

# The Conflict Between Environmental and Sustainable Development Rights and Indigenous Communities' Rights to Prior Consultation in Wind Energy Generation Projects in Colombia

## **The Prior Consultation Right in Wind Projects in Colombia and its Conflict with Environmental and Sustainable Development Rights**

In Colombia renewable energy projects are booming, especially from wind sources. Throughout 2019, the Colombian Ministry of Mines and Energy held auctions for long-term renewable energy contracts which ended in October 2019 with the awarding of eight energy projects, five of which were wind energy projects. These awards are in addition to the activities of 19 international

companies that had already installed wind measurement towers and are carrying out impact studies and obtaining environmental licences and tax exemptions. A new auction for long-term renewable energy contracts will be held in the last quarter of 2021.

This boom is related to Colombia's international environmental obligations to reduce its greenhouse gas emissions,<sup>1</sup> and the country's commitment to exploit renewable sources of energy as a matter

<sup>1</sup> This obligation is included in the Kyoto Protocol, the Paris Protocol and the Statute of the International Renewable Energy Agency (IRENA), ratified by Colombia through Law 1665 of 2013.



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**Under Colombian law, prior consultation is both a fundamental right and a procedural requirement that must be fulfilled whenever a legislative or administrative measure is proposed that may directly affect an indigenous territory or its ethnic identity**

of public utility, national convenience and strategic national interest.<sup>2</sup>

These wind energy projects are all located in the region of La Guajira, within territories belonging to the Wayúu indigenous communities. La Guajira is becoming a powerhouse of wind energy in Colombia. It is expected that the first wind farms will start operating in 2022 and that by 2031 there will be about 65 in operation.<sup>3</sup>

Under Colombian law, prior consultation is both a fundamental right<sup>4</sup> and a procedural requirement that must be fulfilled whenever a legislative or administrative measure is proposed that may directly affect an indigenous territory or its ethnic identity.<sup>5</sup> Since wind energy projects are located within the Wayúu territory, investors are obliged to obtain prior, free and informed consent from the Wayúu communities as a requirement to obtain the environmental licence for each project.

<sup>2</sup> By means of article 4 of Law 1716 of 2014 and the 2018-2022 National Development Plan.

<sup>3</sup> Joanna Barney and Camilo González Posso, *El Viento del Este Llega con Revoluciones: Multinacionales y la Transición Eólica en Territorio Wayúu* (2nd ed, Indepaz 2019) 21.

<sup>4</sup> Colombian Constitutional Court, Judgment SU-039 of 1997 (Free translation):

The participation of indigenous communities in the decisions that may affect them in relation to the exploitation of natural resources offers as a particularity the fact that said participation, through consultation, acquires the connotation of a fundamental right, since it stands as an instrument that is essential to preserve the ethnic, social, economic and cultural integrity of indigenous communities and to ensure, therefore, their subsistence as a social group.

<sup>5</sup> Convention No. 169, 'Indigenous and Tribal Peoples Convention' of the International Labour Organization, adopted 27 June 1989 and entered into force 5 September 1991, Art. 6.

The purpose of this requirement is to protect the indigenous communities' rights and mitigate the effects that any project may have on their culture. In fact, the impact of the wind energy projects on the Wayúu communities is derived from the use of (i) the territory itself for the installation of wind farms, which is the central feature of their identity as a community, and (ii) the resources that are located in the territory, particularly the wind, which the Wayúu communities consider a sacred symbol of a deity.<sup>6</sup>

But this creates a conflict between constitutional rights: on the one hand, all those rights linked to economic development and the use of natural resources to guarantee sustainable development, which can be pursued through renewable energy sources, and on the other hand, indigenous communities' rights to maintain their ethnic integrity.

The conflict between the two is not theoretical. In August 2020, the Colombian Public Ministry (PGN) requested the Ministry of Mines and Energy and the Mining and Energy Planning Unit (UPME) to suspend a project for the construction of a transmission line<sup>7</sup> and to stop granting

<sup>6</sup> Barney and González Posso (n 9) 17, 165.

