

# Convention 169: Where should changes be aimed at?

## How is Convention 169 applied?

Convention 169 of the International Labor Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries will become effective on September 15 of this year. This Convention was ratified after 18 years of congressional debate and after striking “an agreement between the Senate Foreign Relations Committee and the Executive Branch of Government aimed at incorporating a clarifying interpretation that states that the referred Convention shall be only applicable in relation to international treaties ratified by Chile that are in effect”<sup>1</sup>.

On the other hand, as stated by the ILO, the keystone of the Convention is to strengthen the participation of indigenous peoples<sup>2</sup>. Such participation must be merely consultative and not binding, as stated by our country’s Constitutional Tribunal<sup>3</sup>.

Both the Convention as well as the Constitutional Tribunal’s jurisprudence recognize that, above all, the measures to be adopted in order to execute the principles contained in the Convention must be consistent with the country’s domestic laws and, specifically, with its Constitution. Thus, any eventual initiative –under the aegis of this international instrument- that might attempt to violate the fundamental liberties or rights or that should not be in line with our country’s institutions, must be classified as unconstitutional.

**This Convention deepens the direction adopted by Chile’s indigenous policy ever since the beginning of the *Concertación* governments and, just like our Law on Indigenous Peoples, it assumes that the conservation base of the indigenous culture is the land and that life is in communities separated from the rest of society. This conviction has led our current policy to have a strong rural bias, while the reality is that 69% of all indigenous peoples live in urban areas (*Casen 2006 Survey*).**

Convention 169 has only two auto-executing articles; namely, articles 6 and 7. They refer mainly to consulting the interested peoples by means of adequate procedures, about those legislative or administrative measures that affect them directly; all of which must be carried out freely and in good faith and with the objective of achieving agreements about the measures proposed (Art. 6). On the other hand, the people will have the right to decide about their own priorities regarding the development process inasmuch as the measure affects them. Also, such people must participate in the formulation, application and evaluation of national and regional development plans and programs. (Art. 7).

Those Convention norms that are not auto-executable will require legal modifications; but, it is not clear that there is sufficient political will on the part of the Executive Branch to introduce such changes. Let us just consider that the last statements proffered on this subject were that such task will be up to the next government to tackle.

On the other hand, given the reality of Chile’s indigenous peoples today, if the Convention is applied it will not mean progress, because it merely deepens the direction adopted by the indigenous peoples’ policy

ever since the outset of the *Concertación* Governments and, just like our Law on Indigenous Peoples, it assumes that the conservation base of the indigenous culture is the land and that their life is in communities separated from the rest of society. This conviction has led our current policy to have a strong rural bias, while the reality is that 69% of all indigenous peoples live in urban areas (2006 CASEN survey).

To this one must add the poverty levels and the differences that exist between indigenous and non-indigenous peoples. (Table N° 1).

### Code of Responsible Behavior

When confronted with the scenario of the start-up of Convention 169, the Government was in the process of studying a Code of Responsible Behavior whose objective was to regulate investments in indigenous areas. This option, however, was not the right approach, because upon red-taping investments the most affected would have been the indigenous peoples; considering that the Region of Araucanía (where most indigenous communities live) suffers the highest rate of unemployment in the country (13.3%).

Finally, the Government backed off from creating a Code of Responsible Behavior. Now it will be up to the Ministerial Council of Indigenous Affairs to monitor this topic.<sup>4</sup> Just days before discarding the need for such Code, Interior Minister, Edmundo Pérez Yoma, had stated: "Apparently, in order to apply the Convention it is not necessary to have a Code"<sup>5</sup>. This raises the question as to whether certain ministers knew of the proposal before or, whether the Presidential Commissioner had submitted it first within the Government for consideration.

### Where should we be aiming at?

It is clear that Convention 169 has already been approved and, therefore, that we must now implement it in the best manner possible. Thus, the question to ponder now is:

**Table N° 1**  
**Poverty among Indigenous and Non-Indigenous Populations – Year 2009**

	Indígena	No Indígena
Zona Rural	20,2%	10,80%
Zona Urbana	18,40%	13,60%

Source: 2006 CASEN survey.

which participation mechanisms can be used in order to really benefit the indigenous communities and preventing this to become a motive for splits?

