

CHILE

According to the Ministry of Social Development's 2013 Survey, the population that self-identifies as belonging to Chile's indigenous population, via parentage or surname, numbers 1,565,915 people. The Mapuche population accounts for 84% of the indigenous population, followed by the Aymara, Diaguita, Atacameña and Quechua who, together, make up another 15%. Other peoples represent just 1% of the total. According to these figures, the population that self-identifies as indigenous has therefore increased by 50% in the last 10 years. In fact, the 2006 national survey gave a total indigenous population of 1,060,786 but, as of 2013, that number had increased by 505,129.¹

The same statistics reveal that, of the country's total indigenous population, some 74% live in urban and 26% in rural areas. This gives a total of 1,158,451 urban indigenous persons. Only the Mapuche continue to remain in rural areas in high numbers (23.8%) as other groups have largely deserted the countryside. Indigenous peoples suffer from some of the highest rates of poverty in the country. The 2013 survey shows that, while there has been a reduction in the percentage of indigenous peoples living in multidimensional poverty (income, housing, education and health) in relation to previous years, the gap between these people and the non-indigenous population remains the same. Some 31.2% of the indigenous population but only 19.3% of the non-indigenous population live in multidimensional poverty.²

The human rights situation of Chile's different indigenous peoples remained critical throughout 2015, primarily as a result of conflicts over their right to their territories and natural resources. The lack of adequate implementation of ILO Convention No. 169 was a particularly contentious issue, especially the rules governing free, prior and informed consultation. Although theoretical progress has been made over the last few years in recognising indigenous peoples' right to prior consultation on administrative and legislative measures likely to affect them,

this right continues to be violated in practice. This is because state agents (ministries, the Environmental Assessment Service/SEA and so on) see consultation processes as a “mere tick-box formality” which, even if no agreement is reached, will enable the proposed action to be taken forward.

In addition, there has been a deterioration in court decisions regarding indigenous rights over the last year. Although the courts initially supported the right of consultation when investment projects were to be established on indigenous territories and cited Convention No. 169 when setting out the specific standards to be followed in this regard, this power is now held by the environmental courts, who act primarily from a technical logic (environmental regulations) rather than a fundamental rights-based approach.

In addition, the points on indigenous rights in the proposed Water Code reform (Bulletin 7543- 2012) are still pending, awaiting the Code’s submission to indigenous consultation. The proposed text is not yet public knowledge. The government feels that only those articles referring specifically to indigenous peoples need to be put out for consultation, rather than the Water Code reform as a whole. This will thus avoid the fact that the proposed water regime is likely to directly affect indigenous interests when it compromises waters located on or irrigating indigenous territories.

Another legislative initiative applicable to indigenous peoples is the draft bill of law creating the Biodiversity and Protected Areas Service (Bulletin 9,404-12). The bill in question focuses exclusively on public and private conservation, ignoring the contribution that indigenous peoples make to conservation and biodiversity in the country, as stated in the Biodiversity Convention signed by Chile, thus denying legal recognition of and support for the lands and territories these peoples conserve. It also fails to recognise the indigenous right to participate in managing the state’s protected areas, and the duty to return lands on which protected areas have been established when those lands are traditionally occupied and the areas have been created without the consent of the affected communities. Given all these issues, the indigenous peoples made a series of suggestions regarding the draft bill of law during its consideration by the Senate, and these have largely been accepted.³

The rights of the Mapuche people

The situation of the Mapuche people’s human rights remained critical throughout 2015. In fact, it has become even more complex as a result of misleading signals



from the government such as the removal of the (now former) Governor⁴ of Araucanía, the region with the largest indigenous population in the country. Francisco Huenchumilla, a Mapuche lawyer, had shown his open support for the rights of his people and had advocated the need for deep political and legal reforms in order to enforce them. Huenchumilla was replaced by Andrés Jouannet, under whose

leadership the government has prioritised a law enforcement approach to conflicts on Mapuche territory, scaling up the number of police officers and armoured cars in the region⁵ and failing to give any political response to the Mapuche demands, which are based on rights recognised in Convention No. 169.