<sup>7</sup> 'Transmission Line Associated with the Cuestecitas Connection - Collector 1 at 500 kv' project of the Group of Energy of Bogotá (GEB) 'Por no consultar a comunidades wayúu, Procuraduría pide frenar proyecto eólico' (Semana Sostenible, 17 August 2020) <<https://sostenibilidad.semana.com/medio-ambiente/articulo/que-paso-con-el-proyecto-eolico-en-la-guajira-y-las-comunidades-wayuu/54148>> accessed 7 November 2020; 'GEB gana proyecto para transmitir energía eólica desde la Guajira'

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environmental licences for all wind power projects. PGN's request was primarily based on the alleged violation of prior consultation rights of the Wayúu communities, which had not been duly informed about the scope of the projects or about the impact that they could have on their territory.<sup>8</sup>

A decision of this nature may have a severe impact on companies pursuing renewables projects, even if they have consulted previously in accordance with both the guidelines of government authorities<sup>9</sup> and the guidance given by the regional and national authorities.

### Resolution of Conflicts with Local Communities in International Investment Arbitration

Conflicts with local communities regarding natural resources in their territories are not uncommon in Latin America's investment arbitration cases. Latin American countries are generally rich in natural resources and local communities often oppose projects to exploit these resources based on

environmental concerns or the likelihood that such projects would otherwise adversely affect their communities.<sup>10</sup>

Several arbitration tribunals have resolved disputes between investors and local communities, and in so doing have determined how investors' behaviour and especially their response to the opposition of local communities might affect the jurisdiction, merits or quantum of damages of a case. Thus, it is possible to identify standards that investors need to meet in order to comply with international investment law.

To begin, compliance with the prior consultation procedure might affect the tribunal's jurisdiction. This can be addressed through the legality clause contained in bilateral investment treaties, such as the seven Colombia has signed.<sup>11</sup> This clause requires investments to be 'made in accordance with the laws of the host State.' Thus, investments that do not comply with the laws of the host state would not fall within the scope of the treaty and would not benefit from its standards of protection.<sup>12</sup> Prior



## Investors should engage actively with local communities, particularly through prior consultation processes

consultation processes that breach the Colombian legal standard in a fundamental or fraudulent way<sup>13</sup> might impact the legality of the investment and deprive it of treaty protection.

However, this requirement only analyses the legality of the investment at the time it is made. Hence, subsequent illegalities would not deprive the tribunal of jurisdiction<sup>14</sup> and claims in that case would be assessed on the merits.<sup>15</sup>

Arguably, the legality requirement can also be used to assess illegal acts committed by the investor that 'go to the essence of the investment'<sup>16</sup> when carrying out the prior consultation process or pursuing the community's support for the project.

The investor's conduct might also be analysed in the merits phase. If the investor is found to have contributed to the discontent of the community, for example by disrupting the hierarchy or voting process inside the community and creating divisions,<sup>17</sup> or to the escalation of violence by protestors against the project, measures adopted by the state to control public order might be justified and may adversely affect the investor's claim in arbitration.<sup>18</sup>

(Cámara de Comercio de Bogotá, 2018) <[wwwccb.org.co/Clusters/Cluster-de-Energía-Electrica/Noticias/2018/Febre...](http://wwwccb.org.co/Clusters/Cluster-de-Energía-Electrica/Noticias/2018/Febre...)> accessed 7 November 2020.

<sup>8</sup> Laura Vita Mesa, 'Freno a proyecto de energía eólica en La Guajira por problemas con la consulta previa' <[www.assuntoslegais.com.co/actualidad/freno-a-proyecto-de-energia-eolica-en-la-guajira-por-problemas-con-la-consulta-previa-3045414](http://www.assuntoslegais.com.co/actualidad/freno-a-proyecto-de-energia-eolica-en-la-guajira-por-problemas-con-la-consulta-previa-3045414)> accessed 7 November 2020.

<sup>9</sup> Resolution 136 of COLCIENCIAS, Colombian Ministry of Sciences (7 March 2016), which modified the (Free translation) Recruitment Committee of the Science, Technology and Innovation Administrative Department - COLCIENCIAS <<https://minciencias.gov.co/normatividad/resoluci%C3%B3n-136-de-2016>> accessed 7 November 2020.

