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INDIGENOUS ENVIRONMENTAL RIGHTS IN MEXICO: WAS THE 2001 CONSTITUTIONAL REFORM FACILITATED BY INTERNATIONAL LAW?

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Abstract. *This article argues that internal affairs (namely, the 1994 EZLN armed indigenous uprising and the rise to power of the right-wing PAN party) had much more influence on the reform of Article 2 of the Mexican Constitution in 2001 than did international law. In effect, it points out the fact that although international treaties are legally binding, they do not always have effect on domestic legislation, as the latter may ignore or even contravene international regulations. In practical terms, this means that international law does not necessarily impact amendments made to national constitutions and laws. In reviewing the 2001 constitutional reform, we come to realize that this amendment had two major drawbacks. First, it failed to comply with international norms, since specific provisions established in the CBD and C169 were not fully respected. Second, it established a series of provisions that fail to allow indigenous peoples to fully exercise their environmental rights (in particular, access to natural resources). As a result, the Mexican authorities never adequately responded to many indigenous peoples' claims based on the 1996 San Andrés Accords and Cocopa Law agreed upon with the Zapatistas.*

Key Words: *Indigenous environmental rights, international law, Mexican Constitution (2001 amendment), Zapatista Army of National Liberation (EZLN).*

Resumen. *Este artículo argumenta que la reforma del artículo 2o. de la Constitución mexicana en 2001 se debió a eventos internos y no al derecho internacional (específicamente, al levantamiento armado indígena del EZLN y a la llegada al poder del partido político de derecha, PAN). En este sentido, señala que si bien los tratados tienen aplicación directa en cuanto son ratificados, la reforma en cuestión los ignoró y contravino al establecer preceptos vagos, confusos e inadecuados. Esto lleva a considerar que el derecho internacional no necesariamente tiene un impacto en el desarrollo de las reformas constitucionales a nivel*

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doméstico. Al revisar la modificación de 2001 se señala que existen dos grandes retrocesos. Primero, no se tomaron en cuenta ciertas disposiciones internacionales del CDB y del C169. Segundo, se establecieron preceptos que no permiten el ejercicio pleno de los derechos ambientales de los pueblos y comunidades indígenas (particularmente, los de acceso a los recursos naturales), y por tanto, el Estado mexicano no cumplió con las demandas indígenas contenidas tanto en los Acuerdos de San Andrés como en la Ley Cocopa, ambos de 1996, según lo convenido con la guerrilla zapatista.

Palabras clave: *Derechos ambientales indígenas, derecho internacional, Constitución mexicana (reforma de 2001), Ejército Zapatista de Liberación Nacional (EZLN).*

Table of contents

I. Introduction

Over the last few decades, indigenous environmental rights have been increasingly recognized in a diverse number of both "hard" and "soft" international instruments. These rights have been mostly related to the environment, natural resources or issues linked to environmental matters. Many nations have adopted such standards and, as a result, amended their constitutions or modified their statutes to implement and further enhance environmental commitments toward indigenous peoples and communities. International law, however, is not always the starting point for the development of domestic law (*i.e.* constitutional norms and statutes) in regard to indigenous environmental rights. Local conditions such as indigenous unrest, guerrilla movements or civil uprisings have also pushed many nations to create and implement regu-

lations. Improved democratic processes, innovative ways of governance and renewed political scenarios have all contributed to reshape certain aspects of the legal system, all of which may have little bearing on the role played by the State in incorporating international norms into domestic law.

Indigenous environmental rights as established in Article 2 of the Mexican Constitution represent a good example of the foregoing. In fact, the existence of such rights in Mexico is not so much the result of international law as a consequence of deep internal socio-political changes. While Mexico has adopted and ratified both legally and non-legally binding international agreements (in relation to both environment and indigenous rights) —used as references for the major constitutional amendment in 2001— the real reasons for the reform were the 1994 uprising in the southern Mexican state of Chiapas (led by the Zapatista Army of National Liberation, EZLN) and the rise in 2000 of the right-wing PAN party after more than 70 years rule by the alternatively left- center- and right-wing PRI party.

After identifying international environmental rights of (and obligations for) indigenous peoples and their communities, this article argues that internal Mexican affairs had much greater influence on this constitutional reform than international law. It also highlights the fact that despite the influence of ratified international treaties on domestic law (that is to say, once provisions become part of Mexican legislation and applied directly without any need for further incorporation), the 2001 amendment ignored their impact through vague, confusing and inadequate wording. Although the Mexican Constitution and international treaties are designed to be complementary, some provisions, as well as the reform process itself, have actually contravened international standards, which means that international law does not necessarily effect the development of constitutional changes at the national level.

In reviewing the outcome of the 2001 constitutional reform, this article argues that this amendment had two major setbacks. First, it failed to comply with international norms as illustrated by the fact that certain provisions stated in the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries and the 1992 Convention on Biological Diversity were not taken fully into account. Second, it established a series of provisions that fail to provide indigenous peoples and their communities the capacity to fully exercise their environmental rights (in particular, with respect to access to natural resources) and, as a result, did not adequately respond to indigenous peoples' claims pursuant to the 1996 San Andrés Accords and Cocopa Law as agreed to with the Zapatistas. As a consequence, the Zapatistas, who were not part of the constitutional reform process, rejected outright the 2001 amendment.

At this point, no formal talks have been held between the EZLN and the Federal Government, and neither the Executive nor Legislative branch has shown any intention of seriously addressing, revising or proposing any reform to Article 2 of the Mexican Constitution.

II. Identifying Indigenous Environmental Rights under International Law

Environmental rights of (and obligations for) indigenous peoples and communities under international law can be divided into four distinct categories. According to my own typology, such rights and obligations refer to *i*) those that are explicitly related to the environment as a whole; *ii*) those that refer to natural resources (*e.g.* water, forests or genetic material); *iii*) those that are linked to issues directly related to environmental matters (*e.g.* health, sustainable development, the land or the areas they inhabit); and *iv*) those that are related to other issues or rights (*e.g.* human rights). All are implemented by means of diverse agreements, both legally and non-legally binding, that have been signed or adopted by governments through conventions, declarations and other international instruments either under environmental or indigenous law.

Strictly speaking, the phrase "indigenous environmental rights" was not consolidated as a concept until the 1980's. Before that time, environmental rights, on the one hand, and indigenous rights, on the other, pursuant to international agreements were not really intertwined.

In fact, by the time the first international agreement that explicitly referring to indigenous rights was adopted (the 1957 Convention Concerning Indigenous and Tribal Populations, also known as Convention 107 of the International Labour Organization)[1] the term "environment" had not yet acquired the meaning it currently has within international law. Since the late 1950's and for many years afterward, "environmental rights" or "indigenous environmental rights" simply did not exist. It was not until the late 1960's and early 1970's that certain rights were termed "environmental" (but still with no explicit reference to indigenous peoples) as a result of emerging worldwide concern for preserving natural landscapes; taming pollution and negative health effects; preventing resource depletion; planning urban development; diminishing poverty, and so on.[2] As environmental awareness gained increasing importance globally, it led to what has been called the "internationaliza-

[1] Although there were previous international documents that addressed diverse indigenous peoples' matters, the Convention 107 is considered to be the earliest legal precedent that clearly made reference to indigenous rights. *See* Jorge Alberto González Galván, El Estado, los indígenas y el derecho 363-66 (2010).

[2] This is not to say that concerns about our surroundings were not present before these two decades; however, they were about nature (not properly the environment) and were mainly related to local occurrences. Anyway, what is important to remember is that at the time the perception of an emerging crisis that could be named "environmental" arose, not all nations shared the same view about the global environment. While the countries of the North focused on resource depletion and nature preservation, Southern countries focused on the "basic needs" argument and poverty alleviation. For more information on this, see César Nava Escudero, Urban Environmental Governance 12-14 (2001).

tion of environmental matters." In 1972, the international community convened to address human environment-related issues at the United Nations Conference on the Human Environment, held in Stockholm, Sweden. The most important non-legally binding instrument emerging from this conference —the Declaration of the UN Conference on the Human Environment (also the Stockholm Declaration)— made it clear that there was a need "for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment." Although it recognized the existence of environmental rights, it made no explicit reference to indigenous groups and their communities.

