Americas QUARTERLY
PUBLISHED BY AMERICAS SOCIETY AND COUNCIL OF THE AMERICAS

AQ FEATURE

Country Study: Chile

BY Jerónimo Carcelén Pacheco and Valentina Mir Bennett

Read the introduction here.

Read a case study from Colombia here.

Read a case study from Guatemala here.

Read a case study from Peru here.

While Chile has recognized and supported Indigenous rights through a variety of constitutional, legal and statutory norms, one of the most central—especially given the country's extractive industry—is one of the

least settled.

Officially International Labour Organization Convention 169 (ILO 169) has been in effect in Chile since September 15, 2009. But on September 4, 2009, just days before it was to take effect, the Ministry of Planning (today renamed the Ministry of Social Development) issued regulations intended to govern the norms and processes of consultation with Chilean Indigenous communities. Indigenous groups immediately rejected the regulations because the Chilean government had failed to consult them, calling it a law developed without "consultation about consultation." The regulations were officially overturned in March 2014.

To fill the gap left by the rejection of the 2009 decree, since March 2011 Chile's Ministry of Social Development has conducted a consultation process to create a more consensus-based regulatory framework for the implementation of ILO 169.

This process has involved organizing workshops, providing technical and logistical support for Indigenous groups' internal meetings, providing independent counsel and experts selected by the Indigenous people themselves, and financing these and other activities. According to the government, this initiative has been mostly successful, and it is in line with the recommendations of then-UN special rapporteur on the rights of Indigenous peoples, James Anaya, adhering to the principles and standards of the convention, such as good faith and the intention to reach an agreement.

That dialogue process concluded in August 2013, and on November 13, 2013, the Ministry of Social Development finally issued a new decree—Supreme Decree No. 66—replacing the ill-fated Supreme Decree No. 124.

Though this is an important step for Chile, there is still no consensus on three essential aspects of *consulta previa*: how to determine whether Indigenous communities are "affected" by a legislative or administrative measure; the types of measures that should be subject to *consulta previa*; and the types of investment projects that must be subject to *consulta previa*.

As a result, in its 2014 annual report, the ILO Committee of Experts on the Application of Conventions and Recommendations requested that the Chilean government explain in detail how it will carry out effective consultations.

Who's Responsible for This Thing?

According to the law, two public entities in Chile are involved in the implementation of Indigenous consultations: the *Corporación Nacional de Desarrollo Indígena* (National Corporation of Indigenous Development—CONADI) and the *Servicio de Evaluación Ambiental* (Environmental Evaluation Service—SEA). CONADI is the body in charge of promoting the development of Indigenous communities and providing them with technical assistance. The SEA is tasked with promoting and facilitating citizen participation to evaluate development projects that may have an environmental impact. Vesting the responsibility in both organizations, though, has created a division of policy.

A Miner Mount Rushmore: A man leads his mule past a monument to miners on the way to El Teniente cooper mine. Photo: Ivan Alvarado/Reuters

The SEA has the authority to carry out citizen participation and Indigenous prior consultation processes, in compliance with the principles, criteria and standards of ILO 169. According to the Convention, consultations must, among other things, be carried out in good faith, aim to achieve an agreement or consent about the project, and be representative.

Although there is no definition of good faith in the Convention, according to Anaya's criteria, it implies that governments must recognize the authority of Indigenous representative organizations, attempt to reach agreements, and comply with them. Anaya also says that institutional decisions must be the product of Indigenous peoples' internal deliberations, according to their own customs and traditions.

However, these requirements do not imply that it is necessary to reach an agreement. Nor do they imply that communities have a right to veto administrative measures or investment projects, or that communities' agreement or consent can be coerced.

When it was adopted, ILO 169 rested on two existing laws that helped set the standards for the process of *consulta previa* in Chile. The first is Law No. 19.253—the so-called "Indigenous Law"—issued on September 28, 1993, which sets standards for Indigenous protection, promotion and development, and which created CONADI to execute public policies for Indigenous community development and represent Indigenous interests. The law also requires state agencies to consult with Indigenous peoples regarding matters that affect them, but it does not specify how to do so.

The second law is Law No. 19.300, the *Ley Sobre Bases Generales del Medio Ambiente* (General Environmental Law—LBGMA), issued on March 1, 1994. An amendment to the LBGMA was approved on January 12, 2010, and recognizes the obligation of state agencies with environmental responsibilities to contribute to Indigenous development in accordance with ILO 169.

The LBGMA set forth two ways to submit a project for environmental qualification: an *estudio de impacto*

ambiental (environmental impact study—EIA), required when a project may have a special impact regulated under law, such as relocation of a community; and *declaración de impacto ambiental* (environmental impact declaration—DIA), required when there are no special impacts anticipated. After determining a project's environmental impact, either favorable or unfavorable, the government issues a *resolución de calificación ambiental* (environmental qualification resolution—RCA).

