For: Cyrus R. Vance Center for International Justice
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Subject: **Free, Prior and Informed Consent in Bolivia**

I. Executive Summary

Through Law No. 1257 of July 11, 1991, the Plurinational State of Bolivia ("Bolivia") ratified Convention 169 of the International Labor Organization ("ILO Convention"), considered as the first legal instrument that recognizes and puts into force the right to prior consultation in the country. In turn, in accordance with the Political Constitution of the State ("CPE"), Bolivia recognizes prior consultation as a fundamental collective right of Indigenous peoples to be consulted through appropriate procedures, whenever legislative or administrative measures are foreseen that may affect their social, cultural, and economic integrity.

Historically, the performance of the Bolivian economy has been linked to the exploitation and industrialization of natural resources, mainly in the mining and hydrocarbon sectors. In view of this, Bolivia has recognized the need to harmonize activities and projects for the exploitation of non-renewable natural resources with the fundamental principles of express recognition of the existence of Indigenous nations and peoples and ancestral domain over their territories, as well as the respect and protection of their environment and mother earth.

II. Introduction

Within the framework of the CPE, Bolivia respects and guarantees the right to mandatory prior consultation, carried out by the State, in good faith, regarding the exploitation of non-renewable natural resources in the territory they inhabit. In this sense, prior consultation as a legal instrument is an essential element for the respect of the norms, cultural customs and procedures of Indigenous peoples, as well as their right to self-determination.

According to the information collected during the last National Census of 2012, 41% of the Bolivian population over the age of 15 identifies as Indigenous, and according to the projections of the National Institute of Statistics and the latest information handled by the Ombudsman's Office People of Bolivia, in 2016 this percentage would have increased to 62%. In this context, the geographical location of strategic natural resources for the Bolivian economy are and can be found in territories inhabited by Indigenous people susceptible to the implementation of economic activities based on a collective interest in charge of the Bolivian State.

Bolivia is one of the Latin American countries with the largest Indigenous population, however, today it lacks regulations to carry out prior consultation procedures. Next, the applicable legal framework in Bolivia in relation to prior consultation is developed, as well as the background and trends of its implementation.

III. Legal framework

(A) International legislation

As established in the CPE, the constitutional block is made up of international treaties and conventions on human rights and standards of collective rights, ratified by the country.

Likewise, international treaties and instruments in the field of human rights that have been signed, ratified or to which the State has adhered (that declare rights more favorable to those contained in the Constitution), will be applied preferably over the CPE.

- ILO Convention 169 on Indigenous and Tribal Peoples

ILO Convention 169 constitutes the main international norm on prior consultation applicable in Bolivia through which two main postulates are established. On the one hand, the right of Indigenous peoples to maintain and strengthen their cultures, ways of life and their own institutions, and on the other, their right to participate effectively in decisions that affect them.

Based on the international commitments assumed, in addition to recognizing that Indigenous peoples have the right to fair and equitable procedures for the settlement of disputes with the State, Bolivia is obliged to develop mechanisms for effective reparation in case of violation of individual and collective rights of Indigenous peoples[1].

Although it could be interpreted that the purpose of this general rule is to promote new domestic legal provisions by its signatory states regarding prior consultation, the Bolivian state has limited itself to considering the concept of prior consultation as a procedural requirement. Therefore, Bolivia has not developed new regulations that would follow the true spirit of the Convention of reaching an agreement or obtaining consent for the proposed measures.

- United Nations Declaration on the Rights of Indigenous Peoples

Through Law No. 3760 of November 7, 2007, Bolivia elevated the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to the rank of Law.

The aforementioned Declaration determines that the states will consult and cooperate in good faith with the interested Indigenous peoples through their representative institutions before adopting and applying legislative or administrative measures that affect them, in order to obtain their free, prior and informed consent and mainly before approving any project that affects their lands or territories and other resources, particularly in relation to the development, use or exploitation of mineral, water or other resources.

Like the ILO Convention, the scope of this international standard is not sufficient for the implementation of prior consultation without the support of local legal provisions that make it possible to define an adequate procedure, who is subject to the rules and the activities and/or projects that are likely to affect Indigenous peoples.

