

Public Consultations of Indigenous Peoples in the Hydrocarbons Industry

Bolivia and Peru

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Abstract

The purpose of this paper is describe the regime for the public consultations of indigenous peoples specifically established for the hydrocarbons industry in Bolivia and the regulations existing and proposed in Peru, with the intention of making some suggestions for their possible improvement, based on industry experience.

Overview

It has become a commonly documented phenomenon that in most countries where there is a sudden commodities boom, a GDP narrowly focused in extractive activities, extreme income inequalities, presence of multinational companies, coupled with poor governance and a weak institutional regime, there is clear potential for social conflict³. Adding to this combination the presence of indigenous peoples - who occasionally are even marginalized by their own national government - frequently heightens the risk for social conflict.

It is not the purpose of this paper to discuss theoretical or optimal approaches on how to carry out public consultations⁴, nor to address the highly debated topic of how to prevent or cope with intercultural conflict, but rather to highlight the most salient aspects of the public consultations of indigenous peoples' regimes applicable to the activities carried out by the hydrocarbons industry⁵, as they have been enacted or are under legislative consideration in two Andean countries, namely the Pluri-national State of Bolivia and the Republic of Peru. In addition, this paper seeks to provide some ideas and guidance for the possible improvement of the existing regulations, based on international standards, comparative analysis and industry experience.

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³ *Conflict Commodities: addressing the role of natural resources in conflict*. Natalie Pauwels (2003). International Security Information Service (ISIS) Briefing Paper, no. 27. Brussels.

⁴ See, on public consultations: *Cross Cultural Negotiation & Consensus Building Strategies for Foreign Investment Projects Beyond Legal Systems*. Luis Ore. State Bar of Texas ADR Section's Alternatives Resolutions Newsletter Vol.18, No.2 Spring 2009. Available at <www.wiserearth.org/file/view/78ace89e643adbd327d11f1337f94a23> last visited 24.07.2010

⁵ It is also beyond the intended scope of this paper to examine public consultation proceeding in general, or their application in economic activities other than the hydrocarbons industry (e.g. SD 020-2008-EM regulates in Peru public consultation for mining activities, and SD 02-2009-MINAM, dated 26.01.09 regulates consultation and (public) participation (proceedings) in relation to environmental matters; in Bolivia new regulations have been contemplated for the participation of indigenous people in the benefits and environmental control of the activities carried out by mining and metallurgic industry).

1. Relevant international standards

*United Nations Declaration on the Rights of Indigenous Peoples*⁶

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007. The Declaration is the most comprehensive statement of the rights of indigenous peoples ever developed⁷, evidencing the international community's commitment to the protection of the individual and collective rights of indigenous peoples⁸.

With respect to the development, utilization or exploitation of mineral and other natural resources, the Declaration requires “free and informed consent” from the indigenous peoples “prior” to the approval of any project⁹ affecting their lands or territories and other resources, by the governmental authorities.

UNDRIP was ratified as law by Bolivia in 2007¹⁰, making Bolivia the first country in the world to establish in its domestic legislation the obligation to consult indigenous peoples. Peru on its part has not ratified UNDRIP; Nevertheless, a recent decision from Peru's Constitutional Tribunal has determined that UNDRIP should be considered part of the international soft law, i.e. a guidance without any legal consequences that should be followed by the Peruvian State for moral reasons.¹¹

ILO Conventions No .107 & 169 - Indigenous and Tribal Peoples in Independent Countries

The International Labour Organization (ILO) Convention 107¹² “Indigenous and Tribal Populations Convention and Recommendation” (C107), which was approved by ILO in 1957, constituted the first attempt to codify international rules and obligations of the States vis-à-vis the indigenous and tribal peoples that populate their territories. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries¹³ (C169) revised C107, as will be described further hereunder. It is worth noting that Bolivia and Peru were early adopters of both ILO C107¹⁴ and C169¹⁵.

As indicated in the preamble of C107, its purpose is to promote the material well being of the indigenous and other tribal and semi-tribal populations of various independent countries; as

⁶ United Nations Declaration on the Rights of Indigenous Peoples. Adopted by General Assembly Resolution 61/295 on 13.09.2007.