At present, Chile has mechanisms in place that permit participation by indigenous peoples; therefore, we should only need a few modifications in order to be in line with the requirements of Convention 169.

On the one hand, there is the National Environmental Commission's (CONAMA) Environmental Impact System (SEIA), which includes a citizen participation item that states that an abstract of any project submitted for evaluation must be also published in the Official Gazette and in local a newspaper of the region to be affected by the project. In this manner any potentially affected person or organization<sup>6</sup> shall be entitled to submit the corresponding observations before the competent authorities. The Regional Environmental Commission (COREMA) is mandated to ponder the observations received amid the foundations of its resolution. Moreover, those persons who filed observations are entitled to file a claim if they consider that they were not properly pondered.

Additionally, the Reform of Law N° 19,300 about General Environmental Bases (which would establish that if during the evaluation process, the project would have been modified in a manner such that it would substantially alter it) provides for a second 30-day participation process. It also incorporates an Article 4, declaring that it is the duty of the State "to tend toward the adequate conservation, development and strengthening of the identity, languages, institutions as well as the

social and cultural traditions of indigenous peoples, communities and persons pursuant to the law and the international conventions ratified by Chile that are currently in effect”.

Consequently, if this reform is approved, there should be no need to innovate by introducing parallel mechanisms for indigenous peoples to have more participation in the evaluation of projects that directly affect their lands.

Another participation mechanism that is currently available to indigenous peoples is the institution that represents and sustains the country’s indigenous policy. In this case, the National Indigenous Development Corporation (CONADI) is the entity responsible for these affairs. Nevertheless, its institutional design has prevented this entity to fully accomplish its mission, because in its interior it mixes indigenous representation through its Council, which is elected by indigenous peoples and the interest of the State through public service officers.

The solution for a better representation and participation is to separate both instances, creating an Indigenous People’s Council –of a consultative nature- which would enable the CONADI to act as a specialized government service agency.

The *Re-Conocer* (re-cognize) Proposal picks up this idea and proposes: creating an Indigenous Affairs Secretariat, as a superior decision-making instance, installed in the National Planning Ministry (MIDEPLAN), to become an organ of representation, debate, proposals and consultations about the country’s indigenous policies; restructuring the CONADI, in order to convert it into a public service agency to execute the country’s public policies; integrating the *Orígenes* (origins) Program to the CONADI; and, enhancing its overall operation and performance.

Nevertheless, the proposal added additional institutions: a Ministerial Council

for Indigenous Affairs; the creation, within each Minister and Governor’s Office an Indigenous Affairs Unit; and, additionally, the Presidential Commission on Indigenous Affairs. Therefore, when adding all this up, the proposal generates an intricate institutional web that will tend to dilute responsibilities in terms of the country’s indigenous policy.

Progress has been made to date with respect to a draft bill toward the creation of the Undersecretary’s Office for Indigenous Affairs within the Ministerial Council for Indigenous Affairs, created by executive order and also, in the creation of an Indigenous Affairs Unit, stemming from a direct Presidential Order.

Beyond our critical appreciation of the institutional design behind all this effort, the manner in which the *Re-Conocer* measures are being implemented is quite worrisome (the Code of Responsible Behavior was a proposal of this document). To this date, no progress has been

made in reforming neither CONADI nor the *Origins* Program. The priority focus should be precisely on this point. If the Undersecretary’s Office for Indigenous Affairs were to be created, it would be necessary for the CONADI to alter its current role because, otherwise, it would have to report to another institution without yet having defined the proper function of either institution. Also, it is important for this process to create the Council for Indigenous Affairs, called to represent and empower the participation of the indigenous peoples.

On the other hand, it has become evident that such excessive proliferation of institutions will bring about greater in-governability of the country’s indigenous policy. What happened with the Code of Responsible Behavior is a proof of the foregoing. Had there existed a single public policy executing agency, the lack of a single focus on this matter would have gone undetected: Are we

It is to be expected that the start-up of the application of Convention 169 may provide an opportunity to improve the country’s indigenous policy and that at the time when the Council of Ministers should meet to analyze the manner of its implementation they consider the current reality of our indigenous peoples, free of pre-judgments based on stereotypes.

moving toward integration with identity or, toward a greater segregation of the rural indigenous communities? The latter is the road pursued by the *Concertación* to this date.