(B) National Legislation

- Bolivian Constitution

The Bolivian Constitution contains provisions that make direct reference to prior consultation. Given the Bolivian economic model, the Constitution establishes that the exploitation of natural resources in a certain territory will be subject to a consultation process with the affected population, will be convened by the State and will be free, prior and informed.

[1] Article 30 of the CPE states that the native peasant Indigenous nation and people are all the human community that shares a cultural identity, language, historical tradition, institutions, territoriality and worldview, whose existence predates the Spanish colonial invasion.

In general terms, the Constitution does not define that prior consultation is limited to Indigenous peoples[2] but recognizes that when dealing with them as affected people, their procedures and customs must be respected.

The legal provisions that include some general guidelines and procedures for the implementation of prior consultation are detailed below.

- Law No. 1333 on the Environment (Environmental Law)

For the most part, current regulations on environmental matters were promulgated in the 90's with few modifications after the latest Constitution[3] or are under review to reflect the country´s current position on prior consultation.

However, the Environmental Law makes indirect reference to prior consultation, establishing that the State will create the necessary mechanisms and procedures to guarantee the participation of traditional communities and Indigenous peoples in the processes of sustainable development and rational use of renewable natural resources, considering their social, economic, cultural particularities, in the environment where their activities are carried out.

- Law No. 026 on the Electoral Regime (Electoral Law)

According to the Bolivian Constitution[4], the Electoral Law establishes that prior consultation "is a mechanism for direct and participatory democracy, convened by the Plurinational State on a mandatory basis prior to making decisions regarding the implementation of projects, works and activities related to the exploitation of natural resources. The population involved will participate in a free, prior and informed manner."

For this procedure, the aforementioned law determines that the Plurinational Electoral Body will monitor and observe the forms of coordination with the organizations and institutions involved and will issue a report that will indicate the results of the prior consultation.

However, it is essential to note that article 39 which define the scope of prior consultation, determined that the conclusions, agreements, or decisions made within the framework of prior consultation are not binding but must be considered by the authorities and representatives at the corresponding decision-making levels. Therefore, it is possible to infer that public entities and companies that are part of a public consultation process are not required to obtain express consent, but only allow access for the participation of those potentially affected by the decision.

- Law No. 450 for the Protection of Original Indigenous Nations and Peoples in Situations of High Vulnerability and Supreme Decree No. 4793

The aforementioned Law aims to establish prevention, protection and strengthening policies and mechanisms to safeguard systems of individual and collective ways of life of Indigenous nations and peoples in a highly vulnerable situation, whose physical and cultural survival is extremely threatened.

[2] Related legal provisions refer to public consultation as a mechanism for the general population, through informative hearings and others by public entities.
[3] The current Political Constitution of the State entered into force on February 7, 2009.
[4] CPE article 11, II 1, and article 30

Among the principles that govern the application of this law is the principle of favorability, understood as the preferential application of the most favorable norm with conditions and directions for any state action to be carried out in a concrete way involving Indigenous nations and peoples.

On the other hand, it is important to mention that this law, created the General Directorate for the Protection of Indigenous Nations and Peoples ("DIGEPIO") that is under the supervision of the Executive Branch, with the purpose of identifying and establishing a diagnosis of vulnerable situations, addressing the problems and strengthening the required protection mechanisms in favor of nations and Indigenous peoples in situations of high vulnerability.

However, it was not until September 7, 2022, that this law became operational by means of Supreme Decree No. 4793 that mainly:

i) Starts up the DIGEPIO [5],
ii) Creates the Committee for the Protection of Native Indigenous Peoples in Situations of Vulnerability,
iii) Determines that DIGEPIO will establish multidisciplinary work protocols to guarantee the prevention, protection and/or strengthening of these groups.
iv) Creates the Comprehensive Monitoring System for Highly Vulnerable Indigenous Nations and Peoples-SIM under DIGEPIO´s responsibility to contribute with technological tools to the objective of the Supreme Decree.

