

IDPC Advocacy Note

Bolivia's legal reconciliation with the UN Single Convention on Narcotic Drugs

July 2011

Introduction

On 29 June 2011, the Bolivian government denounced the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol, indicating its intention to re-accede with a reservation allowing for the traditional use of the coca leaf. This decision was triggered by Bolivia's need to balance its obligations under the international drug control system with its constitutional and other international legal commitments. The move follows the rejection of Bolivia's proposal to amend the Single Convention by deleting the obligation to abolish coca leaf chewing (Article 49) earlier this year. For further background information, see IDPC's previous Advocacy Note – "Correcting a historical error".¹

IDPC supports the difficult decision taken by the Morales administration to respond to this situation by the most proportionate and legally appropriate means. Bolivia is attempting to balance many legal interests and has an obligation to protect its cultural and indigenous traditions. IDPC calls on the international community to abstain from any objections that could prevent Bolivia's re-accession next year.

In early July 2011, the International Narcotics Control Board (INCB) called on countries to oppose Bolivia's decision. This intervention is extremely unhelpful, and arguably an abuse of the Board's mandate.² We call on the INCB to refrain from any further attempts to influence member states' reaction to the Bolivian announcement.

Background and process

The Single Convention bans coca chewing but allowed countries a temporary exemption under Article 49 to phase out the practice within 25 years. The deadline expired in 1989 (the 1961 Convention entered into force in December 1964).

¹ International Drug Policy Consortium (January 2011), *IDPC advocacy note - Correcting a historical error: IDPC calls on countries to abstain from submitting objections to the Bolivian proposal to remove the ban on the chewing of the coca leaf*, http://idpc.net/sites/default/files/library/IDPC%20Advocacy%20note%20-%20Support%20Bolivia%20Proposal%20on%20coca%20leaf_0.pdf?utm_source=IDPC+Monthly+Alert&utm_campaign=d38ed794ec-IDPC_Special_Alert_Bolivia_proposal&utm_medium=email

² INCB Mandate and functions, <http://www.incb.org/incb/mandate.html>; International Drug Policy Consortium (February 2008), *The International Narcotics Control Board: Current tensions and options for reform*, http://www.idpc.net/sites/default/files/library/IDPC_BP_07_INCB_TensionsAndOptions_EN.pdf

Bolivia's new constitution recognizes the rights of indigenous people to use the coca leaf for traditional purposes in its natural state as part of their cultural heritage.³ The ban in the Single Convention poses a legal conflict for Bolivia which has to be resolved. In 2009, the Bolivian government began a process to remove the ban by proposing a formal amendment to Article 49 to delete references to abolishing coca leaf chewing.

The deadline to oppose Bolivia's proposal was 31 January, 2011. 18 objections⁴ were submitted to the Bolivian amendment on the basis that any minor change to the drug control treaties would undermine the entire international drug control system.⁵ Although the Economic and Social Council of the UN (ECOSOC) has not taken a formal decision to reject Bolivia's proposal – and its advisory body on indigenous peoples, the UN Permanent Forum on Indigenous Issues (UNPFII), has supported Bolivia's move⁶ – the number of objections and the fact that those included all G8 countries, appeared to be sufficient to block the adoption of the amendment. Confronted with that reality, the Bolivian government decided to withdraw from the Convention and re-accede with a reservation. The Bolivian House of Representatives approved the procedure with the adoption of a special law⁷ on 22 June 2011, which was ratified by the Senate on 28 June 2011.

On 29 June 2011, Bolivia presented a formal notification of denunciation⁸ of the Single Convention to the UN General Secretary in New York.⁹ The withdrawal enters into effect on 1 January 2012.¹⁰ Bolivia will then accede to the Convention again with a reservation on the coca leaf and its traditional uses, using the procedure established in Article 50, §3.¹¹

INCB tactics to block reform

On 5 July, 2011, the INCB Secretariat issued a press release¹² that strongly condemned Bolivia's actions. The press release noted that the "Board is of the opinion that while this step by Bolivia may be in line with the letter of the Convention, such action is contrary to the Convention's spirit. The

³ According to the 2009 Constitution: "The State shall protect native and ancestral coca as cultural patrimony, a renewable natural resource of Bolivia's biodiversity, and as a factor of social cohesion; in its natural state it is not a narcotic. Its revaluing, production, commercialization and industrialization shall be regulated by law". Constitution of the Plurinational State of Bolivia, Article 384. The Constitution came into effect on 7 February 2009, after more than 61 per cent of voters approved its text in a referendum on 25 January 2009. See: <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>

⁴ TNI Drug law reform in Latin America, *Objections and support for Bolivia's coca amendment*, <http://www.druglawreform.info/en/issues/unscheduling-the-coca-leaf/item/1184-objections-and-support-for-bolivias-coca-amendment>

⁵ Transnational Institute (March 2011), *Series on legislative reform of drug policies Nr. 11 - Lifting the ban on coca chewing: Bolivia's proposal to amend the 1961 Convention*, <http://www.idpc.net/sites/default/files/library/lifting-the-ban-on-coca.pdf>