⁷ See *The UN Declaration on the Rights of Indigenous Peoples: Leading the Way Forward?* Daniel Ruiz de Garibay. Available at http://www.peacecenter.sciences-po.fr/journal/issue8/hsj_daniel.pdf last visited 24.07.2010.

⁸ The Declaration is a culmination of over twenty years of work that began in earnest at the Working Group of Indigenous Peoples, which began the drafting of the declaration in 1985. The first draft was completed in 1993, and in 1995, the Commission on Human Rights set up its own working group to review the draft adopted by the human rights experts of the Working Group and the Sub-Commission on the Promotion and Protection of Human Rights. More than 100 indigenous organizations participated in the Working Group of the Commission annually. Available at: <http://www.un.org/esa/socdev/unpfii/en/history.html> last visited 24.07.2010.

⁹ Article 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*:

1. *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*

2. *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

3. *States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

¹⁰ On 13.09.07

¹¹ Decision in re. “Gonzalo Tuanama Tuanama and over 50,000 citizens” – Docket No. 0022-2009-PI/TC – Available at <http://www.tc.gob.pe/jurisprudencia/2010/00022-2009-AI.html> - last visited on 01.08.2010.

¹² Date of adoption: 26.06.57. Date of coming into force: 02.06.59. Convention No. 169 revised this Convention in 1989.

¹³ Date of adoption: 27.06.89. Date of coming into force: 05.09.91. 20 countries have ratified this Convention.

¹⁴ Adopted by Bolivia: 12.01.65. Denounced on 11.12.91 (when C169 was adopted). Adopted by Peru: 06.12.60. Denounced on 02.02.94 (when C169 was adopted).

¹⁵ Ratified by Bolivia: 11.12.91. Ratified by Peru: 02.02.94.

well as their spiritual development in conditions of freedom and dignity of economic security and equal opportunity.

C107 envisaged that the way to promote such well being was through the progressive integration of indigenous and other tribal peoples into their respective national communities. This view became highly contested in the 1970s, at a time when indigenous peoples were asserting additional requests 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 country in which they live.

These revisionist calls led to the enactment of new international standards with respect to the rights of indigenous and other tribal peoples, with a view to removing the assimilationist orientation of the earlier standards. The change of paradigm is reflected in C169, which was adopted in 1989 and – among other things:

- Guarantees the right of indigenous and other tribal peoples to be consulted by their national governments on measures, which may affect them directly¹⁶, with the objective of achieving agreement or consent to the proposed measures.
- Grants these peoples the right to decide their own priorities for the process of development and exercise control over their own economic, social and cultural development¹⁷.
- Requires that indigenous people be consulted before any exploration or exploitation of mineral or sub-surfaces resources; promotes their right to participate in the benefits of such activities, and to receive fair compensation for any damages that they may suffer as a result thereof¹⁸.

Out of the multiple rights protected by C169, consultation and participation have been termed to be the cornerstone rights of such convention.

¹⁶ Article 6 of ILO C169:

1. *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;*

(c) *establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.*

2. *The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.*

¹⁷ Article 7 of ILO C169:

1. *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.*

2. *The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.*

3. *Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.*

¹⁸ Article 15 of ILO C169:

1. *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.*

2. *In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, 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. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.*

C169 is a legally binding agreement for those States that have ratified it, including Bolivia (Law No. 1257¹⁹), and Peru (Legislative Resolution No. 26523²⁰). By having ratified this international convention, pursuant to their domestic law, Bolivia and Peru have the obligation to comply with the provisions contained in C169 with respect to public consultations. Furthermore, the Inter-American Court of Human Rights has confirmed in the case of the *Saramaka People vs. Surinam*²¹, that national governments - even those that have not ratified C169 - have the obligation to implement consultation mechanisms that require the free, prior, and informed consent of the relevant indigenous peoples, in accordance with their traditions and customs²², for which reason failure or omission to comply with this obligation could entail liability for the infringing State.

2. Domestic standards - Bolivia and Peru

Bolivia

Bolivia's current Political Constitution of the State²³ enacted in 2009, declares that Bolivia is a "Pluri-national State"²⁴, i.e. it expressly acknowledges that the Bolivian nation is composed of several peoples²⁵ particularly indigenous peoples that were historically subdued not only during colonial times, but also during republican and even in recent "neo-liberal" periods. Bolivia's constitution establishes that the State has the obligation to acknowledge and guarantee the right to self-determination of indigenous, native and peasant peoples²⁶.