To date, it is not possible to identify the start of DIGEPIO´s activities, however, the intention to implement the Supreme Decree is already public knowledge[6]:

- Hydrocarbons Law No. 3058, Supreme Decree No. 29033 and Supreme Decree No. 2298

According to the Hydrocarbons Law, altered by the Supreme Decree No. 29033, Indigenous communities and peoples, regardless of their type of organization, must be consulted in a prior, obligatory and timely manner when it is intended to carry out any hydrocarbon activity (exploration, exploitation, refining and industrialization, transportation and storage, marketing and distribution of natural gas through networks). In this matter, the consultation is carried out in two moments:

i) Prior to the bidding, authorization, contracting, call and approval of hydrocarbon measures, works, or projects, as a necessary condition for these; and,
ii) Prior to the approval of the Environmental Impact Studies[7]

Then, with the amendments of Supreme Decree No. 2298, to speed up the process in cases where the consultation and participation procedures cannot be developed or concluded for reasons not attributable to the competent authority, the authority will issue an administrative resolution to conclude the consultation and participation process. Consequently, this administrative resolution will be incorporated into the Environmental Impact Assessment Study to continue with the process of obtaining the environmental

[5] DS 4793 article 8: Public and private entities that have concessions, rights, permits, authorizations or projects, and/or carry out activities related to them close to or in the territory of Indigenous nations or peoples in a situation of high vulnerability, must inform the DIGEPIO , of the presence of an original Indigenous nation or people in a highly vulnerable situation, providing all possible details.

[6] Noticia Defensoría del Pueblo
Primera Sesión Comité.

[7] Current environmental regulations establish that hydrocarbon projects are required to process an environmental permit prior to compliance with requirements such as the environmental impact study.

permit and move on to the phase of execution of activities. It should be noted that due to the arbitrary aspect granted to the prior consultation mechanisms through the mentioned amendment, in 2015, the Ombudsman filed an unconstitutionality action before the Plurinational Constitutional Court, pointing out that a series of rights were violated.[8] To date there are no updates on the case.

Regarding the right to veto, the Hydrocarbon Law and its regulation do not expressly prohibit Indigenous peoples from exercising the right of veto. However, the executive authorities recognize that due to the constitutional article establishing that natural resources are owned by the Bolivian State, the federal government can expropriate lands for public interest. On the other hand, the Hydrocarbons Law establishes that the lands of Indigenous communities or peoples are excluded from the expropriation procedure unless the hydrocarbon activity or project is declared by express law to be utility and public necessity per the CPE.

- ❖ Law No. 535 of Mining (Mining Law)

In Bolivia, one of the sectors that establishes the obligation to implement the prior consultation procedure is mining. The Mining Law establishes that the right to free, prior and informed consultation must be guaranteed when signing a mining administrative contract that may directly affect the collective rights of the peoples. Unlike the hydrocarbons sector, in this area the participation of the mining operator in the consultations is expected[9]. In addition, the aforementioned Law expressly states that mining operations that include only prospecting and exploration do not require prior consultation.[10]

Once the Work Plan has been approved and the request submitted to the Mining Authority ("AJAM"[11]) for the signing of an administrative contract, the prior consultation process[12] is carried out according to the following phases:

i) Preparatory Phase: The Mining Authority identifies the nations and Indigenous peoples and/or intercultural communities that could be subject to consultation.
ii) Deliberative Phase: Dialogues are established between the company (mining producing actor) and the communities subject to consultation. The authorities and an observing and monitoring body, such as an entity from the electoral body, must be present at these meetings. The Law allows up to three deliberative meetings.

In the event that an agreement is not reached in the deliberative meetings, the third phase begins:

[8] Because the SD establishes that i) "the methodology and schedule for the consultation process in Indigenous territories, based on attendance or non-attendance to the calls made by the competent authority" means that the Indigenous population loses the power to propose methodologies and schedules, ii) "the calls to the meetings to define the consultation are through written, radio and notarized publication" which are not suitable means for the context in which the communities live and do not respect their language and forms of communication and iii)) "the attendance at the event of the representative instances of the Indigenous peoples will give continuity to the execution of the consultation and participation in the state in which it is found (...)" implies ignorance of the concertation, existing the possibility of the Indigenous peoples not participating from the beginning of the process Acción de Inconstitucionalidad
[9] The Hydrocarbons Law only establishes that the Executive Branch, through the corresponding ministries, is responsible for carrying out prior consultation directly with the Indigenous peoples likely to be affected.
[10] Mining Law article 207
[11] AJAM is an entity under custody of the Ministry of Mining. It is in charge of the direction, superior administration, registry, control and inspection of the mining activity in all the Bolivian territory
[12] The Mining Authority will cover the cost of the prior consultation with funds allocated by the mining company.

iii) Mediation phase: The mining authority convenes another opportunity for dialogue and understanding in the corresponding departmental or regional office.
iv) Final decision: In the event that no agreement is reached on the issues discussed in the mediation phase, background information will be sent to the Ministry of Mining so that it issues a Final Decision settling the differences and resolving all the alleged rights and obligations, taking into account the interests of the State and the participants.

