

# Indigenous Consultation and Participation under Chilean Environmental Impact Assessment

Edesio Carrasco – José Adolfo Moreno

*This work comments the new statutes and regulations that are taking place in Chile since 2010 that expanded the standing to participate in those projects or activities that are been assessed under a Environmental Impact Assessment procedure (EIA). As these mechanisms are modified, a new approach is necessary to have an effective and a genuine participation. Furthermore, the paper analyzes the last Supreme Court (SC) decisions on the applicability of the indigenous consultation recognized in ILO Convention No. 169 in investment projects that are been assessed within EIA. The center of this interpretation lies in the lack of a fair regulation and the different criteria that the SC is using since 2010 to face the applicability of this international agreement, despite the efforts that the current administration is doing and the new thresholds that the SC is applying to judge the legitimacy of this mechanism of participation. Those criteria are focused in the (i) direct affectation of the indigenous, (ii) the reasons that justify this consultation, and (iii) the respect of fundamental rights of indigenous tribes when these consultations are conducted, all under clear rules, principles and standards.*

## 1. Brief view to Public Participation and environmental assessment in Chile.<sup>1</sup>

Chilean environmental law gives recognition and application of the participative principle within the environmental assessment procedure. Public participation (PP) is considered a very important part of the environmental impact assessment (EIA) allowing the community and, in some cases, legal entities access to every single detail of a project. Nowadays, communities are empowered to state their opinions, doubts, concerns, make recommendations or requests. It is a legal duty for the environmental authority to consider them and give a weighted response in the final environmental resolution (RCA) that grants or denies the permission. However, PP is not intended be a plebiscite or an election and does not have binding effects on decisions maker. PP in the Chilean EIA procedure is regulated and must give strict observance to the principles of *equal opportunity* and *right of access* to all environmental information.

The EIA is reserved to specific types of projects and activities that are listed in section 10 of the environmental law. It has two ways of assessment; an environmental impact study (EIS) or an environmental impact statement (EID). The EIS is applied to projects or activities that may have significant effects over specific environmental aspects or human health (listed in section 11 of the law). On the other hand, EID is a preliminary study that can demonstrate that a project has not significant impacts (therefore does not require an EIS) and that the project meets all applicable environmental rules. PP is a mandatory stage for every EIS and since 2010 amendment; it can also be applied to an EID under certain conditions and requirements. It extends 60 working days in the case of EIA and 20 in EID. In both cases, the environmental authority is empowered during the assessment to open a new public participation stage.

Moreover, the Chilean environmental law considers indigenous people as a protected population. In that way, due to the ratification of ILO Convention No. 169 (“*Indigenous and*

---

<sup>1</sup> For more details of general Public Participation in Chilean EIA see Armisen, Juan Pablo “*Public Participation in the Environmental Impact Assessment System: New Challenges*” available in: <http://www.iaia.org/conferences/iaia11/uploadedpapers/final%20drafts/Public%20Participation%20in%20the%20Environmental%20Impact%20Assessment%20System.%20New%20Challenges.pdf>

*Tribal People Convention, 1989*”) in Chile, every time that a project or activity may affect significantly them, different and exclusive way of participation is triggered. However, the Convention was enacted before the 2010 amendment to the environmental law was done, so this way of participation has not been included explicitly within it. As we will explain after, although there is an amendment to environmental regulation ongoing that is trying to establish and regularize the application of ILO 169, during the last two or three years many environmental assessment procedures have been under the watchful eye of the courts when they have been required by indigenous people invoking the failure of environmental authority to observe the duty of consultation established in the Convention.

## **2. ILO Convention No. 169 and Indigenous consultation in Chile**

Since 1989 the approach to indigenous issues has changed. A new international convention called “*Indigenous and Tribal People Convention, 1989*” was instituted to recognize indigenous rights over their traditional lands and the need to be consulted prior to governments granting access to those lands for industrial and other purposes. For that reason, this international agreement shifted the way indigenous and tribal people were conceived since 1957, time when ILO Convention No. 107 was enacted. Although ILO Convention No. 169 (“Convention”) doesn’t define who are indigenous and tribal people, it is founded in the belief that indigenous tribes are permanent societies and that they are “people” and not “populations” as ILO Convention No. 107 referred. Furthermore, instead of integration, it promotes “recognition of”, and “respect for”, ethnic and cultural diversity, encouraging the respect to their traditional life styles, its own social organization, and their culture. Thus, indigenous people hold the right to choose to integrate or maintain their cultural and political integrity. In other words, what defines the Convention is self-determination as a fundamental right.