<sup>10</sup> Lila Barrera-Hernández, 'Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water' (2005) 11, 11 Ann. Surv. Int'l & Comp. L. 1, 6; 'the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation.'

<sup>11</sup> For example, the legality clause can be found in the Free Trade Agreement between Colombia and Israel, signed 30 September 2013 and entered into force 11 August 2020, Art 101.

<sup>12</sup> Arif H. Ali, Erica Franzetti, José Manuel García Represa and Eduardo Silva Romero, 'Mining Arbitration in Latin America: Social and Environmental Issues in Investment Arbitration Cases' Jason Fry and Louis-

Alexis Bret (eds), *The Guide to Mining Arbitrations* (1st ed, GAR 2019) <[www.dechert.com/knowledge/publication/2019/6/mining-arbitration-in-latin-america-social-and-environmental-is.html](https://www.dechert.com/knowledge/publication/2019/6/mining-arbitration-in-latin-america-social-and-environmental-is.html)> accessed 7 November 2020.

<sup>13</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction, 27 September 2012, para 266 ('*Quiborax v Bolivia*').

<sup>14</sup> *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No 2012-2, UNCITRAL, Award, 15 March 2016, para 5.62 ('*Copper Mining v Ecuador*').

<sup>15</sup> *Quiborax v Bolivia*, para 266; *South American Silver Limited v Bolivia*, PCA Case No. 2013-15, UNCITRAL, Award, 22 November 2018, para 470 ('*South American v Bolivia*').

<sup>16</sup> Ibid, *South American v Bolivia*.

<sup>17</sup> Ibid, para 114.

<sup>18</sup> Ibid, para 563.

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Lastly, tribunals might address compliance with the prior consultation procedure during the damages phase. Tribunals may resort to Article 39 of the International Law Commission Articles on State Responsibility, which embodies the 'contribution to the injury' principle. Article 39 takes into account the acts or omissions of the injured entity who seeks reparation when assessing its damages<sup>19</sup> and has been applied to reduce the damages ultimately awarded to the investor when they respond with violence or illegal activities that might increase unrest in the community.<sup>20</sup>

Another approach might be taken when assessing the investor's damages. If local opposition to a project is very strong, opposition will affect the expected profitability of the project and, consequently, the damages can be calculated by the amounts actually invested.<sup>21</sup>

This notwithstanding, tribunals also highlight the responsibility of states to implement a 'clear' regulatory framework regarding communications with the local community. Therefore, lack of certainty on the obligations imposed on the investor by the host state's legislation may be a source of this state's international responsibility.<sup>22</sup>

<sup>19</sup> International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, vol 2 (YB Int'l L Commission, 2001) 110.

<sup>20</sup> *Copper Mining v Ecuador*, paras 6.91, 7.29.

<sup>21</sup> *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017, paras 600-604.

<sup>22</sup> *Abengoa S.A. y COFIDES S.A. v United Mexican*

## Recommendations to Avoid Future Conflicts Between Renewable Energy Project Investors and Local Communities in Colombia

The boom in renewable energy projects could trigger conflicts with local communities in Colombia. To avoid these types of disputes, both investors and the state must consider the standards developed by international investment law to ensure the protection of local communities' rights and consequently the projects' success.

On the one hand, investors should engage actively with local communities, particularly through prior consultation processes. Failure to do so will surely affect the success of the project and any claim by the investor, be it on jurisdiction, merits or damages.

On the other hand, to prevent these conflicts the Republic of Colombia must pass effective and clear regulations governing the relationship between investors and local communities, particularly with respect to prior consultation. It is important that regulations that govern prior consultation delineate and specify the obligations of the investor when approaching local communities. Otherwise, the scope of the investors' obligations may be uncertain, which in turn increases local communities' mistrust. In the end, clarifying the rights and obligations of all stakeholders is in the interest of local communities and investors alike.

*States*, ICSID Case No ARB(AF)/09/2, Award, 18 April 2013, para 664.

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