Regarding the right to veto, the law establishes that natural mineral resources are of a strategic nature and of public interest for the development of the country, hence their administration, direction, and control, based on the collective interest, belong to the State on behalf of all the Bolivian people. The law also expressly indicates that the ILO Convention and the Declaration of the Rights of Indigenous Peoples "do not grant the subjects of prior consultation the right to veto the execution of mining exploitation activities."

❖ Framework Law on Autonomy and Decentralization No. 031 (Autonomy Law)

Pursuant to the provisions of the CPE, the Autonomy Law determines the autonomy regime and the bases for territorial organization. With respect to the original Indigenous peasant governments, it indicates that they have the exclusive competence to participate and develop the necessary mechanisms for prior consultation on the exploitation of natural resources. It should be noted that in order to have these administrative management powers, Indigenous communities must comply with an adaptation procedure to acquire this level of autonomy.

According to the information published by the Vice Ministry of Autonomies, currently five original Indigenous nations have already created their Autonomous Indigenous Peasant Government and have legal personality: Uru-Chipayas, Charagua, Raqaypampa, Salinas and Kereimba Iyaambae. [13]

IV. Jurisprudence

The most relevant case in Bolivia that is worth mentioning is the “Tipnis” case which claimed the responsibility of the Bolivian state for the alleged violation of the right to collective property of the Isiboro Secure Indigenous Territory and National Park (“Tipnis”) and the rights of 64 Indigenous communities considering the State´s omission to carry out the prior consultation process for the execution of the “Villa Tunari Highway Project” which crossed the Tipnis. The events are as follows:

- In 2010, the Government in office contracted the Brazilian company OAS for the construction of the highway through the Tipnis.
- In October 2011, after 65 days, the eighth march of Indigenous peoples in defense of the Tipnis reached the government headquarters in the city of La Paz.
- The marchers managed to have Law No. 180 approved, which declared the intangibility of the Tipnis and prohibited the construction of the highway.
- Subsequently, on February 10, 2012, the government promulgated the Law No. 222 on Consultation of the Indigenous Peoples of Tipnis, to obtain the consent of the Indigenous peoples and consult whether or not the inhabitants of the territory wished to declare said territory an intangible zone, despite the fact that the first stage of the project had already been executed.

[13] The documents of autonomous governments of Countryman Original Indigenous Territories can be found on the page of the Vice Ministry of Autonomies

- The Indigenous peoples rejected Law No. 222 and began the ninth march.
- Despite the rejection of the consultation, the Government proceeded with it and in August 2017 the Government implemented the results of said consultation process and approved Law No. 969 that eliminated the intangibility of the Tipnis,
- Regardless, the construction of the highway did not come to be executed.

On June 18, 2012, the Plurinational Constitutional Court issued Judgment 300/2012 resulting from two unconstitutionality actions filed against Law No. 180 and Law No. 222. This judgment, in its operative part:

- Declared inadmissible the abstract unconstitutionality action against Law No. 180,
- Established the constitutionality conditioned to the parties reaching an agreement on the articles of Law No. 222 referring to the scope of application, the procedure, and protocol of the consultation as well as the participants and times,
- Established the conditional constitutionality of article 1 of Law No. 222 in terms of the phrase "... and establish the content of this process and its procedures" and of articles 3, 4 inc. a), 6 and 9 of Law No. 222 conditioned to its concertation, observing the reasoning of this judgment. In other words, the Prior Consultation procedure is constitutional if it complies with the condition that it be agreed upon and with the analysis developed by the Constitutional Court in this judgement.
- It determined that the violation of this sentence will activate the existing guardianship resources in defense of the rights of Indigenous peoples.