### **2.1 Indigenous consultation in Chile**

Although 20 countries have ratified this agreement, including Chile, its implementation has faced a number of hurdles in reaching full implementation. Since 2000 an unfinished debate in Chile has been taken place about the meaning of some of its rules. In that year, the Chilean Constitutional Court held that articles 6 and 7 of the Convention were the only set of laws of this agreement that were self-executing. That means that the rules concerning consultation to the indigenous don’t require Congress intervention in order for those sections to be implemented; the provisions can be applied directly. However, the debate about how these rules are applied returned in 2008. That year, the Constitutional Court stated an interpretation concerning the meaning and scope of the indigenous consultation in Chile. The Court held that the consultation that the international agreement described, is not legally binding. This means that there is not space for mutual vetoes or imposition by those who participate in a consultation. Therefore, authorities must consult those legislative and administrative measures to those indigenous that are “directly affected” by those decisions, but remaining the final decision in the legislative or the administrative authority that makes the consultation.

One year later, the Chilean government enacted a general regulation (D.S. N° 124, September 15, 2009) that indicates the way consultation should be done according to the Convention, explaining how, when and who should do it.

In 2013 the Congress was compelled by the Constitutional Court to regulate, in general terms, the indigenous consultation, exhorting to not delegate this power. However, the consultation in those economic activities that require an environmental assessment still rests in a regulation (D.S. N° 124) that sets specific rules concerning it. In consequence, in Chile the indigenous consultation has two ways to be implemented. On one hand, the consultation of general administrative or legislative measures that affect the indigenous; a matter that Congress should address in the future. On the other, the consultation of specific administrative measures that authorized specific activities or projects that require, during the environmental assessment, an indigenous consultation. Although, this consultation is already being applied, it has not been explicitly included in the existing environmental regulations. There is an ongoing amendment that will recognize and regulate consultation together with other administrative rules that will standardize numerous aspects of the environmental assessment, including the general public participation.

It is reasonable to make such distinction? It is rational to have two ways of consultation regulated in two different texts? Maybe not, but this at least explains the excessive litigation that this issue has produced the last two years in Chile. Why? Because there aren't clear rules, principles and standards for the environmental assessment agency and courts to follow when these type of dialogue are required, especially during a complex environmental assessment. It is not sufficient to state that the indigenous consultation should be prior, free, informed, under a good faith standard and throughout institutions that represent them legitimately. It requires, as we said, specific procedures to apply it properly, reducing the discretion of the administration and the activism of the courts. The uncertainty of its applicability should be reduced.

## **2.2 Supreme Court and indigenous consultation**

At the forefront of this debate is the Chilean Supreme Court (SC). It has decided different cases regarding the way this consultation should be applied under the *Environmental Agency*. The SC has stated that indigenous should be “affected” to trigger the consultation of the Convention. That means that if there isn't any resettlement of human communities or a significant alteration of human group's life styles and customs, there is no base to make an indigenous consultation. The same year the SC stroke down an environmental permit granted by the local government of San Pedro de Atacama by a EID, considering the arguments of local indigenous, and accusing that this Town hall did not consult the indigenous before granting the permit (administrative decision). That was the first time that the SC not only cancelled an environmental permit, but also ordered the local government to present an EIS (because of the significant effect over indigenous people) stating that in that case, the Town hall should undertake consultation meeting the ILO 169 standards.

Two years later, in 2012, the SC ratified an Appeal Court decision in *Los Huasco Andinos Community v. Regional Environmental Assessment Agency*. In this case, both Courts recognized, implicitly, the applicability of article 15 of the Convention as a self-executing rule regarding the right of the indigenous to participate in the use, management and conservations of natural resources. The significance of this decision is that it not only differs from what the SC ruled two years before, it also contradicts what the Constitutional Court held twelve years before in order to precise that the only provisions of the Convention that were self-executing were articles 6 and 7.

Two months later, confirming the criteria used at the San Pedro de Atacama case, in *Antulafquen community v. Regional Environmental Assessment Agency*, the SC held that 18 archeological remains founded when a Wind Farm was under environmental assessment require an EIS and not an EID in order to fulfill the rules and standards of the Convention, omitting any reference to the “direct affectation” that indigenous should suffer.

Finally, in June 2012, in *Tragun mapu community v. Regional Environmental Agency* the SC ratified the opinion given in *Puelma Ñanco v. Regional Environmental Assessment* based on the “affectation” that indigenous suffered. However, the Court added two other concepts for the applicability of the required consultation. First, the consultation, under an environmental assessment, should be “explained reasonably”. In other words, that means that the consultation must be justified in terms of a “direct affectation” (impact) on an indigenous community. At the same time, the Court said that once the consultation is conducted, the rights of those who participate in the consultation should not be disproportionately affected. Therefore, if an indigenous consultation takes place under an environmental assessment, good reasons should justify it, and if it takes place, the indigenous rights - primarily participation - must not be restricted in their essence.

### **2.3 Affectation, reasonableness and proportionality**

As we see, the application of the indigenous consultation when activities or projects are under an environmental assessment is facing some difficulties in its application in Chile. Different criteria from Courts show that there isn't an undisputed interpretation of when and how consultation with indigenous peoples should be applied. Although the rules of the Courts are somewhat divergent, we can conclude that there are some rules, principles and standards that can be exerted for future guidelines in the interpretation of this international agreement.