In addition, Bolivia's constitution establishes as a right of all indigenous, native and peasant peoples, the right to be consulted with respect to the exploitation of non-renewable natural resources (located) in the territories that they inhabit:

*The right to be consulted through adequate procedures, and in particular through their own institutions, each time that administrative or legislative measures are foreseen, whenever they may affect them. Within this frame, (we) shall respect and guarantee the right to the prior mandatory consultation performed by the State, in good faith and in an agreed manner, with respect to the exploitation of non-renewable natural resources (located) in the territories that they inhabit.*²⁷

*To participate in the benefits of the exploitation of natural resources (located) in their territory*²⁸.

¹⁹ Enacted on 11.07.91.

²⁰ Published in the Official Gazette in 1993.

²¹ I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172. Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.doc last visited on 18.8.2010.

²² I/A Court H.R., Case of the Saramaka People. v. Suriname. "137. Most importantly the State has also recognized that the "level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question." The Court agrees with the State and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs" (emphasis added).

²³ Promulgated and published in the Official Gazette on 7.02.09.

²⁴ Article 1 of the Political Constitution of the State ("CPE" in Spanish).

²⁵ Article 3 of the CPE.

²⁶ Article 2 of the CPE.

²⁷ Author's translation of Article 30.15 of the CPE, Articles 301.21, and 352 of the CPE.

²⁸ Articles 30.16 and 403 of the CPE.

Even before the enactment of the current constitution in 2009, Bolivia's Hydrocarbons Law²⁹ in force since 2005, had already regulated the consultation and participation rights in favor of indigenous, native and peasant peoples with respect to hydrocarbons activities (sections 114-118 of Hydrocarbons Law); moreover, Bolivia's Hydrocarbons Law also establishes the right for indigenous peoples to receive compensation from the hydrocarbons producers, for the potential damages that they could potentially suffer due to the socio-environmental impact of the hydrocarbons activities (sections 119-120 of Hydrocarbons Law). The Hydrocarbons Law specifically foresees that public consultations of indigenous people shall be carried out in furtherance of ILO C169, before any (hydrocarbons-related) activity takes place in their territory. Pursuant to the Hydrocarbons Law, decisions following consultations proceedings become binding and therefore "shall be respected".

It should be noted that the Hydrocarbons Law is still in force, even though the Bolivian government has repeatedly announced that it should be soon amended to accommodate new rules for the distribution of governmental tax and royalties income; nevertheless, the dispositions concerning the public consultations of indigenous communities are highly unlikely to be changed in any future hydrocarbons law (while acknowledging this circumstance, we nevertheless provide in another section of this paper certain suggestions regarding the possible improvement of the regulations concerning public consultations of indigenous peoples, including Bolivia's Hydrocarbons Law).

After the enactment of the Hydrocarbons Law, public consultation rights and proceedings were further regulated by Supreme Decree (SD) No. 29033³⁰ "Regulations for consultation and (public) participation (proceedings) for hydrocarbons activities", which has prescribed with greater detail how the public consultations of indigenous peoples should be conducted. Subsequently, these regulations for consultation and (public) participation (proceedings) for hydrocarbons activities were complemented by a decree that had the main purpose of clarifying the proceedings applicable to the environmental impact assessments that had been started before the enactment of the regulations for consultation and (public) participation (proceedings) for hydrocarbons activities³¹. Additionally, the regulations were later on partially amended by a decree that basically shortened the period of time during which consultations should be carried out³².

Lately, the Bolivian Ministry of Hydrocarbons & Energy has announced that it plans to enact additional complementary regulations in order to limit the amount of compensation that may be paid by hydrocarbons producers to indigenous peoples and claimed by such producers as recoverable costs subject to reimbursement by the national oil company YPFB under the existing Operations Contracts, i.e. the Bolivian Government will seek to regulate sections 119 and 120 of the Hydrocarbons Law.

²⁹ Hydrocarbons Law, dated 17.05.05.