In the long run, environmental and indigenous issues eventually converged due to forceful and growing claims that environmental protection (at that time still under the umbrella of "conservation") was only feasible as long as indigenous peoples' interests (referred to as "native peoples") were fully included in international debates and agreements.

> We cannot accept to preserve fragile ecosystems while the native peoples who live in these areas are dispossessed and forcibly dislocated. This is the foundation of the emerging unity between native peoples and the international conservation movement. As ecologically-destructive megaprojects continue to penetrate the world's resource frontiers, the global problems of deforestation, desertification, depletion of fisheries and soil erosion are major concerns of both groups.[3]

For this reason, the idea of connecting environmental rights with indigenous rights under the mantel of international law began to be associated —along with other issues— with indigenous rights over land and natural resources, traditional knowledge and customs, consultation processes, health practices and —most significantly— the environment as a whole.

In December 1983, the Secretary General of the United Nations called upon the Norwegian Prime Minister, Gro Harlem Brundtland, to establish and chair an independent commission to address major environmental challenges to the world community. For this purpose, the World Commission on Environment and Development was created; after five years of research and monitoring, a report —known as the "Brundtland Report" or "Our Common Future"— was presented in 1987 to the UN General Assembly; it called for political action and an international conference to revise and promote proposed changes.

Our Common Future categorically acknowledged the importance of linking environmental and indigenous matters vis-à-vis the recognition of traditional rights and the need for indigenous groups to get involved in policy for-

[3] Al Gedicks, *Native peoples and sustainable development*, *in* Environmental Conflicts and Initiatives in Latin America and the Caribbean 36 (Helen Collinson ed., 1996).

mulation when resource management in areas where they live are the focus of debate and regulation. The report stated:

> The starting point for a just and humane policy for… [indigenous or tribal peoples]… is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life – rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.[4]

In 1989, the UN took on Brundtland Report's main proposal and called for a worldwide conference —the 1992 United Nations Conference on Environment and Development (hereinafter referred to as "UNCED" and known as the Earth Summit)— held in Rio de Janeiro, Brazil. As we shall see below, the Rio Conference, for some a "unique event in the annals of international affairs,"[5] inserted environmental indigenous rights into discussions and texts of agreements signed at the conference. At the same time, the international community adopted the most all-encompassing treaty ever signed with respect to indigenous rights: the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (also known as the 1989 Indigenous and Tribal Peoples Convention, or Convention 169 of the International Labour Organization or, simply, the C169), which included references to environmental rights.

By the late 1980's, a consensus was reached at the global level that all nations should abide by international legal regulations based upon the intertwined development of environmental and indigenous issues. The two decades following these events, however, have helped elucidate a clear distinction between provisions passed under the guise of international indigenous law and those under international environmental law.

Despite progress made in both these areas of law, we must consider that a greater number of ratified agreements have not in any way decreased the controversial nature of the environmental protection of indigenous peoples

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[4] World Commission on Environment and Development, Our Common Future 115-16 (1987).

[5] The significance of UNCED is partly explained due to the fact that it "brought more heads of state and government together than any previous meeting – well over 100, with 178 governments represented in all. Five separate agreements were signed by most of the participating governments. Thirty thousand people descended upon the city, and the Summit received a blaze of publicity around the world." *See* Michael Grubb et al., The Earth Summit Agreements: A Guide and Assessment 1 (1993).

and international indigenous law,[6] both on a national and international level. In fact, not all nations are even willing to ratify these types of instruments. When they do, they may fail to incorporate into their national legislation the full content of a treaty; or may deceptively and confusingly amend their constitutions and laws in ways that result in non-existent or ineffective implementation of indigenous environmental rights.

1. *International Regulations under Indigenous Law*

The most important legally-binding multilateral document under international indigenous law that refers to environmental issues, particularly in relation to rights, is the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter referred to as "C169"). Following our indigenous environmental rights' categorization, this legally-binding instrument includes rights and obligations related to the environment and natural resources, as well as concepts and issues closely linked to environmental matters. In a nutshell, these provisions include:[7]

— Special measures adopted for safeguarding the environment of indigenous peoples involved. Article 4 (1).
— Governments shall ensure that studies are realized in collaboration with indigenous peoples to assess the environmental impact on them of planned development activities. Article 7 (3).
— Governments shall take measures, in cooperation with indigenous peoples, to protect and preserve the environment of territories they inhabit. Article 7 (4).
— The rights to natural resources attached to lands inhabited by indigenous peoples shall be especially safeguarded; the latter include the right to participate in the use, management and conservation of such resources. Article 15 (1).
— When nations retain ownership of minerals, sub-surface resources or rights to other resources attached to their lands, these governments shall establish procedures to consult the indigenous peoples involved; and the latter shall share in any benefits derived thereof and receive fair compensation for damages sustained as a result of exploration or exploitation activities realized on their lands. Article 15 (2).
— Governments shall ensure that adequate health services are made available to indigenous peoples; or shall provide them with the resources to obtain such services. Article 25 (1).

[6] Patricia Birnie et al., International Law & the Environment 627 (3rd ed. 2009).

[7] *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

— Governments shall take measures to facilitate cross-border contacts and cooperation between indigenous and tribal peoples, including participation in environment-related activities. Article 32.

It is interesting to note that as of June 2011, the majority of ratifications of the 1989 Indigenous and Tribal Peoples Convention has been by nations located in Latin America and the Caribbean region (15 out of 22).[8] Surprisingly few are from nations in areas with significant indigenous peoples, particularly Africa (1 out of 22),[9] Oceania and Asia (2 out of 22).[10] While the treaty has only been ratified in four European countries,[11] two other countries with significant indigenous peoples have not regrettably ratified it: the United States and Canada.[12]

In contrast to the above, the most important international multilateral agreement regarding indigenous peoples —albeit non-legally binding— is the United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on September 13th, 2007. The preamble recognizes not only the "urgent need to respect and promote the inherent rights of indigenous peoples… especially their rights to their lands, territories and resources," but the fact that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment." The main provisions include:[13]

— The right to their traditional medicines and health practices, including conservation of vital medicinal plants, animals and minerals. Article 24.
— The right to maintain and strengthen their spiritual relationship with lands they own, occupy or use, including territories, waters, coastal seas and other natural resources; as well as to uphold their responsibilities to future generations. Article 25.
— Rights to the lands, territories and resources they have traditionally owned, occupied, used or acquired. Article 26 (1).
— The right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources. Article 29 (1).

[8] State parties to the C169 include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

[9] This is the Central African Republic.

[10] These are Nepal (Asia) and Fiji (Oceania).

[11] These are Denmark, Norway, Spain and The Netherlands.

[12] Depending on the preferred classification for indigenous peoples in these two countries, it may be possible to count up to 150 diverse peoples (referred to as tribes, bands, nations and communities) inhabiting in diverse geographical sites. For a good account on this, see Native Universe, Voices of Indian America (Gerald McMaster & Clifford E. Trafzer eds., 2004).

[13] *See* United Nations Declaration on the Rights of Indigenous Peoples, 2007.

— The right to maintain, control, protect and develop cultural heritage, traditional knowledge, cultural expressions, manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, and so on. Article 31 (1).
— The right to be consulted to obtain their free and informed consent prior to approval of projects that may affect their lands, territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water or other resources. Article 32 (2).

