

FREE, PRIOR AND INFORMED CONSENT (FPIC) UNDER THE NEW CHILEAN IMPACT ASSESSMENT REGULATIONS

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Supreme Decree No. 40/2012 sets forth new regulations for the Chilean Environmental Impact Assessment System (EIAS). Said regulations, enacted on 12 August 2013, recently came into force, on 24 December 2013.

Following the enactment of Supreme Decree No. 40/2012, Supreme Decree No. 66/2013 came into force after a controversial consultation process. The latter sets forth general regulations regarding consultation of indigenous peoples, however, pursuant to article 8 environmental licenses must be consulted according to the specific provisions included in Supreme Decree No. 40/2012.

Specifically, article 7 section 4 of said regulations states that “*Where relocation of human groups belonging to indigenous peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned*”. The cited text is almost identical to article 16.2 of ILO Convention No. 169 (Indigenous and Tribal Peoples Convention).

The purpose of this paper is to examine the context in which FPIC will be required, considering the current situation of indigenous peoples in Chile, as well as other general IA provisions. It also aims to anticipate some of the difficulties that might arise in connection with its application, as well as identifying the main challenges that the Environmental Assessment Agency will face regarding this change in law.

1. THE SITUATION OF INDIGENOUS PEOPLES IN CHILE

Different indigenous peoples have inhabited what is currently considered as Chilean territory since ancient times. However, ethnical and cultural diversity of these peoples has been consistently and systematically denied, first under the Spanish colonial rule and afterwards under the Chilean Republic. A clear example of this is the fact that the Chilean Constitution of 1980 recognizes only the Chilean people, and makes no reference whatsoever to the indigenous peoples inhabiting the country. In this regard, the Chilean constitution differs greatly from other Latin American constitutions, such as the 2009 Constitution of Bolivia, which specifically recognizes Bolivia as a plurinational state.

Article 1 of Law No. 19,253 on Indigenous Protection, Promotion and Development recognizes the existence of nine “ethnic groups”: *aymara, colla, diaguita, kaweshkar, lickanantai, mapuche, quechua, rapa nui* and *yamana*. According to the 2012 Population and Housing Census, these nine indigenous peoples amount for nearly 10% of the Chilean population. Table 1 shows the number and percentage of Chile’s indigenous peoples’ population, according to the three most recent censuses:

Table 1. Indigenous peoples population in Chile

	1992		2002		2012	
	Nº	%	Nº	%	Nº	%
Aymara	48.477	4,8	48.501	7	114.523	6,7
Colla	-	-	3.198	0,4	13.678	0,8
Diaguíta	-	-	-	-	45.314	2,6
Kaweshkar	-	-	2.622	0,4	1.784	0,1
Lickanantai	-	-	21.015	3,0	6.101	0,4
Mapuche	928.060	92,9	604.349	87,3	1.508.722	88,0
Quechua	-	-	6.175	0,9	13.667	0,8
Rapa Nui	21.848	2,2	4.647	0,7	8.406	0,5
Yamana	-	-	1.685	0,2	1.235	0,1
Total	998.385	100	692.192	100	1.713.430	100

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2. INDIGENOUS PEOPLES' PARTICIPATION WITHIN THE CHILEAN EIAs

Prior to the enactment of Supreme Decree No. 40/2012, impact assessment (IA) laws and regulations in Chile did not contain any specific provisions regarding indigenous peoples' participation. Consequently, their participation rights within the IA process were subject to the same rules and provisions as the general public.

Following the ratification of ILO Convention 169 by the Chilean state in September 2008, and its entry into force in September 2009, the following provision was incorporated to Law No. 19,300 (General Bases of the Environment Law) in January 2010: *"The State is bound to facilitate citizens' participation as well as to promote access to environmental information and promote educational campaigns on environmental protection. State agencies, when exercising their environmental powers and implementing the environmental management instruments, shall see to the adequate conservation, development and strengthening of the identity, language, institutions and social and cultural traditions of indigenous peoples, communities and individuals, according to law and to the international conventions ratified by Chile that are currently in force"*. This provision, which contains a veiled allusion to ILO Convention No. 169 (*"international conventions ratified by Chile that are currently in force"*), has been invoked by the authorities to validate the incorporation of specific conditions in the new regulations, concerning enhanced participation rights for indigenous peoples within the impact assessment process.

Thus under Supreme Decree N° 40/2012 it is possible to identify three tiers of participation rights:

- *Regular public participation:*

Both indigenous and non-indigenous people have the right to access the physical or electronic assessment file, make observations thereto and obtain a grounded answer to said observations.