³⁰ Supreme Decree No. 29033 (Regulations for consultation and (public) participation (proceedings) for hydrocarbons activities), enacted on 16.02.07.

³¹ Supreme Decree No. 29124 (complements SD 29033), enacted on 9.05.07.

³² Supreme Decree No. 29574 (amends SD 29033), enacted on 21.05.07.

Peru

Peru's constitution³³, particularly its Chapter VI "Agrarian and rural and native communities regime" doesn't expressly mention the term "indigenous communities". Furthermore, Peru's constitutional law only expressly recognizes two forms of collective organization: "peasant communities"³⁴ and "native communities"³⁵; nevertheless indigenous/aboriginal peoples should be considered covered by the terminology employed by Peru's constitution. According to a recent decision from Peru's Constitutional Tribunal³⁶, section 2.2. of the constitution fosters tolerance towards diversity, establishing Peru as a pluri-cultural and pluri-ethnic State³⁷. From such condition, the Constitutional Tribunal has derived the following: (i) that the State cannot ignore the existence of indigenous/aboriginal peoples in its territory, and (ii) that it has the obligation to protect them³⁸³⁹.

As it has been mentioned above, in what concerns public consultations of indigenous communities, Peru has ratified C169 by means of Legislative Resolution No. 26523⁴⁰ and thus C169 has become part of Peru's domestic law, i.e. C169 has been in force in Peru's domestic law since February 2, 1994. The Constitutional Tribunal has stated⁴¹ that C169 has constitutional rank, and consequently becomes a normative and interpretation parameter for the control of public acts or decisions that may interfere with the rights of indigenous peoples⁴². Notwithstanding the aforesaid – as will be explained below – the Peruvian State has not yet fully complied with its international and domestic law obligations regarding the regulation of the public consultations of indigenous communities' regime concerning hydrocarbons activities. Such omission – in the view of the Constitutional Tribunal – does not override or excuse the duty for the Peruvian State to enforce the rights and duties included in C169, particularly the obligation to carry out the public consultations of indigenous communities⁴³ on measures that may affect them.

In contrast to Bolivia's Hydrocarbons Law, the Peruvian Hydrocarbons Law No. 26221⁴⁴ does not contain any specific provision regarding the consultation of indigenous peoples. The Hydrocarbons Law has been regulated with regards to public consultations and citizen's participation (but not specifically when they concern indigenous peoples or with the aim of regulating C169), by SD 12/08-EM⁴⁵ and RM 571/08⁴⁶MEM-DM.

³³ Political Constitution of Peru 1993 with 1995, 2000, 2002, 2004 and 2005 (until October) reforms.

³⁴ Further defined by Article 2 of Law 24656 (General Law of Peasant Communities).

³⁵ Defined by Article 8 of Law 22175 (Native Communities Law).

³⁶ Decision in re: "*Gonzalo Tuanama Tuanama and over 50,000 citizens*" – Docket No. 0022-2009-PI/TC. Available at <http://www.tc.gob.pe/jurisprudencia/2010/00022-2009-AI.html> - last visited on 01.08.2010.

³⁷ Following a previous decision of the Constitutional Tribunal STC 0042-2004-AI/TC.

³⁸ Sections 2.19, 89, 149 and 191 of the Peruvian constitution, may be cited as examples of instances of constitutional mechanisms for the defense and protection of ethnic minorities.

³⁹ These rights have been further considered in Directive 012-2000-PROMUDEH/SETAI "Directive to Promote and Ensure the Respect for the Ethnical and Cultural Identity of the Indigenous Peoples, Peasant Communities and Native Communities", approved by R.M.159-2000-PROMUDEH.

⁴⁰ Published in the Official Gazette in 1993.

⁴¹ Constitutional Tribunal decision in re "Loreto Asociación Interétnica de Desarrollo de la Selva Peruana (AIDSESP), Docket No. 06316-2008-PA/TC. Available at <http://www.tc.gob.pe/jurisprudencia/2010/06316-2008-AA.html> last visited on 01.08.2010.

⁴² Constitutional Tribunal decision STC N.º 3343-2007-AA/TC, reasoning Nr. 31.

⁴³ Ibid. Decision in re: "*Gonzalo Tuanama Tuanama and over 50,000 citizens*", paragraphs 11, 12 and 13.

