The national mining legislation is legally incompatible with indigenous rights

Essential regulatory incompatibility exists, which is not only evident between mining regulations and those that recognize indigenous rights, but also between mining and environmental regulations.[1]

In spite of the formal effective term of regulations that recognize indigenous rights (such as ILO Convention 169) and the international myriad of binding precedents that ratifies the obligation of States to respect such regulations, the Peruvian Government (and the companies pertaining to extractive industries) continues to act in a self-sufficient manner, solely guided by the mining canons of sectorial regulations and its interests as a promoter of investment. Thus, at the beginning of the 1990's, the government of Alberto Fujimori made the decision to "sectorize" the environmental management and control of mining and hydrocarbon activities, **assigning the creation of environmental regulations to MEM.** Environmental regulations were also weakened by delegating the responsibility of oversight and control to private companies hired by the mining sub-sector and the Supervisory Board for Investment in Energy and Mining (OSINERGMIN). Outsourcing one of the most important functions of the State, such as oversight, has contributed to the privatization of environmental management and the weakening of the State's responsibility insofar as environmental protection is concerned. This formula has extended to laws that regulate other resources, such as water, etc. The result is that mining legislation is incompatible with internationally recognized indigenous rights.

The first stage of the mining activity, which consists of sampling and prospecting, already presents incompatibilities. Executive Order 109 or the Consolidated Text of the General Mining Act (Supreme Executive Order 014-92-EM, hereinafter referred to as the "GMA") does not require permission or authorization from the interested parties in order to sample and prospect; it only establishes some restrictions with regard to the execution of these activities. On one hand, such activities cannot be carried out where previous mining concessions already exist, areas where neither mining claims, nor fenced or cultivated land are admitted, unless permission is obtained from their holder or owner. On the other hand, these activities are not allowed to be performed in urban areas or areas of urban expansion, reserve zones for national defence, archaeological sites or properties for public use, unless authorization is obtained from authorities (Section Two).

Requests to use mineral resources pertaining to a Protected Natural Area (PNA), classified as a PNA of direct use, are not admitted, if it is shown that this activity is not compatible with the objectives thereof. With regard to PNAs of indirect use, neither is the extraction of natural resources permitted, nor can the environment be modified. (Section Twenty-One a and b of Law 26834, Protected

[1] With regard to this point, see Report 009-2007-DP/ASPMA.CN issued by the Ombudsman's Office on the Overlapping of Hydrocarbon Blocks with Protected Natural Areas and Territorial Reserves in the Peruvian Amazon (2007).

Natural Areas Act). Activities in buffer zones or zones adjacent to the PNAs should not, in theory, put compliance with the objectives of the PNA at risk; for this reason, the provisions set forth in the Master Plan and the verified suitability of the activity by means of an Environmental Impact Assessment (EIA) must be taken into account (Section Twenty-Five of Law 26834, Protected Natural Areas Act).

Nevertheless, these sectorial regulations create a problem for the owners of the land surface, where sampling and prospecting are carried out. **If the owners are indigenous peoples, the problem becomes even more complex, insofar as the regulation, established in Section Fifteen, Item 2 of ILO Convention 169, should be applied:**

> *"In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to land, 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 land****. 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".*

Convention 169 is quite clear, as it indicates that consultation must be carried out in these cases *before undertaking or permitting any programmes for the exploration* or exploitation of such resources pertaining to their land. This is not what happened in the District of El Cenepa, Department of Amazonas, where the mining company, Afrodita (owned by Dorato Perú SAC), which is also a subsidiary of the Canadian company, Dorato Resources Inc.) has commenced its prospecting works, without consulting the indigenous communities of the area.

In this regard, it was indicated in a notice forwarded by AIDESEP on September 19, 2008, that the company, Dorato Perú SAC, through Afrodita, had entered ancestral territories, registered to the communities, who live in this area, without due authorization from the owners of the land surface. Entering indigenous territories without previously consulting has led to serious incidents, putting human lives in danger, as mentioned in this Request for Urgent Action.

