priorities in relation with their way of life, culture, religion, education, health and several other important matters.

Cases

The importance of the Consultation and Participation Processes in the Region is reflected in the following cases:

In **Bolivia**, there was a claim of unconstitutionality in which the appellant, who was a Bolivian Senator, requested the Court to declare unconstitutional articles 114 and 115 of the Law of Hydrocarbons that establishes as an obligation prior consultation with the indigenous peoples in order to be able to develop any hydrocarbon activity. The Senator believed that those articles violated the principle of equality contemplated in the Bolivian Constitution and created unjustified favorable treatment to the indigenous people. The Court resolved that the Convention and therefore the obligation of prior consultation to the indigenous people, when the activity could affect them, belongs to the "constitutionality block" and, for that reason, articles 114 and 115 of the Law on Hydrocarbons referred above does not violate the Bolivian Constitution at all.³

In **Colombia**, the leading case concerning this matter was the Judgment SU-039/07 of the Constitutional Court in February, 1997. In this case the Ombudsman, who is in charge of the defense of the indigenous people and represents several members of the U'wa indigenous community, filed an action for the protection of consultation rights against the Ministry of Environmental and Sociedad Occidental de Colombia Inc. because of the exploitation of natural resources (the "Project") in the community territory of the U'was without carrying out the prior consultation process established by the Convention in due course.⁴

The Court resolved to suspend the environmental license for the Project and required a new consultation process, as the one originally made with the U'was community was not carried out in the manner and with the parameters established by the Convention since in the meetings that they had with the community the U'was representatives were not present and no review of the possible effects of the Project on the way of life and the culture of the U'was occurred.

3. Application of the Convention in Chile.

Before the ratification of the Convention in Chile, the Constitutional Court, in its judgments 309-2000 and 1050-2008 relating to the constitutionality of some articles of the Convention, declared that the Convention has two kind of rules: (i) the **self executable rules**, which have a direct application in the internal regulation of the country; and (ii) the **programmatic rules**, which require for their implementation the enactment of a law or the issue of an instruction or decree that completes them.

Chile ratified the Convention in 2008 and the same came into force on September 15, 2009.

The first approach for the effective application of the programmatic rules of the Convention was the proposal of having a Code of Responsible Conduct (the "Code"). The idea of the Code was to compel the owners of projects on indigenous lands to demonstrate that they have a proper plan to handle the economic, social and cultural effects of their projects and to minimize the environmental effects of the same, always with complete respect of the indigenous rights. In that regard, the Code contemplated the requirement of a new certification, in addition to the environmental one, in order to develop any project.

The implementation of the Code completely failed due to the serious divergences that its provisions generated.

Currently, there is no new regulation of the Convention, but the Ministry of Planning has issued Decree No 124 of September 4, 2009 (the "Decree"), which recognizing the consultation and participation rights contemplated in the Convention, regulated the consultation and participation processes established in article 34 of the Indigenous Law N° 19.253. However, the Decree has given rise to several controversies since it was issued without a prior consultation process.

As in the rest of the Region, the most conflictive and problematic issue regarding the implementation of the Convention in Chile has been the application of the Consultation Process. An example of this can be found in a judgment of the Court of Appeals of Temuco that (i) recognized the obligation of prior consultation to the indigenous peoples in order to decide administrative measures that may affect them directly, (ii) revoked the Environmental Approval Resolution ("RCA") 242, dated October 9, 2009, which

had certified and authorized the project called "Piscicultura Palguin" and (iii) ordered the realization of the appropriate Consultation Process in order to obtain a favorable RCA.

More recently, in a judgment of the Court of Appeals of Puerto Montt, the Court approved a protection action filed by the Mapuche Community "Huillliche-Pepiukelen" against Empresa Pesquera Los Fiordos Ltda. (a fishery), which started its activities on indigenous land that have an important effect on their water supply without a prior Consultation Process. The Court ordered the suspension of all the activities of Empresa Pesquera Los Fiordos Ltda. in the territories of the indigenous community. Moreover, in this case, the Court of Appeals ordered the elimination of all works made to date and the reestablishment of affected land to its prior condition.

4. Learnings.

- There have been important applications of the Convention in Latin American countries that are explained by the existence of several common factors and the substantial number of indigenous populations in these countries.
- The ratification and application of the ILO Convention No 169 concerning Indigenous and Tribal Peoples of Independent Countries by several countries with substantial indigenous communities has set a new standard of authorization and community participation in the development of projects and is here to stay.
- The most conflictive issues of the Convention are the consultation and participation processes related to the exploration and exploitation of natural resources on indigenous lands, which represent major challenges for the states that have ratified it and pose a significant new issue for consideration by foreign investors when developing projects in these countries. This issue becomes more relevant when the participation and consultation processes should be conducted with the goal of achieving agreement or consent on proposed measures, recognizing that the lack of such consent can stop or delay the project indefinitely.
- Another important effect of the application of the Convention is the fact that now foreign investors who have an interest in developing a project in a country which has ratified it (e.g., a mining project) must review and consider the Convention before it starts the project if there are indigenous lands in the area. If the result of that investigation demonstrates the presence of "indigenous lands," the investors should contact the government authority in order to conduct due diligence to learn the opinion of the indigenous people and the possibility to obtain an agreement with them in order to continue with the project.
- What remains to be seen is how the internal laws and regulations of each of the countries will be adjusted to face the new trend regarding the protection of the rights of indigenous population.

1 See "Application of Convention No. 169 by domestic and international courts in Latin America", www.ilo.org [August 13, 2010].

2 See "Monitoring Indigenous and Tribal People's Rights through ILO Conventions – A compilation of ILO supervisory bodies' comments 2009-2010", www.ilo.org [August 13, 2010].

3 See "Application of Convention No. 169 by domestic and international courts in Latin America- A casebook", Pages 53-59, www.ilo.org [August 13, 2010].

4 See "Application of Convention No. 169 by domestic and international courts in Latin America- A casebook", Pages 64-127, www.ilo.org [August 13, 2010].

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