It is clear that President Bachelet's government has been incapable of promoting any public policies or dialogue that would enable the conflicts suffered by the Mapuche in Araucanía and neighbouring regions to be addressed, in particular in relation to logging, hydroelectric and salmon fishing companies, and has instead opted to suppress those demands.

One emblematic case is that of the Añihuerraqui Hydroelectric Power Project, located in Trancura Sector, Cautín Province, Araucanía Region. This is located in the Añihuerraqui estuary, in between the Camilo Coñoequir Lloftonekul and Camilo Coñoequir Mapuche communities who use this estuary for ceremonial and productive uses. It thus affects the rights of the territory's communities. As a result of the impact this project will have on the Mapuche communities, a process of indigenous consultation was initiated which highlighted consequences that had not been considered during the environmental procedures. The organisations involved in this consultation thus established that the hydroelectric project would significantly alter all cultural, religious and socio-economic dimensions of their lifestyle and customs. The construction and commissioning of the project would significantly modify the local production system, which is based on tourism. The final outcome of the consultation was it was not possible to mitigate, repair or compensate for the effects the project would have on the cultural and religious heritage of the Trancura territory and that no measures would therefore satisfy them. This assessment was backed up by the relevant technical bodies such as CONADI and Curarrehue municipality. Despite all this, the project was approved and thus represents a serious violation of the cultural and religious rights of the Mapuche communities.

The rights of Chile's Andean peoples

The indigenous peoples living in the north of the country have, largely unsuccessfully, been demanding the demarcation and titling of their ancestral territories for decades now. During 2015, however, significant progress was made in the land claims of the Lickanantay indigenous communities of Alto Loa. In fact, in response

to the requests of the Toconce, Chiu Chiu and Lasana communities in El Loa Province, Antofagasta Region, the Ministry of Public Lands instigated five free transfers of land totalling some 45,318 ha. These will benefit 878 individuals living in three communities. The Pampa La Teca sector, comprising 35,608 ha, was returned to the Chiu Chiu community. This community also received the eastern sector of the Inca Coya Lagoon (291 ha). Lasana was also a beneficiary community, receiving lands in the Pampa Carbonatera (1,991 ha) and Los Arenales (27 ha) sectors. For their part, the Toconce community received a free transfer in the sector known as Campos de Pastoreo, comprising an area of 7,399 ha surrounded by transversal streams rising in the Andes and coming from the tributaries of the Toconce, Hojalar and Salado rivers.

In other indigenous territories in the north of the country, however, there was no progress in the demarcation and return of lands. Furthermore, studies to identify the lands ancestrally occupied by Andean communities have not been updated. There thus remains a total lack of certainty regarding indigenous territorial demands in this area.

In terms of water, three programmes have been promoted in the regions of Tarapacá and El Tamaruagal.⁶ These programmes are based on the private logic of the Water Code, which advocates a system of individual ownership of water rights, thus supplanting the communal forms of management that have traditionally operated in the Andean communities.

There were fewer high-impact extractive projects in the Andean peoples' territories during 2015 but a number of projects have been given the green light without any consultation of the indigenous communities affected.

On 18 May 2015, the Committee of Environment Ministers decided to cancel the Environmental Certification Resolution (RCA) for the Los Pumas manganese extraction project in the Arica y Parinacota Region.⁷ This committee found the complaints made by the community partially admissible, considering the baseline information insufficient in anthropological terms and with regard to seismic and hydrogeological risks. It stated that there was insufficient prior baseline information to rule out any possible effects on the project area's aquifers. Reports from the National Geology and Mining Service warned of the imminent danger of contaminating the aquifers and the subsequent risk to the sector's agriculture.

A different situation arose in the Paguanta prospecting project, which is a mineral prospecting programme that will open up 63 holes involving 14,000 m of drilling, the erection of 13 drilling platforms, access roads and the construction of

53 watertight pools for the decanting of drilling sludge. The project is based in the headwaters of the Quebrada de Tarapacá basin, in the region of the same name, and is affecting all communities located downstream of the prospecting sites. This project has been approved by the environmental authority without consultation of the indigenous communities affected. The only exception was Cultane community, which signed a document with the company agreeing to the project. It is important to note that the authority has refused the communities their right to consultation, in violation of a court ruling that recognised this right and called for an Environmental Impact Assessment.⁸

The legal actions taken by the Diaguita de los Huascoaltinos Agricultural Community (CADHA) and, in parallel, other indigenous organisations,⁹ have managed to bring the El Morro gold and copper mining project to a halt. This is a project of Canadian Goldcorp Inc., located in the legal and ancestral territory of CADHA in Atacama Region.