Given the fact that exclusion of indigenous peoples is a global concern and a matter of proven injustice, one of the biggest flaws of the 2007 Declaration is that it does not bind signatory-States. In spite of the fact that the international community took quite a long time to reach this agreement —almost 25 years since meetings and deliberations began in the early 80s— there were 4 votes against it and 11 abstentions.[14] Nonetheless, its adoption by the UN Generally Assembly was an achievement for the consolidation of indigenous rights.[15] After many years, the question remains whether the international community needs another 25 years before signing a legally-binding agreement.

Another notable albeit regional agreement is the 1991 Arctic Environmental Protection Strategy. Signed by eight countries (Canada, Denmark, Finland, Iceland, Norway, Sweden, the then Union of Soviet Socialists Republics and the United States of America), this non-legally binding document seeks to protect the Arctic environment "and its sustainable and equitable development, while protecting the cultures of indigenous peoples." It recognizes that such strategy and its implementation "must incorporate the knowledge and culture of indigenous peoples," and states clearly that "the cultures and the continued existence of the indigenous peoples have been built on the sound stewardship of nature and its resources."[16]

One of the main reasons why this "soft law" (*i.e.*, non-legally binding) agreement is mentioned is because the indigenous peoples living in the Arctic region played an active role in its making. In fact, this instrument was built in part upon initiatives already undertaken by indigenous peoples to protect the Arctic environment. This said, two of the five main objectives refer explicitly to indigenous peoples:

[14] The States that voted against it are Australia, Canada, New Zealand and the United States of America (all with indigenous peoples); the abstentions came from Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine. More details in Birnie et al., *supra* note 6, at 627.

[15] González, *supra* note 1, at 368.

[16] Quotations can be found in the 1991 Arctic Environmental Protection Strategy.

> ii) To provide for the protection, enhancement and restoration of environmental quality and the sustainable utilization of natural resources, including their use by local populations and indigenous peoples in the Arctic;
>
> iii) To recognize, and to the extent possible, seek to accommodate the traditional and cultural needs, values and practices of the indigenous peoples as determined by themselves, related to the protection of the Arctic environment;

Representatives of eight governments signed the Declaration on the Protection of the Arctic Environment on June 14th, 1991, which emphasized their "responsibility to protect and preserve the Arctic Environment" and recognized "the special relationship of the indigenous peoples and local populations to the Arctic and their unique contribution to the protection of the Arctic Environment."[17]

Again, "soft law" may be viewed as a weak approach for achieving real environmental protection in fragile regions inhabited by indigenous peoples. As much as this approach represented a "first step" in the right direction, suggestions have already been made that "it will be necessary to establish appropriate institutional arrangements and substantive rules… to ensure that agreed obligations are respected and enforced."[18]

2. *International Regulations under Environmental Law*

As mentioned above, the concept of the environmental rights and obligations for indigenous peoples began to consolidate in the mid- and late-80s of the last century. Indigenous rights within international environmental law, however, did not really gain recognition before the 1992 UNCED. In fact, some instruments discussed or adopted at this Conference addressed diverse environmental issues related to indigenous peoples.

First, the legally-binding 1992 Convention on Biological Diversity (hereinafter referred to as "CBD"), points out in its Preamble the importance of the relationship between indigenous lifestyles and biological resources:

> Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitable benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of the biological diversity and the sustainable use of its components.[19]

While not making reference to the term "right" in the preamble or any other part of the document, it provides that States shall respect, preserve

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[17] *See* Declaration on the Protection of the Arctic Environment, 1991.

[18] For more details, see Philippe Sands, Principles of International Environmental Law 731 (2nd ed. 2003).

[19] *See* Convention on Biological Diversity, 1992.

and maintain certain indigenous practices and knowledge in relation to the conservation and sustainable use of biological diversity. Criticized for being ambiguous and overly flexible, Article 8 (j) states:

> Each contracting party shall, as far as possible and as appropriate:
>
> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[20]

Second, the 1992 Rio Declaration on Environment and Development, while not considered "hard law," emphasizes the role indigenous peoples and their communities play —based on their knowledge and traditional practices— in environmental management and development. Principle 22 establishes that:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[21]

Third (and wider in content and scope) the 1992 Agenda XXI, a non-legally binding instrument, established a whole chapter addressing the relationship between environmental and indigenous issues. Chapter 26, *Recognising and Strengthening the Role of Indigenous People and Their Communities*, outlined a set of activities and objectives that made reference to the goals contained in the C169 and the draft version of the universal declaration on indigenous rights (now the 2007 United Nations Declaration on the Rights of Indigenous Peoples). The starting point in Agenda XXI establishes the following:

> 26.1 Indigenous people and their communities have an historical relationship with their land and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

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[20] *See id.*

[21] See Rio Declaration on Environment and Development, 1992.

> Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.[22]

The three main objectives in this instrument include *i*) empowerment of indigenous peoples and their communities; *ii*) active participation in the national formulation of policies, laws and programs; and *iii*) involvement in resource management and conservation strategies as well as other programs established to support and review sustainable development strategies.

Agenda XXI acknowledges that some indigenous peoples and their communities may require greater control over their lands, self-management of their resources, and more participation (specifically, in establishing and managing protected areas). For this reason, governments are encouraged to ratify or implement international conventions; and to adopt policies and laws to protect indigenous intellectual and cultural property, among other rights. Furthermore, governments should incorporate "in collaboration with the indigenous people affected, the rights and responsibilities of indigenous peoples and their communities in the legislation of each country, suitable to the country's specific situation."[23]

While more precise than the international environmental accords cited above, Agenda XXI is basically an action plan for sustainable development; clearly non-binding, a significant agreement that establishes notable guidelines to be considered and implemented by States.

Finally, two CBD Protocols are worth mention. The Cartagena Protocol on Biosafety, which entered into force on 11 September 2003, and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation, adopted on 29 October 2010, with 37 State signatures (but no ratifications) so far.

The Cartagena Protocol places the interrelationship of indigenous peoples and their communities with biodiversity under the label of "socio-economic considerations." The only two provisions established therein do not refer strictly to the rights of indigenous peoples but rather obligations for them.

> 1. The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustain-

[22] U.N. Agenda XXI, § 3 (26), 1992.

[23] *Id.*

able use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.

2. The Parties are encouraged to cooperate on research and information exchange on any socio-economic impacts of living modified organisms, especially on indigenous and local communities.[24]

By contrast, the Nagoya Protocol consists of provisions about the environmental rights of, and obligations for, indigenous peoples in relation to the access to genetic resources aiming at strengthening their ability to benefit from the use of their traditional knowledge, innovations and practices. In its Preamble, the Protocol recognizes "the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities" and refers to the 2007 UN Declaration on the Rights of Indigenous Peoples.[25] Even so —and as attractive as regulations regarding indigenous peoples' involvement in genetic resources related-matters may appear— this agreement shall not take effect until it has been ratified by at least 50 States (or organizations representing economically integrated regions) that are Parties to the CBD.

III. International Law Does Not Necessarily Explain the Development of Domestic Law

International law is concerned with the regulation of relationships within the international community, historically consisting primarily of States.[26] As a system of rules and principles (conventional or customary) as well as court decisions, international law affects not only the way in which States behave beyond their borders but also how governments create the conditions for the internal implementation of international regulations. These circumstances represent something commonly referred to as *the relationship between international law and domestic law*.

In regard to the nature and existence of this relationship, scholars have addressed the issue whether this constitutes one body of law or two separate bodies.[27] The debate on the nature of the interaction between international

[24] *See* Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000.

[25] *See* Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, 2010.

[26] Traditionally, the only subjects of international law have been the States; however, it is now common to also include as part of the international community other subjects that are entitled to rights and duties, such as international organizations, *de facto* regimes, peoples, individuals, or even multinational enterprises. For a better account on this, see Hermilo López-Bassols, Los nuevos desarrollos del derecho internacional público 92-130 (3rd ed., 2008).