In order to carry out prospecting works, mining legislation does not oblige mining companies to fulfil any requirements related to the preparation of Environmental Studies. Moreover, Section Two of the GMA states that "sampling and prospecting can be freely carried out throughout the national territory"; however, the section mentions immediately thereafter that these activities

cannot be performed on fenced or cultivated land[2], unless permission is obtained from their holder or owner.

For the purposes of the sectorial regulations, permission from the owner of the fenced or cultivated land needs to be obtained. Nevertheless, the problem does not end there, since the territories of the native communities and indigenous peoples can neither be cultivated in their entirety, nor fenced, due to their physical characteristics. In this regard, Section Two of the GMA does not include the particularities of collectively owned land in the Amazon Region, thus failing to protect their land rights.

The foregoing does not comply with Article Fourteen (1) of ILO Convention 169, which indicates the following:

> *"The rights of ownership and possession of the peoples concerned over the land, which they traditionally occupy, shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use land not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."*

Articles Fourteen (2) and Fourteen (3) specify regulations for the protection of land rights of indigenous communities and peoples that not only extend to registered, but also unregistered land that forms part of the ancestral land heritage. In this regard, Article Thirteen (2) of Convention 169 establishes the following:

> *"The use of the term 'land' in Articles Fifteen and Sixteen shall include the concept of territories, which covers the total environment of the areas, which the peoples concerned occupy or otherwise use."*

The differences between mining regulations and those that protect indigenous rights are evident. Section Two of the GMA limits authorizations for sampling and prospecting to fenced or cultivated land, if the mining holder does not have permission from the owners. This not only fails to protect the registered land of the indigenous communities and peoples that cannot be fenced or cultivated, but also that which is unregistered, in addition to the land occupied or used for some other purpose, such as the Protected Natural Area known as the Santiago-Comaina Reserved Zone (ZRSC).

From the standpoint of national regulations, part of the ZRSC Protected Natural Area, which was not included in the area recognized for the creation of the

[2] It is surprising to corroborate that mining legislation has not changed its vision of the country since 1924, seeing as though the same regulation expressed in Section Four of the Mining Code of 1924 is reproduced in Section Two of the current GMA, as we have verified. This shows that the mining sector does not have a real vision of the country, in which it must supposedly govern.

Ichigkat Muja Park, would be unprotected from environmental and Protected Natural Area legislation, since it is not considered an area of indirect use. Since this area also forms part of the environment of the regions that the Wampís and Awajún peoples use, it should be protected, by means of a comprehensive interpretation of Articles Thirteen, Fourteen and Fifteen of ILO Convention 169.

Another sectorial regulation, such as Section Five of the Environmental Regulations for Mining Exploration Activities (Supreme Executive Order 020-2008-EM), establishes that:

> *"Before commencing mining exploration activities, the holder shall have the corresponding approved environmental assessment, with the exception of sampling and prospecting activities, which can be freely carried out throughout the entire national territory…"*

Furthermore, Section Nineteen of Supreme Executive Order 020-2008-EM indicates that:

> *"Sampling and prospecting activities that cause no or slight alterations to the surface do not require the prior approval of an environmental study, such as geological, geophysical or geochemical studies, land surveys or the collection of small rock and surface mineral samples. Instruments or equipment, which may be carried by hand over the surface without causing more significant alterations than those resulting from the ordinary transit of persons, can be used in these mining activities. Sampling and prospecting activities shall be performed, while respecting the rights of the local population and adopting all necessary measures in order to avoid and minimize any disturbance that could affect the socio-economic and cultural activities of the area."*

It is worth highlighting that this stage does not require a concession. Mining Procedure Regulations (Supreme Executive Order 018-92-EM) only require that a mining claim be presented to the General Mining Bureau (DGM) requesting an area for mining prospecting.
Insofar as the incompatibilities in this exploration stage are concerned, Section Eight of the GMA establishes that *"exploration is the mining activity that tends to demonstrate the size, position, mineralogical characteristics, reserves and values of ore deposits."* Exploration is a more intrusive than sampling and prospecting, depending on the explored zone. In many cases, it implies drilling and the use dynamite. Ditches, channels and trenches can be built to gather the required geological information. The mining projected in the territory of the Awajún and Wampís peoples is probably the most consequential: open pit mining.