V. Future trends and scenarios

The main problem identified at the social level is the lack of access to information, since Bolivia currently does not have a Law on Access to Public Information. In particular, in environmental matters, although there is a National Environmental Information System for activities related to the exploitation of natural resources, public institutions are not complying with the survey and dissemination of monitoring reports, minutes of prior consultation meetings, procedures of public tenders and others that allow verifying adherence to national and international regulations.

The precedents in Bolivia regarding prior consultation have generated controversies due to the need to approve specific regulations to implement prior consultation, which, to date, has yet to materialize. The Constitutional Judgment 300/2012 on the TIPNIS case recognizes the need for an adequate regulatory framework on prior consultation. It also lists the elements of prior consultation per ILO Convention and the United Nations Declaration Nations on the Rights of Indigenous Peoples: prior, informed, and in good faith.

The claims by defenders of Indigenous territories revolve around the fact that the actors responsible for organizing the prior consultations do not comply with the elements listed by the Constitutional Judgement 300/2012 and follow a procedure that does not respect the Indigenous institutions, according to the following:

i) Previous: The State must consult before the implementation or execution of a project. In practice, the State still decides when to consider whether or not there are phases within the project that must be subject to prior consultation.[14]

[14] There are no regulations that regulate prior consultation in sectors that exploit natural resources other than the mining and hydrocarbons sectors. The case of Hidroeléctrica Rositas is an example of the arbitrariness that exists regarding the interpretation of current regulations: Hidroeléctrica Rositas - Consulta Previa

ii) Informed: Indigenous peoples must be fully aware of the risks when a project is implemented, the mechanisms to inform them and when they will be informed so that they can propose a development plan or mitigation plan. In practice, there are no guidelines for the State to implement an information procedure according to the forms of communication of Indigenous peoples.

iii) Good faith: There must be an atmosphere of dialogue and agreement. In practice, the claims refer to the violation of this element due to corruption issues.

On the other hand, according to the CPE, the Ombudsman is the public institution in charge of ensuring the validity, promotion, dissemination and fulfillment of individual and collective human rights, which are established in the Constitution, laws and international instruments. Likewise, the Ombudsman's Office is responsible for promoting the defense of the rights of nationals and peasant Indigenous peoples. At last, the Ombudsman´s Office may exercise its functions without the interference or instructions from State bodies.

Given the absence of procedures and mechanisms that protect the rights of Indigenous peoples, the social sectors and the population in general have recognized the importance of pursuing their rights by exercising the constitutional guarantee to file amparo, unconstitutionality and popular actions.[15]

Finally, to date, the Draft Framework Law for Free, Prior and Informed Consultation, agreed upon by the Ministry of the Interior and the native Indigenous peasant organizations at the national level, has not been approved after almost a decade[16]. However, various sectors of society expressed their discontent with the draft law for its inconsistencies since it still allows the violation of the rights of Indigenous peoples

VI. Conclusions

- Bolivia has recognized as part of its current legal system two international instruments that recognize the right to free, prior and informed consultation of Indigenous peoples: ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples.
- Bolivia currently does not have a Prior Consultation Law.
- The Electoral Law establishes that decisions made because of prior consultation are not binding.
- As a consequence of the Tipnis case and the filing of unconstitutionality actions before national laws, the Plurinational Constitutional Court has determined the need to approve a regulatory framework for prior consultation.
- The mining and hydrocarbons sectors have incorporated procedures for prior consultation into their regulations. However, access to public information on these procedures is scarce.
- Current legislation does not contemplate the right to veto by Indigenous nations and peoples. However, the CPE recognizes guarantees and legal defense actions against the violation of fundamental rights: amparo action, unconstitutionality action or popular action.

[15] Art. 128 CPE: The Amparo shall take place against illegal or improper acts or omissions of public official, or of individual or collective persons, which restrict, suppress or threaten to restrict or suppress the rights recognized by the Constitution and the law. Art. 132 CPE: Any individual or collective person affected by a legal norm contrary to the Constitution shall have the right to file an action of unconstitutionality, in accordance with the procedures established by law. Art. 135 CPE: The Popular Action will proceed against any act or omission of the authorities or of individual or collective persons that violate or threaten to violate collective rights and interests, related to heritage, space, public safety and health, the environment and others of a similar nature. nature recognized by this Constitution.

[16] Noticia - Anteproyecto de Ley de Consulta Previa

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We remain at your entire disposal for any comments or questions about this report.