⁶ E/2010/43-E/C.19/2010/15, Economic and Social Council, Permanent Forum on Indigenous Issues, Report on the 9th session (19-30 April 2010), http://www.un.org/esa/socdev/unpfii/documents/E_2010_43_EN.pdf

⁷ *Asamblea legislativa plurinacional de Bolivia – Proyecto de ley N° 0392/2011-2012*, <http://www.druglawreform.info/es/static/item/2602-proyecto-de-ley-no-03922011-2012>

⁸ <http://treaties.un.org/doc/Publication/CN/2011/CN.421.2011-Eng.pdf>

⁹ Press conference by Pablo Solon, Permanent Representative of Bolivia, on Bolivia's coca leaf policy, <http://boliviaun.net/cms/?p=2036>

¹⁰ See Article 46 of the UN Single Convention of Narcotic Drugs, 1961, <http://www.unodc.org/unodc/en/treaties/single-convention.html>

¹¹ The official Commentary on the 1961 Single Convention mentions explicitly that (p. 476): "By operation of article 50, paragraph 3, a Party may reserve the right to permit the non-medical uses as provided in article 49, paragraph 1, of the drugs mentioned therein, but also non-medical uses of other drugs, without being subject to the time limits and restrictions provided for in article 49", <http://www.unodc.org/unodc/en/treaties/index.html?ref=menuaside>

¹² International Narcotics Control Board (5 July 2011), *International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs*, <http://www.unis.unvienna.org/unis/en/pressrels/2011/unisnar1114.html>

international community should not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement certain treaty provisions. Such approach would undermine the integrity of the global drug control system ...” The INCB labels the step to be a “threat to the international drug control system” and even warns Bolivia “to consider very seriously all the implications of its actions in this regard”.

IDPC strongly disagrees with the unhelpfully harsh and threatening tone used by the INCB Secretariat and regards it as yet another example of its bias and lack of capacity in constitutional, international and human rights law. No reference is made to the legal conflict Bolivia needs to solve and no other solution for Bolivia is offered other than to simply adhere in full to the treaty obligations made in 1961, including the abolition of coca leaf chewing. For Bolivia that is no longer an option. It would not only force the country to violate its own Constitution, but also infringe upon numerous other international treaty obligations on human and indigenous rights.¹³ Bolivia has taken a measured, proportionate and legally appropriate step to balance multiple commitments.

Bolivia’s limited options

Bolivia’s Constitution allows for a period of four years for the government to denounce and, in that case, renegotiate the international treaties that may be contrary to the Constitution.

Apart from requesting an amendment to the Single Convention and the process of denunciation, the alternative procedure available under the treaty to rectify the erroneous ban on coca leaf chewing would be a World Health Organization (WHO) scientific review of the coca leaf classification currently placed in Schedule I of the Single Convention. Bolivia considers that the outcome of such a procedure would take too long to comply with the four-year Constitutional deadline. Moreover, given the reactions to its amendment proposal, the Bolivian government has reasonable fears that even a positive WHO recommendation to de-schedule the coca leaf would be confronted with political opposition. The procedure now set in motion is a gesture of compromise, as the reservation will only apply to Bolivia with no implications for other parties of the Single Convention.

After Bolivia deposits its instrument of re-accession with the reservation, the treaty will come into force for the country 30 days later (article 41, §2). After one month, Bolivia would formally be a state party to the Single Convention again. The accession procedure could even be initiated before the denunciation takes effect, avoiding an interim period where Bolivia would not be a treaty member.¹⁴ However, other State parties will have twelve months from the date of Bolivia’s re-accession to object to the new reservation. After those twelve months, unless one third of the parties have objected, the reservation “shall be deemed to be permitted”. In the unlikely scenario that one third or more state parties object, out of the total of 184 parties to the Single Convention as amended by the 1972 Protocol, the reservation would be considered invalid.

What would happen in that scenario is an unsettled matter in international law. Several options are mentioned by experts in the field:

¹³ See the attached backgrounder: International Centre on Human Rights and Drug Policy (1 July 2011), *Bolivia’s concurrent drug control and other international legal commitments*,

http://www.druglawreform.info/images/stories/documents/international_legal_commitments.pdf

¹⁴ <http://idpc.net/es/alerts/bolivia-solicitara-adhesion-a-convencion-de-estupefacientes-en-diciembre>

- The state's accession might be nullified and its treaty membership terminated, in the absence of a clear indication of its intent to adhere to the treaty without the reservation.
- The state might be considered a party to the treaty except for the clauses to which its invalid reservation applied.
- The reservation may be severed and the state is deemed a party to the treaty in its entirety, including the provisions covered by its now stricken reservation.¹⁵ In that case, Bolivia would probably feel obliged to denounce the treaty again.
- The final option is that it simply remains unresolved. Reservations are an important and much-used instrument in the development of international law and, in other examples, generally appear to remain in effect despite any objections brought against them.¹⁶

While it is true that the procedure of treaty denunciation followed by re-accession with reservation is a sometimes contested mechanism and rarely happens, it is considered to be a legitimate procedure in exceptional cases. Some commentators suggest that it is a valuable and important mechanism that contributes to the effective functioning of the international treaty system.¹⁷ The Bolivian case would be the first of its kind in the history of the UN drug control treaties.