⁴⁴ Organic Hydrocarbons Law No 26221 - /Supreme Decree No. 042-2005-EM establishes ordered text for Law No. 26221.

⁴⁵ Supreme Decree No. 012-2008-EM, published in the Official Gazette on 20.2.08, enacts the Regulation on Citizen's Participation in Hydrocarbons Activities.

⁴⁶ Ministry of Energy and Mining (MEM), Ministerial Resolution No. 571/08, dated 5.12.08, enacts and approves Guidelines for the Regulation on Citizen's Participation in Hydrocarbons Activities.

Peru's Constitutional Tribunal⁴⁷ and the People's Defendant (who submitted to the National Congress a proposal for a law⁴⁸ entitled "Frame agreement for the consultation of indigenous peoples"⁴⁹) have found *SD 12/08-EM and RM 571/08 MEM-DM* to be insufficient in order to fully meet the requirements set forth by C169 because they do not specifically include an obligation in favor of the indigenous peoples to be consulted before the start-up of any project that might affect them.

This view has been also articulated by ILO's Experts Committee⁵⁰, which has stated⁵¹ that *SD 12/08-EM* doesn't comply with C169, article 6's objective of "*achieving agreement or consent to the proposed measures*". The reason for these assertions is that Article 3 of Decree No. 012-2008-MEM states that the purpose of consultations is merely "*to reach better understanding of the scope of the project and its benefits*", in contrast to C169's objective of "*achieving agreement or consent to the proposed measures*"⁵². However, it should be noted that *RM 571/08 MEM-DM* – although not specifically referring to the consultation of indigenous peoples – establishes in its Article 6 that an objective of citizen's participation is to "... *promote... dialogue and build consensus; and to become aware and transmit the opinions, positions, points of view, observations or contributions with respect to such (hydrocarbons) activities, so that the competent authorities may take decisions in the administrative proceedings that they administer*" (emphasis added).

Insisting on the fact that *SD 12/08-EM* and other Peruvian regulations do not comply with C169 requirements, the ILO's Experts Committee has repeatedly urged the Peruvian Government:

"... to take the necessary steps to bring national law and practice into line with Articles 2, 6, 7 and 15 of the Convention, taking into account the right of the peoples covered by the Convention to decide on their own priorities and participate in national and regional development plans and programmes"

⁴⁷ Decision in Constitutional Tribunal's docket *03343-2007-PA-TC*, dated 19.02.09, in re: Jaime Hans Bustamante Johnson constitutional appeal against decision of First Mix Decentralized Section of the Superior Court of Justice of San Martín, dated 10.05.07. The regional government of San Martín started these proceedings against various petroleum enterprises and the Ministry of Energy and Mines regarding hydrocarbon projects being carried out in a regional conservation area. In its ruling, taking account of the provisions of C169, the Constitutional Tribunal reaffirmed the right of indigenous peoples to be consulted before the start-up of any project that might affect them, and also referred to article 2(19) of the Peruvian Constitution which requires the State to protect ethnic and cultural plurality in the Nation (paragraph 28).

⁴⁸ See Legislative initiative, Bill No. 3370/2008 drafted by the People's Defendant, and submitted to the Congress of the Republic on 6.07.09.

⁴⁹ Using its prerogatives under Article 107 of the Constitution.

⁵⁰ ILO's Experts Committee was created in 1926 and is made of 20 independent jurists. Its role is to verify the application of the conventions ratified by ILO's member States. Through their reports, recommendations and direct requests, the Experts Committee regularly examines the application of International Labor Standards in ILO member States. Representation and complaint procedures can also be initiated against states that fail to comply with conventions they have ratified.

⁵¹ Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), published on 26.2.10: Available at www.ilo.org/ilolex/gbe/ceacr2010.htm last visited on 18.8.2010.