The Pascua Lama project, a gold, silver and copper concentrate mining project on the border between Chile and Argentina and owned by the Canadian company, Barrick Gold Corporation, has also come to a halt, it would seem indefinitely. The project, involving an investment of USD 8,500 million, has been suspended by the company until market conditions improve. Internationally, CADHA has lodged a complaint with the Inter-American Commission on Human Rights (IACHR),¹⁰ and this has been declared admissible¹¹ and is awaiting publication of the IACHR's Merits Report. It is alleged that, by giving environmental approval to the project, the Chilean state was in violation of CADHA's territorial rights and their right to free, prior and informed consultation and consent.

Lastly, it should be noted that the state has been summoned before the IACHR for discriminatory actions. The first case relates to the Chusmiza-Usmagama Aymana community,¹² which has suffered the confiscation of its waters without its consent and despite a court case over the very same waters being pending between the same parties. The second is the case of G.B.B.,¹³ a woman of Aymara origin who lost her son, D.B.B., while he was shepherding in the Chilean *altiplano* and who was sentenced to 12 years in prison for abandonment of a child resulting in his death in a remote place, despite the defence team and communities contesting the ethnocentric and discriminatory judicial reasoning behind this decision. During G.B.B.'s trial, the authority's put up her daughter, C.B.B., for adoption without her consent and have, to date, refused to give her any information on her daughter's whereabouts or well-being. The possibility of signing a

friendly agreement with the state is being explored in both cases. In the case of G.B.B., negotiations are progressing well and it is hoped such an agreement may soon be signed.

The rights of the Rapa Nui (Easter Island)

The Rapa Nui people are continuing to demand recognition of their territorial and political rights.¹⁴

These demands have remained unmet to date. As indicated in previous reports, 71.48% of the island's territory (which has a total area of 16,600 ha) is owned by the state and shared between the Vaitea Fund (4,597 ha) and the Rapa Nui National Park (6,913 ha). This latter is administered by the National Forestry Corporation (CONAF),¹⁵ a private company aimed at conserving, increasing, managing and using the country's forest resources and protected areas. As for the Vaitea Fund, the body that was previously administering these lands, the Easter Island Agricultural and Services Company Limited (SASIPA), has dropped out leaving them without any administration since 2013.

With regard to the Rapa Nui National Park (PNRN), the National Forestry Corporation (CONAF) this year proposed a co-administration model and submitted the proposal for indigenous consultation. Both the administrative measure (the co-administration of the Park) and the consultation process were agreed with the Easter Island Development Commission (CODEIPA) but not with the Rapa Nui's representative organisations. CODEIPA is a state body created by Indigenous Law 19,253, and comprising eight state representatives and seven elected Rapa Nui representatives. It is therefore not one of the Rapa Nui's own organisations. The Rapa Nui declared that CONAF's proposal was unsatisfactory as it did not guarantee their territorial rights and, following this, some organisations led by the Rapa Nui Parliament took over the administrative offices of the PNRN. The authority pursued the occupants for criminal liability and, through CONAF, submitted criminal complaints against seven leaders of the Maori Rapa Nui Organisation and the Rapa Nui Parliament. These organisations, criminalised by the state through CONAF, were thus excluded from the consultation.¹⁶ Only 319 people out of an electoral register of 2,800 voted in the consultation, with 264 in favour of co-administration. Given the clear illegitimacy of the process, CODEIPA's elected

representatives refused to be involved and declared the consultation null and void.

In terms of political rights, a migration policy was established during 2015 aimed at limiting the island's burgeoning population, safeguarding the ecosystem, and ensuring the social, cultural and economic sustainability of the Rapa Nui. Government action was focused on drafting the migration policy and its content was established with the agreement of the Easter Island Development Commission. The bill of law was submitted for indigenous consultation in January 2016, and around 1,400 people voted in the process, approving the bill presented by government. This will now continue its passage through the legislature.