- *Consultation:*

Pursuant to articles 85 of Supreme Decree No. 40/2012, when a project generates or presents one of the effects, characteristics or circumstances set forth in articles 7, 8 or 10 of the regulations and said project directly affects one or more human groups belonging to indigenous peoples, the Environmental Assessment Agency shall, in accordance with section 2 of article 4 of Law 19,300, design and develop a consultation process. The same article states that the consultation process shall be: (a) in good faith; (b) through procedures appropriate to the sociocultural characteristics of each

people; (c) through their representative institutions; (d) informed; (e) so that they have the possibility to influence the environmental assessment process; and (f) with the purpose of achieving agreement or consent.

Consultation is required only for projects submitted to the EIAS as Environmental Impact Studies; it does not apply to projects that have been submitted as simple Environmental Impact Statements. Consequently, it is possible to conclude that Supreme Decree No. 40/2012 considers 'significance' (under IA laws and regulations) and 'direct affectation' (under ILO Convention No. 169 article 6.1 a)) as equivalent concepts.

- FPIC:

Within the Chilean EIAS, projects or activities required to undergo mandatory impact assessment under article 10 of Law No. 19,300 shall require an Environmental Impact Study if they generate or present at least one of the effects, characteristics or circumstances listed under article 11 of said Law. Article 11 c) specifically refers to the "*Resettlement of human communities or a significant alteration of human groups' lifestyles and customs*" as one of such effects, characteristics or circumstances.

Article 7 section 4 of Supreme Decree No. 40/2012, which further refers to resettlement and alteration of human groups' lifestyles and customs, states that "*Where relocation of human groups belonging to indigenous peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned*".

The main difference between consultation (as set out in article 85) and FPIC is that while consultation is mandatory for all projects submitted to the EIAS that directly affect one or more human groups belonging to indigenous peoples, FPIC is only required for projects considering relocation of human groups belonging to indigenous peoples. Another relevant difference is that in consultation, achieving agreement or consent is the purpose of said procedure, whereas pursuant to article 7 section 4, consent is an actual requirement. In other words, for projects considering the resettlement of human groups belonging to indigenous peoples consent should not simply be the purpose of a consultation process, but its actual result.

The main reason why a higher standard is generally required for projects that entail the relocation of indigenous peoples is basically the belief that "*most indigenous peoples have a special relationship to the land and territories they inhabit. It is where their ancestors have lived and where their history, knowledge, livelihood practices and beliefs are developed. To most indigenous peoples the territory has a sacred or spiritual meaning, which reaches far beyond the productive and economic aspect of the land*"¹. Said belief also explains other provisions set forth in ILO Convention No. 169 (for example, article 15 on the right of indigenous peoples to participate in the benefits of mining activities) and has been recognized in several other international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007. In fact, said Declaration sets forth in article 10 that "*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return*"².

Specifically regarding Supreme Decree No. 40/2012, the inclusion of this higher standard might be

¹ Indigenous and Tribal Peoples' Rights in Practice: A Guideline to ILO Convention No. 169. Page 91.

² United Nations Declaration on the Rights of Indigenous Peoples, 2007.

understood as an act of compliance with the ILO's Committee of Experts on the Application of Conventions and Recommendations' 2013 report, which contains the following recommendation regarding application of ILO Convention 169 by Chile, in connection with Environmental Impact Studies: *"In the event that an environmental impact study entails prospection or exploitation of resources in indigenous peoples' lands and/or resettlement of indigenous communities, the Commission invites the Government to indicate how will compliance with all requirements set forth in articles 15 and 16 of the Convention be assured"*³.

3. SOME DIFFICULTIES AND LIMITATIONS THAT MIGHT ARISE IN CONNECTION WITH FPIC

Given that Supreme Decree No. 40/2012 has only recently come into force, there is no experience in practical application of provisions regarding FPIC⁴. Even though article 7 section 4 has been meant to emulate article 16.2 of ILO Convention 169, it is necessary to examine the different terms and expressions of this provision vis-à-vis general IA regulations in order to anticipate some of the issues that could arise when applying this provision:

- *"Where relocation of human groups belonging to indigenous peoples [...]"*

As stated above, FPIC is a requirement only for projects submitted to the EIAS as Environmental Impact Studies that acknowledge resettlement as one of the project's significant impacts. Moreover, it is necessary that said significant impact affects not just any human group, but one belonging to indigenous peoples. Pursuant to article 2 letter d) Supreme Decree No. 40/2012, indigenous peoples are *"those defined in article 1 letter b) of ILO Convention 169 and recognized as such in article 1 section 2 of Law No. 19,253"*, whereas the term 'human group' is defined in article 7 as *"any group of people sharing a territory, in which they interact permanently, thus producing a life system formed by social, economic and cultural relations which eventually tend to generate traditions, common interests and feelings of belonging"*.