[27] Jorge Palacios Treviño, Tratados. Legislación y práctica en México 183 (4th ed. 2007).

law and domestic law has been traditionally encompassed by two main conflict theories, known as the monist and dualist approaches. Broadly speaking, the former posits that both domestic and international law are part of a single system in which international law prevails; the latter postulates that the two systems represent two separate bodies of law with no need by either to justify its existence vis-à-vis the other.[28] On the whole, the debate has focused on the impact of international legal regulations on a given system of domestic law; that is to say, with a focus on normative hierarchy.[29]

Beyond the theoretical importance of the dualist-monist dichotomy, most writers would agree that international law does not exist to be ignored by States, but rather to be adopted and put into effect domestically. Although this can be achieved in diverse ways, discussions have focused on the need to evaluate how international provisions are implemented in specific domestic legal systems a process that has been described as the incorporation, adoption and transformation of internal law.[30] The diverse ways in which international provisions can be incorporated depend greatly on the system of domestic law itself: it is very much a matter of constitutional law. This, in turn, depends on the interpretation and practice of law in each specific State.

For instance, some legal regimes (*e.g.*, Canada) embrace the constitutional principle that no treaty is self-executing,[31] which means that international treaties are considered neither law nor a source of domestic law. As the treaty-making process is executive by nature, and lawmaking is performed by legislatures, the executive branch cannot *ipso facto* make laws; for this reason, treaties "must not be law." As a result, treaties require, for instance, primary legislation or statutes that "effectively discharge the state's treaty-derived obligations" to take full legal effect under Canadian law.[32] A similar example can be found in England, where international agreements become part of law only after they are given effect by Parliament. How treaties are made, ratified and implemented is considered by courts as a matter pertaining to the executive branch of government. For this reason, legislation enacted by Parliament is

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[28] For a more detailed description on these two schools of thought, see Ian Brownlie, Principles on Public International Law 31-3 (7th ed. 2008); Mathias Herdegen, Derecho internacional público 166-68 (Marcela Anzola trans., 2005).

[29] *See* Palacios, *supra* note 27, at 189; Bernardo Sepúlveda, Derecho internacional 67 (20th ed. 2000).

[30] In this respect, see Brownlie, *supra* note 28, at 41.

[31] In this context, "self-executing" refers to the principle adopted by a system of law on whether international law requires some sort of incorporation through domestic legislation in order to take effect locally. It does not describe the nature (self-executing or otherwise) of the provisions themselves.

[32] Besides conventional law, the Canadian reception system also contemplates that rules of customary international law may be directly incorporated into the common law without any legislative action. For more on this, see Gib Van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 Val. U. L. Rev. 927, 927-28 (2010).

required: "In England… the conclusion and ratification of treaties are within the prerogative of the Crown… and if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent. As a consequence treaties are only part of English law if an enabling Act of Parliament has been passed."[33]

On the other hand, certain systems of domestic law adopt the rule that when a treaty is adopted pursuant to the Constitution then no enacted legislation is required (self-executing principle); as a result, courts and tribunals are automatically bound.[34] Once the treaty has been concluded and ratified by the executive branch, it becomes law, enjoying full implementation within the legal system. In these cases, the executive branch implements the international agreement[35] after being officially published. In so doing, it may make secondary or subordinate legislation (*e.g.*, regulations, decrees, rules, statutory instruments, or their equivalent) in order to flesh out a norm, or simply, to make the agreement fully effective.

This process most closely resembles Mexico's legal system. Once a treaty is ratified, it becomes part of Mexican law[36] and takes full effect upon being officially published. Under this system, treaty provisions must comply with the Mexican Constitution; in cases of conflict, however, the treaty may not be ratified unless the executive decides otherwise due to its special significance. In these cases, the Constitution must be subsequently amended.[37] While Senate approval is constitutionally required before a treaty may be ratified,[38] it never attains the formal *status* of statute or law, as lawmaking (i.e., primary legislation) is reserved solely to the Legislative Branch through the intervention of both chambers, the Senate and the Chamber of Deputies. Certainly,

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[33] See Brownlie, *supra* note 28, at 45. Apart from the conventional issue, it must be said that something different occurs when it comes down to customary international law, which may be directly incorporated by the common law as part of English law. Here, as it happens in Canada, no legislative intervention is required.

[34] *See id.*, at 47-9.

[35] *See* Sepúlveda, *supra* note 29, at 75.

[36] Article 133 of the Mexican Constitution states that the Constitution, Congressionally-passed laws and treaties reached pursuant to the Constitution comprise the *Supreme Law* of the Union.

[37] For more information on this, see Palacios, *supra* note 28, at 198-99.

[38] According to Article 76 (I) of the Mexican Constitution, the Senate has exclusive powers to approve all treaties celebrated by the Executive. Once a multilateral treaty is approved by the Senate, the Executive usually publishes the act of approval making reference to the treaty but without publishing its contents. The Executive then elaborates the instrument of ratification and proceeds to make deposit of this instrument in the international organization designated for this purpose. It is a common practice that only after the treaty enters into force internationally the Executive publishes the contents of the entire treaty, thus beginning legal implementation at the national level. For more details, see César Nava Escudero, *Guía mínima para la enseñanza del derecho internacional ambiental en México*, 113 Boletín Mexicano de Derecho Comparado 125, 143-44 (2005).

Congress may pass laws regardless of the existence of treaties; however, when a treaty does exist, legislation cannot contravene it. With or without primary legislation, the executive branch can implement international agreements by means of secondary or subordinate legislation, particularly by executive decrees.

Pursuant to this reasoning, it can be argued that irrespective of the means utilized for implementation, international law encourages States to amend constitutions, enact legislation, and adopt new ways for judicial adjudication. This can take the form of constitutional and statute amendments, the enactment of new laws, and the issuance of secondary legislation. To a certain extent, this explains why domestic law within States has expanded. In fact, for certain countries, international law has become the main engine for legal transformation in the field of environmental law.[39]

As much as international provisions stimulate continual constitutional and legal reform, however, the development of domestic law does not respond solely to international influence. While this may not be surprising (as domestic law clearly evolves with or without international law) it is interesting to note that even as international commitments exist, local circumstances tend to influence constitutional change and enactment of new legislation much more than international law. In these situations, any or all of the following may occur:

— Only after internal changes take place can international treaties (including legal-binding instruments) be incorporated as part of domestic law. This in itself does not guarantee, however, that the spirit and substance of international provisions are adopted by a State.
— If reform of one or several areas of domestic law takes place as a result of internal factors, the wording of the modifications may differ significantly from that obtained in the international text. If the writings of each instrument are compared, the domestic provisions could appear vague, confusing or even deceptive.
— As a result, States may be unable to comply with international commitments and, as a result, conflicts between international and national law may arise. For this reason, domestic legal reforms may not always conform to international provisions.
— Finally, constitutional amendments are often completely unrelated to either international provisions or internal demands.

[39] This situation was thoroughly documented at the beginning of this century in the case of the Latin American and Caribbean region. *See* Programa de las Naciones Unidas para el Medio Ambiente, el desarrollo del derecho ambiental latinoamericano y su aplicación. Informe sobre los cambios jurídicos después de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo 1992, 20 (2001). Not too much has changed since this report was published.

One example that falls within this category is the Mexican constitutional amendment of 2001 regarding the recognition of the environmental rights of indigenous peoples and their communities. As we shall see below, *i*) a major constitutional reform in Mexico occurred in 2001 regarding indigenous environmental rights; *ii*) although there are some similarities in the wording of certain constitutional provisions *vis à vis* international instruments, others diverge, giving the impression that some of them were intentionally and/or maliciously worded in the Mexican Constitution, in particular regarding the protection and effect of indigenous environmental rights and natural resources; *iii*) the origins of this reform only came about after the emergence of two major internal events despite the existence of prior international instruments adopted by Mexico; and *iv*) while international regulations advance and Mexico continues to adopt international agreements regarding these matters, no constitutional reforms to improve the current situation have been proposed, discussed or approved by the central government or legislature.