Environmental instruments that would guarantee gold exploitation without contamination do not guarantee the human rights of indigenous peoples, as already indicated in this Request.

In accordance with the Regulations for Environmental Protection in Mining and Metallurgical Activities (Supreme Executive Order 016-93-EM) dated April 28, 1993, Environmental Impact Assessments (EIA) *"shall be carried out in projects in order to perform activities in mining, processing, general works and mining transport concessions, which shall assess and describe the physical-natural, biological, socio-economic and cultural aspects corresponding to the area of influence of the project, with the objective of determining the existing conditions and capacities of the environment, analyzing the nature and scope and foreseeing the effects and consequences of carrying out the project, indicating prevention and control measures to be applied in order to achieve a harmonic balance between the mining industry's operations and the environment."*

The value given to EIAs in national legislation is unjustifiably very high. This implies "infallibility", in other words, the environmental safety of the population depends on whether or not its provisions regarding expected risks are scrupulously complied with. Nevertheless, a report issued in 2006 entitled, *"Comparison of Predicted and Actual Water Quality in Hardrock Mines"* casts doubt on the validity of EIAs to scientifically identify risks and prevent them. In this regard, the report revealed that most metal mines in the United States of America contaminate clean water, in spite of the fact that EIAs indicated the contrary. US Federal Law requires scientific methods to be used in order to predict the environmental impacts of mines before operating permits are granted. However, according to the report, 76% of twenty-five mines studied contaminated nearby water sources, exhibiting levels exceeding the permitted water quality standards, even when the EIAs confirmed that all the mines would comply with such standards.

Furthermore, these environmental instruments neither consider respect for the right to consultation, contained in Convention 169, nor the right to consent, as recognized by the United Nations Declaration on the Rights of Indigenous Peoples.

Environmental legislation establishes consultation as a citizen participation mechanism in the adoption of decisions, policies, laws and projects that may cause environmental damage. Consultation, citizen participation and information access are stipulated in Article Forty-One et seq. of such law. Although the National Environmental Impact Assessment System Act proposed to unify EIA and participation regulations, **MEM has continued to create ad-hoc sectorial regulations that imply little or no risk for investment promotion.** Something similar has occurred in relation to the adaption of sectorial regulations issued by MEM to international legislation associated with the rights of indigenous populations. In spite of the efforts of social organizations to integrate these regulations, MEM has systematically refused to legislate in

accordance with internationally recognized indigenous rights standards[3], opting instead to establish its own interpretation of participation and consultation.
One of the aspects of these environmental instruments that clashes with indigenous rights is the right to participation. In this regard, Supreme Executive Order 028-2008-MEM, Regulations for Citizen Participation in the Mining Sub-Sector, is applicable. Its right to consultation consists of the following:

1) [It is] the participatory process consisting of meetings with the "civil society" and sector companies, including the pre-publication of proposals on the MEM website for two months. This led to the approval of new "Regulations for Citizen Participation".
2) The term, indigenous peoples, (peasant and native communities) is not used in the regulations, but rather "populations involved in the processes of definition, application of measures, actions or decision-making by competent authorities associated with the sustainable development of mining activities."
3) The text does not mention effective or significant participation, but rather "responsible participation".
4) The definition of Citizen Participation and Consultation in such regulation reads as follows:

> *"The mechanisms of citizen participation shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of knowing, before the commencement and execution of the mining activity, if and how the interests of the indigenous peoples or peasant communities, who live in the area of influence of the projected mining activities, are protected. Nevertheless, consultation does not give the populations involved the right to veto mining activities or decisions made by authorities."*

This definition does not include the provisions set forth in Article Six of ILO Convention 169, insofar as the objective of consultation is concerned, without which its execution is pointless. The objective of consultation, according to the Convention, is to reach an agreement or consent on the proposed measures.