Considering that it is not uncommon for project owners to encounter certain difficulties in identifying human groups as such, and in order to anticipate any additional complications that could arise due to the lack of an adequate registry of indigenous communities in Chile, article 2 letter d) specifically states that individuals belonging to indigenous peoples may generate human groups, notwithstanding their manner of constitution or organization.

- *"Where relocation [...] is considered necessary, as an extraordinary measure [...]"*

The context in which this provision is included in ILO Convention No. 169 is different from the one in Supreme Decree No. 40/2012. Article 16.2 of ILO Convention 169 follows up on article 16.1 which states the basic principle which should be applied under all normal circumstances concerning resettlement of indigenous peoples: that indigenous peoples should not be removed from their lands. However, Supreme Decree No. 40/2012 contains no reference to such principle, thus conferring a different meaning to the term 'necessary'.

Pursuant to the ILO's document 'Indigenous and Tribal Peoples' Rights in Practice: A Guideline to ILO Convention No. 169', relocation could be considered 'necessary' for *"some pastoralist and small island communities that are severely affected by changes in the global climate"*⁵; other examples of necessary relocation mentioned in the same document include war and natural disasters. However, it is not that

³ Committee of Experts on the Application of Conventions and Recommendations' 2013 Report. Page 908. Personal translation.

⁴ Only the Court of Appeals of Antofagasta has referred, albeit tangentially, to article 16.2 of ILO Convention, in connection with the *El Morro* Mining Project in the sentence dated February 17 2012 (Rol 618-2011).

⁵ Indigenous and Tribal Peoples' Rights in Practice: A Guideline to ILO Convention No. 169. Page 98.

kind of situation that is assessed under the EIAS, but rather the execution of energy generation and mining megaprojects, which are seldom regarded as 'necessary' by affected communities.

Consequently, it is very difficult to provide the term 'necessary' of some particular meaning, especially in the context of an impact assessment system such as the Chilean one, which does not consider the possibility of assessing project alternatives.

In this particular regard, it appears as though inclusion of FPIC within IA regulations might hinder, rather than improve, protection of indigenous people's rights over their lands and territories. Direct application of article 16.2 of ILO Convention No. 169 by Courts of Law might have resulted in the conclusion that a specific investment project is not necessary and, therefore, that it is not possible to relocate affected indigenous peoples. However, it is hardly possible to arrive at the same conclusion, considering that resettlement is a possibility specifically provided for under IA regulations.

- "[...] such relocation shall take place only with their free and informed consent"

Pursuant to the cited ILO Guidelines "*Free and informed consent means that the indigenous peoples concerned understands fully the meaning and consequences of the displacement and that they accept and agree to it. Obviously, they can do so only after they have **clear and accurate information** on all the relevant facts and figures*"⁶.

Considering that consent on relocation should be obtained as a result of a consultation process, it will be necessary to strengthen the consultation process itself, so that it may provide the necessary safeguards for consent to be free and informed. Unfortunately, consultation has been applied only recently and in very few cases in Chile, and no successful consultation processes have been achieved as of this date in connection with projects submitted to the EIAS.

- "Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures [...]"

This is perhaps the aspect most difficult to harmonize with the procedural aspects of the IA process.

It is highly probable that in complex and controversial projects the consultation process will end towards the final stages of the IA process, which cannot exceed 120 working days for Environmental Impact Studies. Only then will it be possible to ascertain whether consent has been obtained and, if it hasn't, to implement the "*appropriate procedures*". However, it seems hardly possible to effectively carry out appropriate procedures, which could even include "public inquiries", under pressure.

Consequently, it will be necessary to provide the IA process with the necessary flexibility, so that it may accommodate such appropriate procedures.

4. CONCLUSIONS

Considering that former Environmental Impact Assessment System regulations did not establish a differentiated form of participation for indigenous peoples, article 7 section 4 of Supreme Decree No. 40/2012 represents, in principle, a relevant improvement for indigenous peoples' participation within the EIAS. However, considering that FPIC is now part of general IA regulations, it must be interpreted in such a way that is compatible with those regulations.

It will be up to the Environmental Assessment Agency to apply provisions regarding FPIC in such a

⁶ Indigenous and Tribal Peoples' Rights in Practice: A Guideline to ILO Convention No. 169. Page 98.

way that is not only compatible with general IA regulations, but that is also harmonic with international instruments that refer to the matter, such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples, so that indigenous peoples' rights are not limited, but rather improved by the new regulations.

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