IV. The 2001 Constitutional Amendment

On August 14, 2001, the Political Constitution of the United Mexican States (hereinafter referred to as the "Mexican Constitution") underwent a profound transformation with respect to indigenous peoples' affairs. For the first time in contemporary Mexican history, a major constitutional reform recognized the existence of indigenous peoples *and* indigenous communities, providing for a series of rights to which they are entitled and a set of obligations for the federal, state and municipal authorities.

The main provision prior to the 2001 amendment (*i.e.* Article 4, first paragraph, amended in 1992)[40] made reference to indigenous peoples but not "communities," and instead of properly recognizing their rights, simply stated that a federal law or statute would protect and promote the development of their languages, culture, customary practices, resources, ways of social organization, as well as providing limited access to local and federal justice.

Some scholars have acknowledged that two of the most important reasons for including indigenous peoples at the constitutional level in 1992 resulted from the fraudulent presidential elections in 1988 and/or pressure to do something regarding the "celebration" of 500 years of the "discovery" of the Americas by Christopher Columbus in 1492. These reasons led to a description of this reform as an *opportunist amendment* and a political declaration of *goodwill*.[41]

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[40] This amendment was made to the Mexican Constitution on January 28th, 1992. A few days before, on January 6th of the same year, another amendment —quite trivial and shortsighted, in fact— was made to the Constitution regarding the protection of the integrity of the lands of indigenous groups by statute. See Constitución Política de los Estados Unidos Mexicanos [Const.], art. 27 (VII) para. 2.

[41] *See, e.g.*, González, *supra* note 1, at 215; Adelfo Regina Montes, *San Andrés: el lugar de las*

Whereas indigenous rights (environmental or otherwise) were mentioned, they were never formally recognized and —most importantly— never went into full effect, as the Mexican Congress failed to pass any statute after the 1992 amendment.

1. *Comments on the Content. A Few Notes on the Relationship between International and Constitutional Provisions*

Contrary to the 1992 constitutional reform, the 2001 amendment states that either or both categories, *indigenous peoples* and/or *indigenous communities*, are entitled to certain rights and subject to certain obligations. These two categories are defined in Article 2 (paragraphs two, three and four) as follows:[42]

> The Nation has a multicultural composition, originally sustained on its indigenous peoples, who are those regarded as indigenous on account of their descent from the populations that originally inhabited the Country's current territory at the time of colonization, who retain some or all of their own social, economic, cultural and political institutions.
>
> The fundamental criteria to determine to whom the provisions of indigenous people apply shall be the self-identification of their indigenous identity.
>
> Those communities which constitute a cultural, economic and social unit settled in a territory; that recognize their own authorities according to their uses and customs are the ones that comprise an indigenous folk.

It must now be taken into account that the 2001 constitutional change (a) explicitly recognizes indigenous environmental rights; (b) refers to natural resources; (c) includes concepts and issues closely linked to environmental affairs (specifically to the land or areas inhabited by indigenous peoples); and (d) mentions other related issues such as human rights. Article 2 (A. II, V and VI) states:

> A. This Constitution recognizes and protects the right to self-determination of indigenous people and communities and, consequently, their right to autonomy, so that they may:
>
> …
>
> II. Enforce their own legal systems to regulate and solve their internal conflicts, subject to the general principles of this Constitution, respecting constitutional rights, human rights, and in a relevant manner, the dignity and integrity of women. The Law shall establish the cases and validation procedures by the corresponding judges or courts.

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muchas verdades y de los muchos caminos, *in* Acuerdos de San Andrés 273 (Luis Hernández Navarro & Ramón Vera Herrera comps., 1998).

[42] Constitutional texts in English have been taken from Mexican Supreme Court, Political Constitution of the United Mexican States (2d ed., 2008).

> …
>
> V. Maintain and improve their habitat and preserve the integrity of their lands as provided in this Constitution.
>
> VI. Attain preferential use and enjoyment of any natural resources located in the sites inhabited and occupied by the communities, save for the ones pertaining to strategic areas as provided in this Constitution. The foregoing rights shall be exercised respecting the nature and classes of land ownership and land tenure set forth in this Constitution and the laws on the matter, as well as the rights acquired by third parties or by members of the community. To achieve these goals, communities may constitute partnerships under the terms established by the Law.

Other constitutional provisions, though not considered rights *per se*, refer to governmental "obligations" or "tasks," to establish institutions and develop policies that help facilitate the full application and effect of indigenous rights, including those related to environmental matters. In addition, the Mexican Constitution makes reference to specific authorities' obligations in relation to concepts or issues strictly linked to certain environmental matters, such as health and sustainable development. Article 2 (B. III, V and VII) states:

> B. In order to promote equal opportunities for indigenous people and to eliminate any discriminatory practices, the Federation, the Federal District, the States and the Municipalities, shall establish the institutions and shall determine the policies needed to guarantee full force and effect of indigenous people's rights and the comprehensive development of their towns and communities. Such policies shall be designed and operated jointly with them.
>
> In order to decrease the needs and lags affecting indigenous towns and communities, authorities are obliged to:
>
> ……
>
> III. Assure effective access to health services by increasing the coverage the national system of health, but benefiting from traditional medicine, and also to support better nutrition for indigenous people through food programs, especially for children.
>
> ……
>
> V. Foster the incorporation of indigenous women to development by supporting productive projects, protecting their health, granting incentives to privilege their education and their participation in decision making processes regarding community life.
>
> ……
>
> VII. Support productive activities and sustainable development of indigenous communities through actions aimed at, allowing them to attain economic self-reliance, applying incentives for public and private investments which foster the creation of jobs, incorporating technology to increase their own productive capacity, and also insuring equitable access to supply and marketing systems.

The existence of several constitutional provisions regarding indigenous environmental rights leads us to wonder to what extent international law in-

fluenced the process for drafting these reforms. As pointed out above, the influence of international treaties can be seen in the texts of several constitutional provisions. For instance, similar texts on the definition of "indigenous peoples" are reflected in the Mexican Constitution and in the C169 (see Table 1).[43]

Nevertheless, many existing environmental rights and mandates contained in international law have been vaguely stated, inadequately worded, or deceptively included in the Mexican Constitution.

Table 1. Mexican Constitution and the C169 on the Definition of Indigenous Peoples

Mexican Constitution	*Indigenous and Tribal Peoples Convention*
Article 2, paragraphs two and three The Nation has a multicultural composition, originally sustained on its indigenous peoples, who are those regarded as indigenous on account of their descent from the populations that originally inhabited the Country's current territory at the time of colonization, who retain some or all of their own social, economic, cultural and political institutions. The fundamental criteria to determine to whom the provisions of indigenous people apply shall be the self-identification of their indigenous identity.	Article 1, 1(b) and 2 1. This Convention applies to: … (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. … 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

At least three examples explain the latter. First, the case where State duties exist regarding the respect, preservation and maintenance of traditional knowledge, innovations and practices of indigenous peoples and their communities in relation to the conservation and sustainable use of biological di-

[43] The Convention 169 entered into force internationally on September 1991; Mexico ratified it one year before, on September 1990.

versity and the equitable sharing of the benefits arising from the use of such traditional knowledge, innovations and practices, all of which are derived from the 1992 Convention on Biological Diversity.[44] Despite the ambiguity and flexibility of the international legally-binding agreement that allows each signatory State to take action "as far as possible" and "as appropriate," the Mexican Constitution does not even bother to mention the relationship between indigenous peoples and biological diversity. It may be argued, however, that some recognition exists of the latter, as the Constitution addresses the existence of indigenous rights to natural resources. The concept of biodiversity is commonly used to describe "species," and this notion (which refers to organisms such as plants and animals) is one of the many components usually included within the definition of "natural resources." Even so, the full implementation of indigenous rights to natural resources (as discussed below) is not only too general but overly restrictive. In sum, let us emphasize that the Constitution failed to take into account this particular provision of a legally-binding international instrument ratified by the Mexican State.

