SUPREME COURT OF JUSTICE OF MEXICO
SECOND CHAMBER

Case of Indigenous Communities affected by the release on the environment of genetically modified soybeans

Constitutional Writs under Revision: 241/2015, 270/2015, 410/2015 498/2015, 499/2015, 500/2015 and 198/2015

Amicus Curiae
"Comparative and International Standards on the Right to Free, Prior and Informed Consent"

English Summary

INSTITUTIONS PRESENTING THE AMICUS

Bogota, Lima, Mexico City, Ottawa and Washington, D.C.
30 September 2015

Amicus Curiae
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English Summary

On 30 September 2015, Dejusticia (Colombia), the Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa (Canada), the Due Process of Law Foundation (United States), Fundar- Centro de Análisis e Investigación (Mexico) and the Instituto de Defensa Legal (Peru) submitted before the Second Chamber of the Supreme Court of Justice of Mexico an *amicus curiae* regarding the international and comparative standards of the right to free, prior and informed consent.

The Mexican Supreme Court of Justice recently decided to address, for the first time, a case regarding prior consultation. It will merge seven constitutional writs (*recursos de amparo*) that relate to the authorization, granted to Monsanto by the Mexican federal government, to plant genetically modified soybeans in the Yucatan Peninsula, without consulting Indigenous Mayan communities. According to these communities, the authorization affects their right to prior consultation, as well as their right to a healthy environment, territory, culture, and tradition.

Facts of the Case

The Pac-Chén and the Cancabchén communities are indigenous Maya located in the Yucatan Peninsula. Their indigenous status is acknowledged at the state and federal levels. In this region, apiculture is one of their most important economic activities and part of their subsistence relies on the export of honey and other related by-products.

Since 2005, the Mexican federal government has authorized the release of genetically modified soybeans at the pre-commercial stage. On 25 February 2011, the "Monsanto Comercial S.A. de C.V." corporation requested permission to plant 30,000 hectares of genetically modified soybeans in the State of Campeche, Quintana Roo and Yucatán. Even though there was never a consultation process carried out by the government with the affected indigenous communities, the federal government provided Monsanto with a licence to go forward with the planting on 17 June 2011. On 27 February 2012, the affected indigenous communities presented the first set of constitutional writs before an Administrative Tribunal in Mexico City.

On 2 February 2012, the Mexican Agricultural Secretariat (SAGARPA) received a second request from Monsanto, seeking authorization to plant 253,500 hectares of genetically modified soybeans at the commercial stage in the Yucatán Peninsula, Chiapas and the Planicie Huasteca, an area where Mayan Indigenous communities are located. SAGARPA posted an open consultation process on their website but never carried a consultation process in accordance to the 169 ILO Convention or the jurisprudence of the Inter-American Court of Human Rights. Monsanto received authorization to proceed on 6 June 2012. On 26 June 2013, indigenous Mayan communities in Campeche and Yucatán filed a second set of constitutional writs before local tribunals.

In all, seven constitutional writs related to Monsanto were decided upon by various state-level tribunals in Mexico between 2013 and 2014. In all of these cases, the tribunals granted the right to the affected indigenous Mayan communities, ordering the federal government to carry out a public consultation process with these communities. The federal government appealed these decisions, and as a result the cases were passed to the Supreme Court. The Second Chamber of the Mexican Supreme Court of Justice, as a result, now has the opportunity to confirm these decisions and to judicially establish the standards to carry a prior, free and informed consent, in accordance to international obligations accepted by Mexico.

Submission

The Supreme Court of Justice must decide on the content and implementation of the right to free, prior and informed consultation in Mexico. Thus, the organizations presenting this *amicus* wish to shed some light on this topic which is fundamental for the advancement and development of human rights in Mexico.

The first part of the *amicus* identifies and discusses international standards on the right to prior consultation. It examines the development of this right by the United Nations and the international human rights system, and then analyzes the effect that the development of the right has had on the Inter-American Human Rights System, particularly the Inter-American Court of Human Rights. It is important to mention that Mexico is a state party to ILO Convention 169 and also a signatory of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").

The right to prior consultation is a human right of indigenous peoples as recognized by the United Nations in Article 19 of UNDRIP. The purpose of prior consultation is to ensure that indigenous peoples have all the information necessary to make decisions that they deem to be in their best interests. The duty to consult arises in any situation where indigenous peoples' interests are at stake, , and where actions or administrative and legislative decisions undertaken within their territories will most likely affect their way of life or well-being.

According to both UNDRIP and ILO Convention 169, consultation should be carried out by appropriate means, in good faith and with the representative institutions of indigenous and tribal peoples. The content of the right has developed progressively over time and now includes the idea that consultation requires the free, prior and informed consent of indigenous peoples. The aim of consultations is to obtain the free and informed consent of the indigenous group or community.

The second part of the *amicus* analyzes relevant practice regarding the application and implementation of the right to prior consultation in Australia, Canada, Colombia, New Zealand, Peru and various countries in Africa. An analysis of these countries reveals that, regardless of the region or legal tradition, prior consultation is recognized as a right of indigenous and tribal peoples. Hence, States have an obligation to fulfill this right in accordance with the principles established by ILO Convention 169 and UNDRIP. Further, these case studies demonstrate that

the development and implementation of the right to prior consultation can occur through both legislative and judicial means. However, the existence of legislative or judicial measures is not a precondition for a State to fulfill its international obligations for the right to prior consultation, as stated in ILO Convention 169, UNDRIP and the American Convention on Human Rights.

The third part of the *amicus* focuses on the need to carry out processes of consultation in the event that a State decides to authorize the use of genetically modified organisms in indigenous territories. International standards place specific importance on food security, the impact on the environment and its repercussions on indigenous subsistence, culture and traditions. Additionally, international standards emphasize the need for the protection of biodiversity and the sustainable use of genetic resources to protect food and agriculture, and the participation of indigenous communities in these activities.

Conclusions

An examination of international standards on the right to prior consultation and the implementation of this right in Australia, Canada, Colombia, New Zealand, Peru and various countries in Africa results in the following conclusions:

First, the right to prior consultation is an internationally recognized and constitutionally protected human right. Therefore, the implementation of this right cannot be limited or restricted by procedural or administrative actions, as this would undermine the principle of legality.

Second, the doctrine and jurisprudence recognize that all consultation processes must be carried out in a prior, free and informed manner. These three elements form the core of the right to consultation, and each element has its own characteristics and requirements that a State must ensure are respected and fulfilled.

Third, while a State may adopt the necessary means for carrying out a consultation process, this should be done in a way that enables the indigenous peoples in question to understand the implications that an administrative or legislative action or decision may have on their community, territory or culture.

Based on these conclusions, Dejusticia, the Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa, the Due Process of Law Foundation, Fundar Centro de Análisis e Investigación and the Instituto de Defensa Legal, ask that the Court:

- Annul the administrative act granted by SAGARPA to "Monsanto Comercial S.A. de C.V." authorizing the sowing of genetically modified soybeans in the 253,500 hectares located in the Yucatán Peninsula, Chiapas and the Planicie Huatesca, based on the absence of prior consultation processes with Indigenous Mayan communities.

- Order SAGARPA and other government agencies to carry prior, free and informed consultation processes that may affect the rights of Indigenous Peoples, according to international obligations accepted by Mexico.

- Develop, through its jurisprudence, international standards for the protection, exercise and enjoyment of free, prior and informed consultation for the benefit of indigenous peoples; and,

- Ensure that processes of free, prior and informed consultation to be carried out in Mexico are inclusive, including encouraging the participation of indigenous women and other community members.