For that purpose, the concept of “affectation” plays a key role. The Convention stated that it should be a “direct affectation” to trigger the consultation. The Chilean Environmental Law also specifies that a public participation is required under an EIA when there is a resettlement of human communities or a significant alteration of human group life styles and customs. In consequence, when these specific circumstances occur, the indigenous consultation takes place. Therefore and following Jack M. Balkin, if the “*text states a determinate rule, we must apply the rule because that is what the text offer us*”<sup>2</sup>. When the Convention uses fixed rules, as the above mentioned, is because it wants to limit discretion, and encourage predictable, certain and stable decisions. However, more specific and strong rules regarding this affection are necessary for a good environmental assessment. The Chilean government is working in that direction and during this year a new regulation concerning this issue will be enacted based on this idea.<sup>3</sup>

---

<sup>2</sup> BALKIN (2009), p. 12.

<sup>3</sup> It is important to say that Mr. James ANAYA, UN Special Reporter on the rights of indigenous peoples, in November 2012, made comments on the regulation draft that Chilean government is working to implement the Convention. Document available in <http://unsr.jamesanaya.org/special-reports/comentarios-a-la-propuesta-del-normativa-de-consulta-chile>.

However, taking in consideration that this international agreement also requires a flexible interpretation, principles and standards are necessary, as well, for a fair outcome when this consultation is applied. For that purpose, there are other key provisions, more detailed, that are delegated for each generation to be interpreted. It is important to remember that the Convention is a basic law that leaves to each generation the task to make sense to some of its words. For example, when the Convention says, “*consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances...*” (Article 6.2), is leaving a margin to interpret more broadly the limits of what means “good faith” and “appropriate circumstances”. In other words, the Convention recognizes that there are some aspects of the indigenous consultation that need flexibility and dynamism to be properly implemented, respecting the context in which it should be applied. That is what the Chilean authorities are doing with the drafting of the next regulation in order to implement the Convention. In fact, the regulation draft concerning the indigenous consultation – the document that was also under an indigenous consultation - states that the consultation should be done according to the “*sociocultural characteristics of each people*” of the country. Taking in consideration that Chile has several types of indigenous tribes, this is a reasonable standard that the Chilean regulation is following. The fact that regional directors of the Environmental Agency can, in advance, undertake meaningful consultations with those indigenous tribes whose lands or development areas could be affected by economic activities located there or in their influential area of them, stimulates, in flexible terms, prior, free and informed consent to those projects situated there.

Finally, all these considerations have to be complemented with the necessary respect that indigenous deserve when the consultation conducted. That means that when the consultation is being done, their rights, especially the participation in equal and reasonable conditions shouldn't be constrained, which would alter the essence of this right and the purpose of the consultation. This is a principle that authorities must take in consideration when the consultation is being conducted.

### **3 Conclusion: Simple rules for a complex problem**

Although Chile is just starting to implement this Convention, we believe that the nation should adopt a broad understanding of what the consultation means for a developing country. This understanding should take the form of a new commitment with indigenous peoples and should be emphasized within certain core rules, standards and principles. Of course, those minimalist provisions under ILO Convention 169 should provide an indispensable equal treatment for those who participate in the consultation. In keeping the consultation simple, and not imposing disproportionate burdens and tracking how well it is working, the incentives to apply the consultation grow and if it's applied, the respect for indigenous get stronger and investors get certainty.

The role that SC decisions have played during the last three years regarding the applicability of the Convention, had forced the whole country to hold a serious discussion in order to really achieve a total respect for our aboriginal tribes and also give clear rules for investors. The standards of the consultation must be defined in concert with the ones that are going to be consulted. However, this has not been a peaceful or easy discussion. There are a number of opinions from the different indigenous tribes and communities on this respect. Nevertheless, the Chilean government is precisely doing that; defining simple and

clear provisions to be applied when an indigenous consultation is required; all based on the ideas presented from all the involved sectors as well as decisions of the Supreme Court.

## Notes

ANAYA, James: *Comments on Draft Consultation regulation – Chile*. Document available in <http://unsr.jamesanaya.org/special-reports/comentarios-a-la-propuesta-del-normativa-de-consulta-chile> [March 13, 2013].

BALKIN, Jack M.: *Fidelity to Text and principle*, in *The Constitution in 2020*, Edited by Jack M. Balkin & Reva B. Siegel, Oxford University Press, 2009.

ARMISÉN, Juan Pablo: “*Public Participation in the Environmental Impact Assessment System: New Challenges*” Document available in <http://www.iaia.org/conferences/iaia11/uploadedpapers/final%20drafts/Public%20Participation%20in%20the%20Environmental%20Impact%20Assessment%20System,%20New%20Challenges.pdf> [March 13, 2013].