A second case involves the limited recognition of ownership rights of indigenous communities. The C169 clearly states in Article 14 that "the ownership and possession rights of peoples who inhabit lands which they have traditionally occupied shall be recognized." Despite the recognition contained in Article 2 (A. V) of the Constitution regarding indigenous peoples and communities' right to preserve the integrity of their lands, it fails to recognize indigenous *communities* as subjects of law pursuant to Article 2, last paragraph of the same Constitution. That is to say, indigenous communities are constitutionally regarded as "entities of public interest" under the tutelage or protection of the State; this means they have no legal capacity (unless legally granted) to fully exercise their ownership rights.

Finally, another example where no clear evidence is present of international treaties influencing domestic law, can be seen in the wording of the 2001 constitutional amendment. This issue regards the removal of indigenous peoples from their lands in accordance with Article 16 of the C169.

> Article 16
>
> 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
>
> 2. When the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. When their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
>
> 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

[44] The Convention on Biological Diversity entered into force internationally on December 1993; Mexico ratified it on February 1993.

> 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express as preference for compensation in money of in kind, they shall be so compensated under appropriate guarantees.
>
> 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Pursuant to the content of the C169, the text of Article 2 of the Mexican Constitution does not include one single reference to this effect. It may be argued that these rights, *i.e.* those prohibiting that indigenous peoples be removed from their lands or otherwise displaced without their free and informed consent, as well as other related procedures, belong to states and municipalities' jurisdiction rather than to the federal government's, and thus they have not been explicitly mentioned in the Constitution. It could also be argued that the Constitution addresses these issues by determining that they be decided by statutes but not by the Constitution *per se*. In any case, the fact is that no provision makes clear reference to this matter. Again, international agreements seem to have had little real impact on the wording of these constitutional provisions.

In sum, is there any need to incorporate the texts of legally binding international treaties into the Mexican Constitution given the fact that under Mexican law, ratified treaties are part of domestic law? For example, the C169 became part of Mexican law upon ratification (*i.e.* with no need to be incorporated) and enjoyed full implementation.[45] In fact, no requirement exists that the Constitution include, either wholly or in part, the contents of a ratified treaty, especially regarding the recognition of rights, mainly because the Constitution and international treaties often complement each other.[46] This does not mean, however, that the Constitution shall never or cannot willingly incorporate international regulations. Moreover, it does not mean that if incorporation is not realized, the Constitution can ignore or go against

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[45] In this respect, see, for example, Patricia Kurczyn Villalobos, *Reflexiones sociojurídicas acerca de las reformas constitucionales "en materia indígena,"* in Miguel Carbonell & Karla Pérez Portilla, Comentarios a la reforma constitucional en materia indígena 83-4 (2001).

[46] For a good explanation of this, see Manuel González Oropeza, *Aplicación del Convenio 169 de la OIT en México*, *in* Estudios en homenaje a don Jorge Fernández Ruiz. Derecho constitucional y política 259 (David Cienfuegos Salgado & Miguel A. López Olvera coords., 2005); Manuel González Oropeza, *Nueva constitución y nuevo derecho indígena*, *in* Constitución y derecho indígenas 244-46 (Jorge A. González Galván coord., 2002). Additionally, one should take into account that the Constitution has been recently amended (June 2011) and has stated in Article 1, second paragraph, that any human rights' regulations shall be interpreted in accordance with both the Constitution and treaties. As interesting as the human rights side of indigenous environmental rights may appear, this article does not discuss this issue.

international law (even if some may correctly argue that it may) through an inadequate wording of an amendment.

In the end, failure to consider international law poses the risk of legal conflict based on domestic wording that differs or runs counter to provisions agreed upon internationally. In the long run, failure to adhere to the provisions of international agreements underlies the notion that international law must have a decisive impact on constitutional and legal modifications made in individual States.

2. *Understanding the Origins. The Zapatistas and the Changing Political Scenario*

In spite of the fact that Mexico had ratified before the 2001 constitutional amendment two "hard law" agreements (*e.g.* the CBD and the C169) as well as other non-legally binding instruments (such as the Rio Declaration and Agenda XXI) —all related to indigenous environmental rights— the origins of such amendment are more directly related to domestic events than to international commitments. The two main reasons for the Mexican constitutional reform were, firstly, the 1994 indigenous uprising in the Southern Mexican state of Chiapas; and, secondly, the rise to the presidency of the right-wing party *Partido Acción Nacional* (hereinafter called the "PAN"), in effect ending more than 70 years of national rule by the alternatively left- center- right-wing party *Partido Revolucionario Institucional* (hereinafter called the "PRI").

On January 1st, 1994, a guerrilla movement in Chiapas, the Zapatista Army of National Liberation[47] (hereinafter called "EZLN"), comprised mainly of indigenous groups, urban intellectuals such as *Subcomandante Marcos*, their chief spokesman, and supported by local liberation theology priests, declared war (through the First Declaration of the Lacandon Jungle) on the Mexican Government and Army. Through their slogan "Today we proclaim: enough is enough!" the EZLN declared at the beginning of its first declaration (six in total) that indigenous peoples had no health care, no land and —among other environmentally-related issues— demanded the end of the exploitation of natural resources in areas controlled by them.[48] The government responded by sending in thousands of troops to combat the indigenous insurgency and some areas of Chiapas were bombarded.

After twelve days of armed conflict between the Zapatistas and the Mexican army, then President Carlos Salinas de Gortari (1988-1994) announced a unilateral ceasefire, and "peace talks" between the EZLN and the Federal Government began. After two years of negotiations, representatives of both the EZLN and the government agreed in February 1996 on a document called the San Andrés Accords (hereinafter called the "ASA")[49] which

[47] In Spanish, *Ejército Zapatista de Liberación Nacional*.

[48] *See* First Declaration of the Lacandon Jungle, 1993.

[49] In Spanish, *Los Acuerdos de San Andrés Larráinzar.*

included, among other things, rules for recognizing the rights and cultures of indigenous peoples, including various environmentally-related rights. As first conceived, the ASA was a framework that served as the basis for the creation of a legal document intended to reform the Constitution, being one of many legislative steps in the negotiation process.[50]

By the time the ASA was signed, Ernesto Zedillo Ponce de León had already assumed power, and became the last PRI President of Mexico, 1994-2000. But even after voluminous negotiations and the government's apparent commitment to reach an accord, it became clear that there was no real intention to peacefully resolve the conflict.[51] Indeed, the Zedillo administration failed to fulfill basic commitments signed as part of the ASA; as a result, the armed conflict continued. In fact, the conflict continued throughout the remainder of his administration.

In the face of growing conflict and apparent willingness on the part of the government to secure an "ongoing peacekeeping process," the Mexican Congress presented in November 1996 a proposal for a constitutional amendment —commonly known as the Cocopa Law—[52] which, though not a formal legal initiative, was nonetheless referred to as a "Law." While the Zapatista guerrilla accepted the terms in which the Cocopa Law had been drafted, the Federal Government refused; as a result, the process effectively ended.[53]

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[50] A detailed description of the contents and scope of the San Andrés Larráinzar Accords can be found in José R. Cossío Díaz, Los problemas del derecho indígena en México 43-136 (2002).