⁵² "*The Committee notes the Government's statement that the Peruvian State construes consultation as "processes whereby points of view are exchanged" and has held a series of socialization workshops. It also notes that the Government refers to Decree No. 012-2008-MEM (regulations on citizens' participation in hydrocarbon activities), according to which the purpose of consultation is "to reach better understanding of the scope of the project and its benefits", which is much narrower than what the Convention provides. The Committee wishes to point out that Article 6 of the Convention provides that the consultations shall be undertaken with the objective of achieving agreement or consent to the proposed measures. Although Article 6 of the Convention does not require consensus in the process of prior consultation, it does require, as the Committee underlined in its general observation of 2008 on the Convention, the form and content of consultation procedures and mechanisms to allow the full expression of the viewpoints of the peoples concerned, "so that they may be able to affect the outcome and a consensus could be achieved". The Committee wishes to underscore that the Convention requires a genuine dialogue to be established between the parties concerned to facilitate the quest for agreed solutions, and emphasizes that, if these requirements are met, consultation can play a decisive role in the prevention and settlement of disputes. The Committee further points out that meetings solely for the purpose of information or socialization do not meet the requirements of the Convention*".

Furthermore, in view of the high number of social conflicts⁵³ that have taken place in Peru in recent years around the exploitation of natural resources, and having in mind the events of Bagua and Utcubamba⁵⁴, which resulted in the death of 33 people following an extended social conflict involving indigenous peoples who were protesting against the enactment of new legislation concerning the right to land, the ILO's Experts Committee additionally asked the Peruvian Government to:

“ suspend the exploration and exploitation of natural resources which are affecting the peoples covered by the Convention until such time as the participation and consultation of the peoples concerned is ensured through their representative institutions in a climate of full respect and trust, in accordance with Articles 6, 7 and 15 of the Convention;” (emphasis added).

Recently, on May 31, 2010, a bill under the name of “Law concerning the right to prior consultations of indigenous or aboriginal peoples acknowledged by Convention 169 of the International Labour Organization” was approved by the Peruvian Congress. This bill was nevertheless subsequently observed by the Executive Power on June 21, 2010, and for such reason it has been resubmitted by the Executive Power to the Congress, to be debated or ratified without considering the observations, by the Congress. The reasons why the Executive Power has observed the bill were chiefly the following:

- The bill doesn't indicate what the consequence is if consensus or agreement is not reached. The Executive Power holds the view that C169 doesn't grant indigenous peoples a right to veto and thus the State may adopt a decision even if it is contrary to the opinion of the indigenous peoples that were consulted.
- Given the possibility of adopting decisions against the opinion of the indigenous peoples consulted, the Executive Power has indicated that it should nevertheless adopt such decisions taking into account the general interest and National interest, establishing a participation in the benefits (in favor of the indigenous peoples) or, equitable compensation for the damages that they could suffer.

3. Current and future regulations: possible improvements

For the purposes of this section, we will focus on the Bolivian “Regulations for consultation and (public) participation (proceedings) for hydrocarbons activities”, and in the Peruvian bill of “Law concerning the right to prior consultations of indigenous or aboriginal peoples acknowledged by Convention 169 of the International Labor Organization”⁵⁵ (hereinafter “Peruvian bill”). The Peruvian bill has been selected in lieu of the existing regulations since – at it has been previously mentioned - the latter do not satisfy the requirements set forth by C169 (particularly, its clause 6), and given that the Peruvian bill – assuming that it becomes a law – would probably serve as the basis for the regulations that could be enacted specifically concerning hydrocarbons activities.

⁵³ The People's Defendant Report on Social Conflicts N° 73 states that out of the 255 social conflicts from March 2009 until March 2010, 126 (49%) were socio-environmental conflicts. Available at http://www.defensoria.gob.pe/conflictos-sociales/objetos/descargas/45reporte_73.pdf last visited 02.08.2010.

⁵⁴ See People's Defendant Report. Available at <http://www.defensoria.gob.pe/descarga.php?pb=4752> last visited 18.8.2010.

⁵⁵ For this purpose, we will make abstraction of the fact that the Peruvian bill is intended to be a general framework (i.e. for all types of industries), while the Bolivian SD only concerns the hydrocarbons industry.

In the first place, it should be mentioned that the idea of implementing changes to the existing regulations is not ours. Both in Peru and in Bolivia, there have been frequent (and sometimes contradictory⁵⁶) demands from diverse social actors, such as indigenous communities⁵⁷, NGOs⁵⁸, international organizations, and even from the members of the respective national government^{59,60}, requiring the enactment or modification of regulations concerning government consultation with indigenous communities.