5) Consultation establishes principles, such as the right to participation, information access, respect for cultural diversity, non-discrimination, citizen monitoring and continuous dialogue. The problem is that the regulations refer to populations involved in general and not indigenous peoples. This prejudices the specific interests and rights of these peoples,

[3] An example of this was the series of meetings between MEM, the Society of Mining and Petroleum and AIDESEP, unsuccessfully held since 1998 to establish a common set of regulations on the consultation and participation procedure for hydrocarbon operations. MEM dismissed the Proposed Regulations on Consultation and Participation Procedures for Hydrocarbon Operations in Territories of Indigenous Peoples of the Peruvian Amazon, submitted by AIDESEP, in the framework of the working group organized by MEM. This document includes various articles of Convention 169.

including them in a much broader concept of "populations involved", under the misunderstood principle of non-discrimination.

6) In order to intervene in the citizen participation process, the Regulations establish requirements. The norms, customs and traditions of the indigenous peoples are not considered.
7) **Citizen participation is considered after the mining concession is granted.** This goes against the provisions set forth in Convention 169, which indicates that, "consultation shall be carried out before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their land" (Article Fifteen).
8) Participation mechanisms set forth in the regulations shall be applied before and during the preparation and presentation of the EIA; nevertheless, it does not state if there is an obligation to consider the opinion of the affected parties for the purpose of mitigating and modifying the actions to be followed (Article Six and Fifteen of ILO Convention 169 and the jurisprudence of the Inter-American Court). During the EIA assessment process, undertaken by the competent authority, participation mechanisms shall also be applied. The citizen participation plan is proposed by the company and approved by the pertinent authority. Indigenous peoples do not participate in this.
9) During the execution of the mining project, the citizen participation plan must include the participation mechanisms that shall be developed and shall be assessed together with the EIA and must comply with the Community Relations Plan presented by the company. These documents are prepared by the company. Citizen participation is also considered, when mines are closed, but there are no participation mechanisms in the exploration phase.

In accordance with the regulations set forth in Convention 169, the best standards of practice for States with regard to consultation, as well as national and international jurisprudence[4], these regulations do not establish the right to free, prior and informed consultation, since they do not express the content set forth in Convention 169 or in international jurisprudence. Moreover, their provisions affect the intrinsic logic characteristic of the Convention, by centralizing all the proactive functions, insofar as the participation of "affected populations" is concerned, in authorities and companies. They do not incorporate the right to free, prior and informed consent either.

Some officials of MEM do not have any information about the indigenous peoples, who live in the area of the concessions or use the area in some way, shape or form, and when they do, they generally favour mining or hydrocarbon projects.[5] They tend to assume that indigenous peoples are less important than mining exploitation.

[4] Section V of the Title I of the Peruvian Code of Constitutional Procedure considers the jurisprudence of international courts as part of the "constitutional block".

[5] See MEM document entitled, "Peru´s Opinion on the Final Report of the Extractive Industries Review (RIE) to the World Bank". Ministry of Energy and Mines in and for Peru, 2004.

In accordance with the right to consultation established in ILO Convention 169, they believe that consultation processes should be carried out after concessions are granted; meanwhile, indigenous peoples and their organizations believe that such processes should be carried out before, otherwise it would be pointless for them to express their opinion. The foregoing is also clearly indicated in Article Fifteen, Item 2 of ILO Convention 169.

Finally, in relation to the fourth and last stage of the mining activity (mine closures), Article Seven of the Mine Closure Regulations (Supreme Executive Order 033-2005-EM) indicate that such closures must be subject to a citizen participation process, understood by the Regulations as follows:

a) Publication of announcements
b) Radio announcements
c) Delivery of the closure plan to regional authorities
d) Delivery of certificates to authorities
e) Access to the mine closure plan dossier

As observed, we are once again dealing with a sectorial approach that does not take into account the regulations of superior hierarchy, as contained in Convention 169.