[51] It is now well documented that during and after the 1995-1996 negotiation process, the Mexican Army did not leave their designated detachments in Chiapas and did actually carry out a series of hostile actions against indigenous peoples and Zapatista sympathizers. Military harassment provoked, among other consequences, the removal of certain indigenous peoples from their lands. Side by side, the Federal Government persecuted and detained non-indigenous persons because of their political relationship with the Zapatista movement: the most famous, to name a few, were Javier Elorriaga, María Gloria Benavides (Elisa), and Fernando Yáñez, allegedly accused of being members of the EZLN. Additionally, more than sixty foreign Zapatista supporters (mainly from Canada, France, Italy, Norway, Spain, Switzerland and the United States) were deported. Information can be obtained from human rights organizations (such as Human Rights Watch or Amnesty International). For a historical review, the following are recommended: Gloria Muñoz Ramírez, *EZLN: 20 y 10 el fuego y la palabra, in* La Jornada-Revista Rebeldía (2003); Manuel Vázquez Montalbán, Marcos: el señor de los espejos (1999).

[52] Cocopa stands for Commission of Concord and Pacification, which in Spanish means *Comisión de Concordia y Pacificación*, created in 1995 by the Legislative in order to ameliorate the conflict. This Commission was integrated by representatives (senators and deputies) of the three major political parties: the aforementioned PRI and PAN, and the left-wing *Partido de la Revolución Democrática* (PRD).

[53] The Federal government rejected the Cocopa Law in January 1997. From then onwards other similar legal documents were elaborated: one by the Zedillo administration, another by the PAN, and another by the Green Party. None of them succeeded. For a detailed evaluation of the significance of the Cocopa Law, see César Nava Escudero, *La primera reforma constitucional*

Environment-related issues such as the right to own land, among other matters, never gained the government's support.

> In January 1996 an important agreement on a future constitutional acknowledgment of Indian rights was reached, but negotiations concerning political reform and economic matters ultimately failed. A difficult issue seemed to be the claim by the Indian communities to keep ownership of their land, including their underground resources, a demand adamantly rejected by the Mexican government since it is widely believed that Chiapas is rich in hydrocarbons below ground.[54]

After several years, the 1996 Cocopa Law (which was founded on many but not all the principles and mandates sketched out in the ASA)[55] began to serve as the framework for the realization of the 2001 constitutional amendment. As described below, however, Mexican legislators made significant changes to the Cocopa Law when it reached Congress at the end of 2000; as a result, the 2001 amendment failed to follow or even respect the substance of what had been agreed upon in 1996.

For this reason, many commentators —both EZLN sympathizers and otherwise— have generally agreed that, irrespective of the importance attached to international law, the current provisions came about as the result of the 1994 indigenous uprising.[56]

The second source of the 2001 constitutional amendment was the new Mexican political scenario at the end of the twentieth century. While the Zedillo administration completely opposed any explicit recognition of indigenous rights at the constitutional level during his six-year term, the elections of July 2000 emerged as a unique opportunity not only to end more than 70-years of rule by the same political party (*PRI*), but to change things for indigenous peoples and their communities.

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ambiental del nuevo milenio: el acceso de los pueblos indios a los recursos naturales, *in* Derecho comparado Asia-México. Culturas y sistemas jurídicos comparados 429-36 (José María Serna de la Garza coord., 2007).

[54] Manuel Castells, The power of identity 86-6 (2d ed. 2004).

[55] Some writers still believe that the Cocopa Law fully included all the contents of the ASA; see, for example, Oswaldo Chacón Rojas, Teoría de los derechos de los pueblos indígenas. Problemas y límites de los paradigmas políticos 146 (2005). However, I believe this point of view is far from realistic, at least in relation to such environmental issues as access to natural resources.

[56] This, of course, does not undermine previous local indigenous movements fighting for recognition of their existence and rights. Some sources that acknowledge the decisive role of the 1994 Zapatista guerrilla in the reform of the Mexican Constitution are Miguel Carbonell, Los derechos fundamentales en México 1003 (2005); Cossío, *supra* note 50, at 145; Chacón, *supra* note 55, at 149; González, *supra* note 1, at 328-29; González Oropeza, *in* Estudios en homenaje a don Jorge Fernández Ruiz. Derecho constitucional y política, *supra* note 46, at 258-60; Kurczyn, *supra* note 45, at 69-70; Marcia Muñoz de Alba Medrano, *La reforma indígena y el acceso a los servicios de salud*, *in* Carbonell & Pérez, *supra* note 45, at 128.

Indeed, the strongest opposition candidate at that time, Vicente Fox Quesada from the right-wing PAN, promised during his campaign to create the political conditions necessary to peacefully resolve the Chiapas conflict.[57] Like most politicians, however, Fox made big and splashy campaign promises, including his infamous declaration that he could resolve the Chiapas conflict in "fifteen minutes"!

Vicente Fox (2000-2006) ultimately won the general elections and publicly declared that his first duty as the President of Mexico would be to send to Congress the Cocopa Law and continue to fight for a major constitutional reform of indigenous rights and culture.[58] The incoming President kept his promise and, after only a few days of taking office, sent the Cocopa Law to Congress, specifically to the recently-elected Senate. For this reason, the Cocopa Law immediately became a reference point for the elaboration of the legal initiative to reform the Mexican Constitution.

During the following months, however, the Senate profoundly altered the Cocopa Law, re-drafting the entire document and creating in effect a new one, which it finally approved in April 25th, 2001. This was subsequently sent to the Chamber of Deputies for revision and, after a short three-day period for debate, was approved on April 28th; it should be noted that some left-wing legislators approved the new proposal.[59]

Inexplicably, the Zapatistas were never consulted during this process. This meant that the Mexican State clearly failed to conform to that established in the C169 (and even the Agenda XXI). When the final draft was ready to be sent to the Federal States for their legal consent at the end of April, the EZLN decided to reject the document.

With no political will left to approach the EZLN during the legislative discussions, Vicente Fox finally decided to promulgate the Senate's proposal for a constitutional amendment on August 3rd. This was then published a few days later, on August 14th.

As much as the 2001 amendment explicitly recognized diverse indigenous environmental rights, the published text differs considerably from commitments agreed to between the EZLN, the prior Congress, and the Federal Government pursuant to that established in the ASA and the Cocopa Law. In the end, the Senate's final proposal took into account certain provisions of the Cocopa Law (in a partial and fragmented way) but failed to integrate many commitments outlined in the ASA.

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[57] This commitment (together with ten others) was made on May 2000 during a speech given in Mexico City. More information can be obtained at www.mexicomaxico.org/Voto/4A/FoxCompromisos.htm#DIEZ.

[58] This commitment was publicly announced on December 1st 2000 before the Congress (Senators and Deputies) during the first day of his six-year mandate. The exact words of his speech can be found in Nava Escudero, *supra* note 53, at 433.

[59] Some opposing views can be acquired from González Oropeza, *in* Estudios en homenaje a don Jorge Fernández Ruiz. Derecho constitucional y política, *supra* note 46, at 258-60.

For instance, the 2001 constitutional amendment established a number of restrictions for full implementation in regard to access to natural resources, most of which were not part of the Cocopa Law and/or the ASA; in addition, such access was not even considered collective. In fact, the ASA established a *collective* and *preferential* access to natural resources; for its part, the Cocopa Law recognised the former but not the latter. Not only did the 2001 amendment fail to consider the collective nature of this right, but also included preferences subject to many legal restrictions.[60]

Pursuant to Article 2 (A, VI), the amendment —as re-written by Congress— nullified any realistic chance for exercising preferential (and collective) access rights to natural resources. The main limitations to this right include: *i*) it is reserved to indigenous *communities* but not to indigenous *peoples*; *ii*) it can only be put into effect as long as ownership and land tenure pursuant to that set forth in the Constitution is respected; *iii*) the communities can use and enjoy resources located only on sites they inhabit or occupy; *iv*) they are not allowed to manage natural resources in strategic areas (*i.e.* oil, hydrocarbons, and so on); *v*) they must respect rights acquired by third parties or by members of the same community; *vi*) indigenous communities are not subjects of law but entities of public law; and *vii*) recognition of the latter are subject to provisions established under local and state law. I have argued elsewhere that limitations imposed to exercise a supposedly "preferential right" implies the creation of a non-existence right or, rather, a *virtual right*.[61]

Shortly after the publication of the 2001 amendment, more than 330 local authorities (municipalities) that govern in areas mainly inhabited by indigenous peoples went to the Supreme Court to contest alleged breaches in the amendment procedures pursuant to that established in the Constitution itself. Unbelievably, the Supreme Court claimed that it lacked the authority (competence) to review the amendment and decide the issue, arguing that the Legislature was a sovereign power.[62] This led to a "rule of law crisis" as the decision by the majority of Supreme Court justices implied that the constitutional amendment process could be realized without any revision! As a result, a major legal uncertainty suddenly arose: if the nation's highest court of law had no authority to review the constitutional reform process, then who does?