The Trans-Pacific Partnership and indigenous rights

Last October, along with 11 other states, Chile concluded the negotiations for the Trans-Pacific Partnership (TPP). This is a commercial agreement that has been negotiated in secret, without providing any information either to the general public or the indigenous peoples. Comprising more than 6,000 pages, its contents affect indigenous peoples' rights in many ways. Some of the most critical content for indigenous rights is to be found in the chapter on intellectual property, which fails to protect the traditional knowledge associated with genetic resources. Also of concern is the chapter on investment, which establishes an obligation on states to grant investors "fair and equitable treatment, and full protection and security", as well as a commitment not to indiscriminately expropriate or nationalise their investments, either directly or indirectly unless for a public purpose, and then only on payment of effective compensation. When determining whether a state action is indirect expropriation or not, the TPP will consider its nature, its economic impact, and its interference with "unequivocal and reasonable investment expectations", thus leaving the door open to investors to dispute laws or public policies favouring human or indigenous rights through the arbitral courts recognised in the TPP. The numerous FTAs that Chile has signed with more than 60 states over the last few decades have had the direct result of an increase in extractive and productive investments—mining in the north, logging and salmon farming in the south, energy and infrastructure projects throughout the country—on indigenous lands and territories. This has been achieved both by attracting investment from companies domiciled in countries with which Chile has signed

trade agreements and through an opening up of markets for national companies. This trade agreement should therefore be put out to consultation with the indigenous peoples, something that the government has not yet announced. ○

Notes and references

- 1 Ministry of Social Development, CASEN 2013 Pueblos Indígenas, Síntesis de Resultados, March 2015. Available at: http://observatorio.ministeriodesarrollosocial.gob.cl/documentos/Casen2013_Pueblos_Indigenas_13mar15_publicacion.pdf
- 2 Ibid.
- 3 See actual text of the bill, with indigenous peoples' and environmental organisations' suggestions at: https://www.camara.cl/pley/pley_detalle.aspx?prmID=9819&prmBL=9404-12.
- 4 The Governor is the President of the Republic's representative in the region.
- 5 <http://www.elmostrador.cl/noticias/pais/2014/10/06/carabineros-se-refuerza-con-tanquetas-y-personal-del-gope-en-la-araucania/>
- 6 Information provided by CONADI. Available online at: <http://www.conadi.gob.cl/index.php/noticias-conadi/1268-conadi-mas-de-1500-millones-en-fondos-concursables-para-proyectos-de-comunidades-indigenas-de-todo-chile>. (viewed on 30 January 2016).
- 7 See National Human Rights Institute, *op.cit.* 2013, pp. 249.
- 8 Supreme Court, Roll No. 11,040-2011, judgment of 30 March 2012.
- 9 Supreme Court, Roll No. 11,299, 7 October 2014.
- 10 Case 12,741.
- 11 Inter-American Commission on Human Rights. Admissibility Report No. 1411/09, 30 September 2009.
- 12 Inter-American Commission on Human Rights. Admissibility Report No. 29/13, 10 March 2013. Case 12,904.
- 13 Petition 687/2011.
- 14 See information gathered in the fieldwork conducted by the Indigenous Peoples Rights Observatory in Rapa Nui (7 – 12 August 2014), in the context of consultancy work commissioned by the Ministry of Public Lands, resulting in the production of a study and analysis of the different legal systems of land ownership and tenure coexisting in Rapa Nui.
- 15 According to Decrees 72/1995 and 9/2000, the PNRP covers an area of 6,907.45 hectares. However, a recent study conducted by the National Forestry Corporation (CONAF) revealed that the area actually subject to the body's administration was 7,263.936 hectares (CONAF, 2014: 1).
- 16 These organisations submitted an appeal for protection, Roll No. 89,686-2015, which was rejected by means of a judgement on 8 January 2016. This judgment was appealed before the Supreme Court, Roll No. 4238-2016, and is currently being considered.

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