Within this regulatory framework, the Chilean state has developed and expanded the details for implementing consultations through four legal instruments:

1. Supreme Decree No. 124 (issued in September 2009 which—as described above—was later overturned);
2. Supreme Decree No. 40, issued on October 30, 2012 by the Ministry of the Environment, which establishes a special consultation process for Chile's native peoples through the *Reglamento del Sistema de Evaluación de Impacto Ambiental* (Regulation of the Environmental Impact Assessment System—SEIA). According to the regulation, a company must request information from the SEA about the presence of Indigenous people in the area and other relevant facts, and the SEA will explain the legal or technical requirements that must be complied with;
3. Ordinance No. 140143, issued in January 2014 by the Executive Director of the SEA, to regulate the "*Análisis de ingreso por susceptibilidad de afectación directa a grupos humanos pertenecientes a pueblos indígenas*" ("Preliminary analysis of Indigenous groups' susceptibility to direct affectation"); and
4. Supreme Decree No. 66 of 2014, mentioned above, which regulates the implementation of ILO 169.

Meanwhile, Chilean courts have issued a series of rulings on *consulta previa* that have failed to establish a single, consistent standard for enacting Indigenous consultations.

In fact, the Chilean Supreme Court has taken two different positions on Indigenous consultation. In 2010, the Supreme Court maintained that if an investment project had been submitted to the Ministry of the Environment in the form of an eia, and a citizen participation process ("*participación ciudadana*") had been carried out by the SEA, this would sufficiently satisfy the criteria for consultation established in ILO 169.[1]

Later, overruling its previous position, the Court decided that a special consultation process for Indigenous peoples must be carried out by the SEA—independent of the general citizen participation process already required for EIAs. These consultation processes must be tailored to the specific communities and projects undergoing an environmental assessment.[2]

As a result, two relevant debates have developed around the application of ILO 169 in Chile: first, how to interpret the Chilean Supreme Court's varying legal opinions on the standards for applying *consulta previa* to Indigenous peoples; and second, the constitutionality of the SEIA regulation, which was finally resolved with a ruling by the Supreme Court on September 30, 2013.

Political and Social Pushback

Acceptance of the slow, piecemeal process of defining and detailing how best to carry out the rights embodied in ILO 169 has not been smooth.

On September 11, 2013, a group of congressional deputies from the center-left *Nueva Mayoría* (New Majority) coalition challenged the constitutionality of Supreme Decree No. 40 (which established the SEIA regulation) before the Constitutional Court. Among other things, the deputies argued that, per Article 6 of ILO 169, Indigenous consultation must be carried out not only for "serious" legislative and administrative measures, as the regulation stipulates, but for any measure that affects the collective rights of Indigenous

communities.

However, the Constitutional Court rejected the challenge on September 30, 2013, declaring it inadmissible because it questioned the legality of the SEIA regulation, and not the regulation's constitutionality. There have been no further appeals.

Meanwhile, in response to Indigenous communities' concerns, the SEA is currently conducting eight consultation processes with Indigenous groups. With the exception of a paper pulp project in Bío Bío owned by forestry company Celulosa Arauco y Constitución (CELCO) , all the projects are in the energy and mining sectors.

One, the Transelec case, highlights the application of the principle of good faith and the use of representative mechanisms to obtain the consent of the consulted community. Transelec Norte S.A., a Chilean transmission company, is in the process of developing a half-mile electric power line and an electrical substation in the Lo Prado neighborhood of Santiago, Chile. While preparing the environmental baseline study, the company learned that the proposed route would impact a *rehue* (ceremonial site) and a field for the Mapuche traditional sport of *palín*, which was being used by Santiago's urban Mapuche communities.

In light of this, the electric power line route was modified so that it would not cross Indigenous territory. The company contacted Indigenous representatives to gather information about the possible effect of their project's activities and reported the situation to the SEA, requesting a formal resolution to start the *consulta previa* process in February 2013.

This was the first consultation process to begin in Chile under the SEA, and it confronted a major challenge when, in the middle of the consultation process, the community of Lo Prado declared that it was no longer interested in discussing the power line, which it remained opposed to. As a result, the SEA officially ended the consultation, concluding that it had acted in "good faith" and made every effort to reach an agreement and attain community consent.

Even after the controversy, the project received a favorable RCA environmental ruling. It is currently moving forward, although the communities are likely to challenge the RCA in court.

In recent years, the Chilean Supreme Court has ruled on the obligation to consult Indigenous communities in a variety of cases, establishing criteria to determine when it is appropriate to do so. Whenever it determines that a project could affect an Indigenous community, the Court has adopted various measures to ensure that the state complies with its obligation to consult. These include invalidating the project's RCA, ordering projects to strengthen adherence to environmental standards by submitting an EIA, or ordering them to carry out a consultation as established in ILO 169.