Bolivia's reservation will be modelled on the one they already made when they signed and ratified the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances^{18,19}. Parties considering objecting would therefore have to explain why the reservation by Bolivia under the 1988 Convention was acceptable, while a similar reservation under the 1961 Single Convention is deemed to be a "threat to the integrity of the Conventions".

Conclusion

The Single Convention was presented at the time as a move to clarify and adapt the earlier treaties to the changes which had occurred over the years. Recalling this history should do much to remove the misplaced aura of sacred immutability that currently shrouds the contemporary UN drug control treaty framework. Regimes of all types undergo change during their existence and there is therefore nothing

¹⁵ Helfer, L.R. (2006), 'Not fully committed? Reservations, risk and treaty design', *Yale Journal of International Law*, 31(367): 379, http://www.yale.edu/yjil/PDFs/vol_31/Helfer.pdf

¹⁶ Swaine, E.T. (2006), 'Reserving', *Yale Journal of International Law*, 31(307): 307, http://www.yale.edu/yjil/PDFs/vol_31/Swaine.pdf

¹⁷ In an authoritative analysis of the denunciation/re-accession procedure from an international law perspective, Professor Laurence Helfer, Director of the International Legal Studies Program, Vanderbilt University Law School, [concludes in the Yale Journal of International Law](#) that "... a categorical ban on denunciation and re-accession with reservations would be unwise. Such a ban would ... force states with strongly held objections to specific treaty rules to quit a treaty even when all states (and perhaps non-state actors as well) would be better off had the withdrawing state remained as a party. It would also remove a mechanism for reserving states to convey valuable and credible information to other parties regarding the nature and intensity of their objections to changed treaty commitments or changes in the state of the world that have rendered existing treaty rules problematic or inapposite". See: Helfer, L.R. (2006), 'Not fully committed? Reservations, risk and treaty design', *Yale Journal of International Law*, 31(367): 379, http://www.yale.edu/yjil/PDFs/vol_31/Helfer.pdf

¹⁸ UN treaty collection register: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en#EndDec

¹⁹ In fact, the negotiations of the 1988 Trafficking Convention provided the context for a previous attempt –undertaken by Bolivia and Peru jointly- to repair the damage done by the Single Convention to Andean coca culture, resulting in the adoption of the provision that any measures "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historical evidence of such use" (article 14, §2). The possible application, however, was immediately neutralised by specifying that this could not weaken any obligations assumed in previous treaties, leading to an inherent contradiction between the 1961 and 1988 Conventions that Bolivia is now attempting to solve by adding a similar reservation to the Single Convention as the –uncontested– one they put on the record in 1988.

unique about reforming the current drug control regime and the Single Convention upon which it is based.

Member states should find a way to support Bolivia in reconciling its constitutional and treaty obligations, moving away from a rigid defence of every word of the 50-year old Single Convention, to create a drug control framework that is fit for purpose for the 21st Century. The 50th anniversary of the Single Convention this year in fact is an opportune moment to start considering a revision of some of its out-dated and misplaced provisions.²⁰

For further background information:

Correcting a historical error: IDPC calls on countries to abstain from submitting objections to the Bolivian proposal to remove the ban on the chewing of the coca leaf:

[http://idpc.net/sites/default/files/library/IDPC%20Advocacy%20note%20-%20Support%20Bolivia%20Proposal%20on%20coca%20leaf_0.pdf?utm_source=IDPC+Monthly+Alert&utm_campaign=d38ed794ec-IDPC Special Alert Bolivia proposal&utm_medium=email](http://idpc.net/sites/default/files/library/IDPC%20Advocacy%20note%20-%20Support%20Bolivia%20Proposal%20on%20coca%20leaf_0.pdf?utm_source=IDPC+Monthly+Alert&utm_campaign=d38ed794ec-IDPC%20Special%20Alert%20Bolivia%20proposal&utm_medium=email)

Backgrounder: Bolivia's concurrent drug control and other international legal commitments:

http://www.druglawreform.info/images/stories/documents/international_legal_commitments.pdf

Press conference by H.E. Pablo Solon, Permanent Representative of the Plurinational State of Bolivia, on Bolivia's decision to withdraw: <http://www.druglawreform.info/en/newsroom/latest-news/item/2574-press>

TNI Series on legislative reform of drug policies - Lifting the ban on coca chewing:

<http://www.idpc.net/sites/default/files/library/lifting-the-ban-on-coca.pdf>

TNI drug law reform website – Unscheduling the Coca Leaf:

<http://www.druglawreform.info/en/issues/unscheduling-the-coca-leaf>

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²⁰ Bewley-Taylor, D. & Jelsma, M. (12 March 2011), *Series on legislative reform of drug policies Nr. 12 – Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation* (Transnational Institute), <http://www.idpc.net/sites/default/files/library/fifty-years-of-1961-single-convention.pdf>