Consequently, if the Government pretends to go ahead with its policy of segregation and ruralization, it will be moving in a direction that is contrary to what indigenous peoples want and need. Proof of this is the 2006 CEP Survey of the Mapuche People, where, when confronted to the question as to whether they wanted their communities to be further integrated to the rest of Chile or, if they wanted more autonomy; 81% of the indigenous people surveyed answered that they wanted more integration.

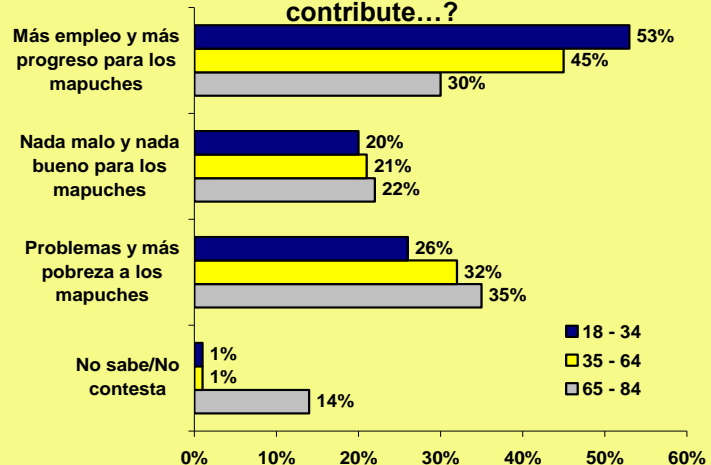
On the other hand, with respect to what the Mapuche people in general think about investments in their area; most of them consider that investments bring about more employment and progress for them (Chart N° 1).

## Conclusions

The Government's policy reversal regarding the Code of Responsible Behavior constitutes a positive step forward because it now appears that there is a willingness to debate this topic in a joint manner. Studies have been commissioned to several universities around the country, whose results should subsequently undergo public scrutiny and debate covering all potentially affected sectors and experts on the subject.

It must be borne in mind that at the time when the Convention should become effective –i.e. in September 2009- only its articles 6 and 7 will have a concrete form. These articles refer to the creation of a consultative body to represent indigenous peoples (which could well be the Indigenous Affairs Council, proposed in the *Re-Conocer* Proposal. And, insofar as participation is concerned, progress must be made in reforming Law N° 19.300, which includes indigenous peoples.

**Chart N° 1**  
**Do you believe that the agricultural, forestry or touristic businesses that are materialized near the communities, contribute...?**



Source: Survey: *What do the rural Mapuche communities think?* Libertad y Desarrollo, 2003.

Finally, it is to be expected that the start-up of the application of Convention 169 may provide an opportunity to improve the country's indigenous policy and that at the time when the Council of Ministers should meet to analyze the manner of its implementation they consider the current reality of our indigenous peoples, free of pre-judgments based on stereotypes.

<sup>1</sup> ["Categorico apoyo del Senado a Convenio 169 de la OIT sobre pueblos indígenas" \(Categorical Senate support to ILO Convention 169 regarding indigenous peoples\)](#) 4-3-2008. In: [www.senado.cl](http://www.senado.cl).

<sup>2</sup> Expert Commission Report on the Application of Conventions and Recommendations. International Labor Conference, 98<sup>th</sup> Meeting, 2009.

<sup>3</sup> Sentence on Case N° 1.050; Whereas clause 12.

<sup>4</sup> ["Consejo de Ministros definirá en julio plan de trabajo por norma indígena"](#), (Council of ministers will decide on a work plan toward an indigenous norm in July). *El Mercurio*, June 16, 2009. B2.

<sup>5</sup> ["El código que nadie quiere"](#). (The Code that nobody wants). *La Nación* newspaper, June 14, 2009. 30 – 31.

<sup>6</sup> All natural persons and all organizations duly represented by a legal person are entitled to know the Environmental Impact Study and all its ancillary documentation.