Based on our industry experience, the following are some of the key possible areas for the improvement of the existing regulations and topics that should be addressed by any planned regulations:

1. Simplifying and expediting consultations⁶¹: ensuring early consultation while providing enough time for internal discussion within the communities, in accordance to their own cultural traditions. In this respect, the regulations should also determine what are the consequences of the government's failure to complete the consultations within the specified time periods, i.e. shall any liability be incurred by the public functionaries in charge of conducting the consultation proceedings? May an interested party consider such delays as force majeure under the relevant hydrocarbons contract?;
2. More effective coordination between relevant public entities⁶² (directly or indirectly) involved in the consultations⁶³ is required: e.g. assuming that more than one competent authority is involved, the regulations should establish clear cut stages through the consultations proceedings, and specify at which stage the different governmental entities should act (individually or in coordination);

⁵⁶ See Reporte Energía magazine. 09.02.10. "Crece el debate sobre el 'veto' indígena en hidrocarburos" examining the different postures taken on occasion of the conflict between the Mosestén and Lecos peoples of the north of La Paz department and the company Petroandina SAM, a joint venture between Bolivia's YPF and Venezuela's PDVSA. Available at <http://www.hidrocarburosbolivia.com/bolivia-mainmenu-117/semanarios-mainmenu-126/27332-crece-el-debate-sobre-veto-indigena-en-hidrocarburos.html> last visited 18.8.2010.

⁵⁷ See eg. "Perú: Observaciones de la OIT al Estado despiertan adhesión en instituciones sociales" 01.03.10. Available at <http://www.servindi.org/actualidad/22901> last visited 18.8.2010.

⁵⁸ See eg. "Perú: Indígenas y campesinos demandarán al Estado por incumplir Convenio 169 OIT" 04.03.10. Available at <http://www.servindi.org/actualidad/23037> last visited 18.8.2010.

⁵⁹ Bolivia - La Razón newspaper 11/1/2010: "YPFB : la licencia y la consulta indígena son un obstáculo". The Executive President of YPF, Bolivia's National Oil Company, has stated that the "... consultations and participation of indigenous peoples and peasant communities have become an obstacle" to the implementation of the hydrocarbons projects and the investment by the energy companies, and acknowledged that the Ministry of Hydrocarbons was already working on new regulations.

⁶⁰ People's Defendant – Press Release 056/OCI/DP/2010. "People's Defendant insists on the need for approving the bill 'Frame agreement for the consultation of indigenous peoples'". Available at <http://www.defensoria.gob.pe/descarga.php?pb=4967> last visited 18.8.2010.

⁶¹ Ensuring early consultation and providing enough time for internal discussion within the communities; conducting consultations in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. As it has been stated by the Inter American Court of Human Rights in the judgment in Saramaka People v. Suriname ... the "level of consultation that is required is obviously a function of the nature" of the project and potentially affected rights of the relevant indigenous peoples. Judgment entered on 27.11.2007.

⁶² Law 3058, "Article 117 (Competent Authority to Execute the Consulting Process). *The authorities of the Ministry of Hydrocarbons, the Ministry of Sustainable Development, and the Ministry of Indigenous Affairs and Native Peoples, considered as competent authorities, for purposes of this Chapter, are jointly responsible for the execution of this Consulting Process ...*"

⁶³ Avoiding the "musical chairs" syndrome in terms of knowing at all times who is the responsible entity and avoiding any holdups. See DS 29574 in which coordination is required between the Ministry of Hydrocarbons and Energy, the Vice-Ministry of Bio-Diversity, Forestry Resources and Environment, the Vice-Ministry of Lands, and YPF.