Since that time, indigenous and non-indigenous unrest (particularly the Zapatista movement and their supporters) —with unrelenting focus on the procedures and contents of the 2001 constitutional amendment— provoked a complete break-off of relations between EZLN representatives and the Federal Government.

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[60] For a comparative exercise on this particular environmental issue, see Nava Escudero, *supra* note 53, at 436-439.

[61] A more detailed description of this critique can be found at César Nava Escudero, *De los derechos indígenas ambientales o del por qué existen preceptos constitucionales virtuales*, *in* Derechos humanos y medio ambiente 101- 22 (Jorge U. Carmona & Jorge M. Hori Fojaco coords., 2010).

[62] González, *supra* note 1, at 351-52.

Several proposals have been subsequently made (unsuccessfully) to revise the entire Mexican legal system (including Article 2 of the Constitution)[63] in order to secure and safeguard the rights —both environment-related and otherwise— of indigenous peoples and their communities.

> The Special Rapporteur's mission to Mexico in June 2003… had found that human rights violations occurred mostly in the frequent local and municipal agrarian and political conflicts, and in the administration of justice, which was seriously deficient. The 2001 reform of the Constitution had not met the aspirations and demands of the indigenous movement and had also failed to establish constructive dialogue between indigenous representatives and the government of the State of Chiapas, where there was ongoing internal conflict, triggered by the Zapatista uprising in 1994. The Special Rapporteur recommended that the Government of Mexico should pay urgent attention to preventing and resolving such social conflict, that it should carry out judicial reform to guarantee protection of indigenous peoples' human rights and that it should revise the constitutional reform of 2001 so that such rights could be safeguarded and peace in Chiapas could be achieved.[64]

The Fox administration's "interest" in engaging the Zapatistas began to fade after the Supreme Court reached its decision. Another election took place in 2006 and, as a result, the same political party (PAN) remained in office —despite allegations of electoral fraud.

Is the current administration under President Felipe Calderón Hinojosa (2006-2012) committed to revising (or proposing to Congress) recommendations for eventually amending the 2001 constitutional amendment? Is there any interest in addressing these topics? These are difficult questions to answer in light of the Mexican government's double-talk regarding the Zapatista conflict and nearly all environment-related matters —including the catchy worldwide climate change campaign which has become the Federal Government's main political-action propaganda.

On the one hand, Calderón's administration has admitted that the so-called changes made to the Constitution on August 2001 do not resolve the armed conflict nor respond to the central claims of indigenous peoples in Mexico; this amendment has been labelled *legislative simulation* whereby no

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[63] In this respect, see the Report elaborated by the FIDH, an international non-governmental organization on human rights (created in 1922 and founded by Pierre Dupuy); after a thorough revision, it concluded that the 2001 constitutional reform does not permit full implementation of indigenous peoples rights because it fails to conform either to domestic expectations or recent international norms. Federación Internacional de los Derechos Humanos, Informe 331/3. México. Los pueblos indígenas en México 44 (June 2002).

[64] Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Australian Indigenous Law Reporter 102, 17, 9(1) (2005) *available at* http://www.austlii.edu.au/au/journals/AUIndigLawRpr/2005/17.html.

indigenous rights have been categorically recognized.[65] On the other hand —and despite the admission of a need to revise the 2001 constitutional amendment— the current administration has not done anything to revive the peace process; as a consequence, no formal talks have been initiated with the EZLN.

Is there any hope of reviving the peace process through a constitutional reform initiated by the Executive branch and consultations with the indigenous movement? This is difficult to envision, as President Calderón has devoted five years of his six-year mandate in fighting organized crime (his so-called "war on crime") and, as a result, has ignored a political opportunity to resume momentum gained on behalf of indigenous rights in Mexico.

At the time of this writing (June 2011), one thing is certain: the conflict considered to be one of the two main motivating forces for the 2001 constitutional amendment (whose content apparently permits full application of indigenous environmental rights) has not yet been resolved. In spite of new federal statutes, secondary legislation, and legal changes made at the local level since the reform of the Mexican Constitution,[66] the fact remains that the Zapatistas have independently started to create and build government structures and new ways of governance, as well as the means for protecting their environment, lands, habitat, and natural resources.

V. Conclusions

Mexico has adopted and ratified international agreements (both "hard" and "soft" law) that have established the environmental rights of indigenous peoples and their communities as well as duties for signatory States. Although no constitutional obligation exists to incorporate treaties (or their contents) into domestic Mexican law —since they are deemed part of domestic law immediately upon ratification— the Mexican government passed a 2001 constitutional amendment on indigenous environmental rights.

These constitutional changes, however, blithely ignored the spirit and substance of important indigenous environmental rights provisions contained in several international agreements; e.g., the C169 and the CBD. In fact, the way in which these rights have been worded in the Mexican Constitution gives the impression that constitutional amendments —when compared to international treaties— often express divergent purposes and goals as a result of vagueness, and inadequate wording.

Some examples used in this article to explain this are: *i*) no constitutional recognition of the relationship between indigenous peoples and biological diversity; *ii*) the lack of recognition of indigenous communities' right of owner-

[65] *See* Secretaría de Medio Ambiente y Recursos Naurales, Programa de los Pueblos Indígenas y Medio Ambiente 2007-2012, 22 (2009).

[66] For some examples, see Nava Escudero, *supra* note 61, at 113-15.

ship, as they are not considered subjects of law but *entities of public interest*; and *iii*) the lack of clear and explicit references to the rights of indigenous peoples and their communities in relation to the government's duty to ensure that they shall not be removed from their lands without their free and informed consent.

Domestically, the 2001 constitutional amendment (which was not formally accepted by the EZLN) failed to adequately respond to indigenous demands because, paradoxically, it established a series of legal impediments to guarantee the protection and force of indigenous environmental rights to natural resources. This is but one of many instances that support the view that the only way to resolve the Chiapas conflict —and thus permit the full exercise of these rights— is for the Mexican government to begin discussion of a subsequent reform to this amendment.

The latter requires three conditions. First, indigenous peoples must be consulted (including those that comprise the Zapatista guerrilla); second, prior agreements (*i.e.* the 1996 San Andres Accords and the 1996 Cocopa Law) should be properly integrated into the Mexican constitutional and legal (both federal and local) regime; third, proposals to change the Mexican Constitution should not contravene or ignore, as they surely have so far, any international provision contained in documents previously adopted or ratified by Mexico.

Although international law's influence (albeit minimal) on the Mexican Constitution is reflected in parts of Article 2, the two main sources for the 2001 constitutional reform were (a) the 1994 EZLN uprising; and (b) the fall from power (by means of democratic elections) of a political party that had ruled Mexico for over 70 years. Had it not been for the indigenous uprising and political momentum achieved at the beginning of the millennium, indigenous environmental rights would have never been recognized at the constitutional level. This is not necessarily good news, however, for indigenous peoples and indigenous communities in Mexico. The road to the full exercise of indigenous peoples' environmental rights is still long and fraught with legal obstacles.

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