For example, in the case of the El Morro (Goldcorp) mining project in Chile's Atacama region, the Supreme Court invalidated the project's favorable RCA because it concluded that the *Comunidad Agrícola Los Huasco Altinos*, a local agricultural community with Indigenous members, had not been appropriately recognized as an Indigenous community and consulted before the project was initiated. The company later carried out a consultation process with the community, and the *Comisión de Evaluación de la Región de Atacama* (Evaluation Commission of the Atacama Region) rated the El Morro project favorably.

Nevertheless, the communities remain unsatisfied with this decision and have challenged the new RCA through an appeal filed on December 5, 2013. The case has not yet been resolved.

Such community resistance provides convincing evidence that companies' trust-building efforts will be insufficient as long as *consulta previa* processes have not been institutionalized and regulated by the

Chilean state. Therefore, *consulta previa* must be both legal (in other words, conform to all of the applicable rules) as well as legitimate—a valid system for receiving the opinions of the Indigenous communities that could be affected by development projects.

Establishing the Consensus Framework and State Capacity

Chile faces a substantial challenge on Indigenous matters. Not only must it revise and strengthen its institutional apparatus to deal effectively with the needs of Indigenous communities, but it must also implement a procedure of open, transparent and participatory prior consultation. To that end, the government of Chilean President Michelle Bachelet has outlined a series of steps intended to address the institutional and regulatory shortcomings of *consulta previa*. The first step is to constitutionally recognize the rights of Indigenous peoples.

In recognition of the institutional and political shortcomings of CONADI, Bachelet has announced a plan to create a Ministry of Indigenous Affairs and an autonomous Council of Indigenous Peoples—rather than a separate office—that would represent the diverse Indigenous groups in Chile.

Correcting the procedural wrongs of the recent past, Bachelet has also proposed a process to review and modify Supreme Decrees No. 40 and No. 66, in consultation with Indigenous communities. The goal would be to fully consult and air, in a transparent and participatory manner, the regulations to fully and effectively comply with the standards of ILO 169. Last, none of this can be done if the state lacks the financial capacity to monitor and implement any of these commitments. To that end, the Bachelet government has promised to evaluate a financing mechanism for consultation processes to ensure that they are sufficent.

Should these promises be met, they will go a long way toward applying and upholding the criteria and standards of ILO 169, beyond the more narrow definition of environment. More, such an effort will confer legal certainty on investments in Chile that respect and protect the rights of Indigenous peoples.

Endnotes

Connect with *AQ*

AQ's 2014 World Cup Coverage

Check in with *AQ* for updates on the 2014 World Cup in Brazil.

AQ and Efecto Naím: NTN24 Partnership

June 1: This *AQ*-Efecto Naím segment looks at sustainable cities in the hemisphere.

WEB EXCLUSIVES

- AQ Slideshow: Colombia Preserves San Andrés and Old Providence Archipelago's Seaflower Marine Protected Area

  June 13, 2014

  by Luis Carlos Villegas

  

  Learn about Colombia's role in preserving the Seaflower Biosphere Reserve and Marine Protected Area in the western Caribbean.
- AQ Slideshow: The Least Colombian Department in Colombia

  June 3, 2014

  by Ramón Campos Iriarte

On May 25, raizales—Afro-Caribbean people living on the Archipelago of San Andrés, Providencia and Santa Catalina—participated in the Colombian presidential elections.

MORE WEB EXCLUSIVES »

Read our new series of first-person articles.

Most Popular

MOST POPULAR ON *AQ* ONLINE

Most Viewed

Past: 1 day 1 week 1 month 1 year

Brazil's Long To-Do List (283 times)

The New Buzz About Montreal (91 times)

Brazil Crashes out of the World Cup (36 times)

Brazil Endorses International Decade for People of African Descent (24 times)

Monday Memo: Argentine debt – Putin in Latin America – Italy investigates Plan Cóndor – Earthquake – Trapped Honduran Miners (24 times)

NOW ON AS/COA ONLINE

Summary: Panel Discussion - Expectations for the Sixth BRICS Summit

by Shannon Hilsey - 5 hours ago

Panelists: Yukon Huang, Senior Associate, Carnegie Endowment and former World Bank Director for China Tanvi Madan, Fellow ...

Brazil Loses Big At World Cup - And Not Just On The Field

by Andrew O'Reilly - 5 hours ago

After the historic and heartbreaking 7-1 loss Germany handed host nation Brazil on Tuesday, the last thing Brazilians probably ...

Brazil-BRICS Trade: A Visual Breakdown

by Elizabeth Gonzalez - 7 hours ago

On July 15, several of the world's most powerful emerging market leaders will meet in Brazil. Heads of state from the ...

Americas Society / Council of the Americas

AQ MEDIA PARTNER

FINANCIAL TIMES

World

[America Movil: play on]

7 hours ago

The smartest thing would be for Carlos Slim to sell not what has the least value to him, but what has the most value to someone ...

Companies

[Brazil poll contenders fear World Cup hangover]

9 hours ago

The national mood has switched from elation to despair after the team's drubbing, threatening more strife and volatility ahead ...