3. Clearly establish what are the consequences of failing to reach an agreement or to obtain the full consent from the indigenous communities (indicating what legal remedies are available to the respective stakeholders, including the interested energy company⁶⁴) and, as the Peruvian Executive Power has indicated (and the Constitutional Tribunal has confirmed), stating that there is no veto in favor of the indigenous communities and therefore the competent authority conducting the consultations retains the power to enact regulations or carry out actions even if they have not been consented by the indigenous peoples that were consulted;
4. Determining the extent of the liability of the State for failing to perform consultations in accordance with the regulated standards and/or within the scheduled timeframe (and establishing an effective and expedited procedure for challenging a decision taken as a result thereof);
5. Regulating who should pay for the consultations costs and how much, in case that all the costs arising from carrying out the consultations, are not absorbed by the State. In the Peruvian bill it has been established that these costs will be (fully) absorbed by the State⁶⁵. In contrast, Bolivian regulations currently determine that any costs incurred by the State shall be reimbursed⁶⁶. It is our view that establishing a reimbursement mechanism doesn't contribute to the alignment of the respective interests among the relevant stakeholders, i.e. the public functionaries may be tempted to incur in expenditures without any restraint or to unnecessarily extend the consultations proceedings;
6. Which (if any) compensation⁶⁷ payment/mechanism, in favor of the relevant indigenous communities and peasant peoples, shall be discussed/agreed upon as part of (or simultaneously with) the consultations⁶⁸?. The Peruvian bill is silent with respect to any possible compensation in favor of indigenous peoples; nevertheless, it should be noted that – preempting the Legislative Power's role – the Peruvian Constitutional Tribunal has indicated that in certain occasions the indigenous peoples should be entitled to an extra compensation, beyond legal parameters, to ensure not only the continuation of their existence as an indigenous people (cultural identity), but also the improvement of their quality of life⁶⁹. Similarly, as it has been indicated above, the Bolivian Hydrocarbons Law establishes the obligation for the company interested in carrying out a hydrocarbons-related activity in the territory of indigenous peoples, to compensate them for eventual/potential socio-environmental damages. Consequently, it should be determined if agreeing on the payment of compensation and its quantum should be a condition that may impair (or not) the conclusion of the consultation proceedings, and whether any parameters for the calculation of such compensation should be established by the State.

⁶⁴ In the sense of administrative law, even though the energy company is not part of the consultations proceedings, it may argue that it has a legitimate and vested interest in their outcome.

⁶⁵ Article 18 of the Peruvian bill.

⁶⁶ Law 3058, Article 117, 2nd paragraph “... *The Consulting Process shall be financed by the Executive Power, to the account of the project, work, or hydrocarbon related activity dealt with.*” Accordingly, Article 2 of SD 29124 determines that “*The Consultation and Participation procedure shall be financed to the account of the relevant project, works or hydrocarbons activity...*”.

⁶⁷ As discussed above, ILO C169, Article 15, introduces the concept of compensation in the context of the public consultations of indigenous communities.

⁶⁸ This matter is also regulated by Article 119 of Law 3058, which establishes the right for indigenous peoples to receive compensation from the hydrocarbons producers, for the potential damages that they could potentially suffer due to the socio-environmental impact of the hydrocarbons activities.

⁶⁹ Decision in re: “*Gonzalo Tuanama Tuanama and over 50,000 citizens*”.

It is worth mentioning that regulating in detail the public consultations proceedings with respect to indigenous peoples, will only partially address the sources of difficulties that have been normally faced by the companies wishing to carry out projects in territories inhabited by indigenous communities, since there are many “legal lacunae” on other areas. In this respect, in our opinion, in addition to the above-mentioned matters, other regulations should be considered and new rules shall be promptly enacted if the governments are serious about their role and attitude towards the companies carrying out hydrocarbons activities (e.g. in Bolivia new regulations are required to introduce in the legal regime the concept of administrative easements/rights of way; i.e. regulated (pre-established) tariffs for the compensation for the use of land / loss of production in the case of easements/expropriation of land, etc.).

Conclusions

Even though specific legislation exists in Bolivia and C169 compliant regulations may soon be enacted in Peru concerning the public consultations of indigenous peoples in relation to hydrocarbons activities, there is ample degree of dissatisfaction in both countries with the status quo.

Diverse social actors have repeatedly voiced their calls for the enactment of new regulations and the improvement of the existing ones. It is our view that the authorities should seize this opportunity to improve the existing or planned regulations, based on the know-how that they have accumulated to date from conducting public consultations, as well as from the comparison of regional experiences, trying to focus on issues such as the ones that have been previously mentioned in this paper and other ones that may be most relevant to the different stakeholders.

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