

**Indigenous Peoples, Energy, and Environmental Justice:
The *Pangue/ Ralco* Hydroelectric Project in Chile's *Alto BioBío*
By Marcos A. Orellana^S**

In the upcoming months, the reservoir of the *Ralco* dam, one of a series of dams along the Upper *BioBío* River in Southern Chile, will destroy the pristine mountain ecosystem and will permanently and irreversibly disrupt the semi-nomadic lifestyle and cosmivision of the *Mapuche/ Pehuenche* people.¹ At the same time, the communities affected by the dam will attempt to reconstruct their lives and culture using resources and rights provided by a “friendly settlement” reached by them with the Chilean Government and approved by the Inter-American Human Rights Commission (IACHR). This is the aftermath of a decade-long struggle by indigenous communities and environmental groups in defense of their rights against the project sponsor (Endesa -- a formerly public but now privatized company), the Chilean government, and the International Finance Corporation (IFC).

Controversial issues raised in the *BioBío* dams case present difficult public policy questions: How to reconcile respect for indigenous peoples’ cultures with energy demands by the dominant majority? How to operationalize prior informed consent with respect to large dams that involve resettlement and flooding of ceremonial and sacred sites? How to hold multinational corporations accountable for human rights violations? And how to determine the “public interest” in light of developmental needs and indigenous peoples’ cultures and rights?

In general, this case highlights the fact that projects in violation of fundamental human rights do not constitute sustainable development. In other words, violation of the rights of indigenous peoples cannot be justified by the ‘public interest’ of the settler, dominant majority.

This piece presents a chronicle of the decade-long struggle of the *Mapuche/ Pehuenche* against the flooding of their cultural ecosystem. This account first provides a historical background, and then examines the role of the IFC, the Chilean government, and the project sponsor in regard to the dams. It concludes with discussion of the petition presented by the affected indigenous families to the IACHR and of the settlement that was finally negotiated.

Background

For centuries, the *Mapuche* from deep South America have struggled against invasion of their territories. First came the Incas, forcing the people to worship the sun and to pay taxes to the emperor. Yet the Inca ultimately could not defeat the *Mapuche* bands and were forced to establish their frontier on the *Maule* River, a couple hundred kilometers north of the *BioBío*.

A few hundred years after the Inca’s failed incursions, European conquerors scoured for gold, silver, sugar and salvation in the ancestral domains of the indigenous peoples of the Americas. The Spaniards succeeded in conquering the Aztec and Inca Empires, but were not able to attain control over the territories south of the *BioBío* River. The *Mapuche* bands proved to be an insurmountable obstacle for the army of Spain, the most powerful European Empire of the time. In 1610, Peace Accords were signed between the Spanish Crown and the *Mapuche*, recognizing the *BioBío* as the frontier.

In 1810, the *criollos*, descendants of the Spanish colonizers, had become a powerful elite and declared independence from Spain, setting out to create the new Republic of Chile. Under the new laws, the *Mapuche* were regarded as citizens of the Republic, and their territories annexed to the new Chilean State. On the ground, however, the *BioBío* River remained a frontier between western

civilization and the *Mapuche* peoples. The *BíoBío* came to symbolize the centuries' old war that forged the spirit of the social construct of Chile. The ambitions of the elite controlling the State machinery of the new republic, however, using arms from European and American dealers, would soon destabilize the centuries-long peace agreement.

According to historians, in 1881 the Chilean army, in a joint operation with its Argentine counterpart, conducted an ethnic cleansing campaign in the territories of the *Mapuche* Nation.ⁱⁱ In Chile, the military strategy proved successful in destroying resistance and handing control over the *Mapuche* territory to the Chilean State. In Argentina, the military action exterminated native peoples from the Pampas.

After their military victory, the natural resources in the *Mapuche* domains, particularly the ancient forests, were readily transformed into cash to finance wars against Bolivia and Peru. This proved most convenient after years of fighting in the *Atacama* Desert to protect (and share the profit of) British mining investments in the high Andes plateau.

With their territories under the power of the Chilean State, the *Mapuche* people endured a century of constant encroachment. Chilean laws and courts proved instrumental in steadily reducing the number of hectares under *Mapuche* 'legal title'. The process of loss was slow but steady, and resulted in a fragmented indigenous people cornered into a small fraction of their original territory.

During the last three decades, the *Mapuche* have been struggling against the neoliberal economic models introduced by General Pinochet's dictatorial regime. The models held that market-based, capital-driven development strategies would work more effectively if community-based property rights and management systems were forcefully divided. Thereon, local communities were divided by the decrees of Chilean administrative agencies: common property was divided into individual patches.

The economic model implemented during the Chilean dictatorship had a single objective: economic growth. The environment was, and to some extent still is, visualized by the prevailing economic model as a source of raw materials and a sink for the wastes of ever-increasing human consumption. The equilibrium of the energy flows in the ecosystems and the rational use of renewable resources were set aside for short-term profits and political interests of those in power. The democratic regimes that emerged during the 1990s adopted virtually the same model, albeit with minor corrections that allowed newly elected authorities to assert that change was underway.

This story has repeated itself throughout much of Latin America, where globalization has meant the arrival of new conquerors armed with formidable technologies that enable them to plunder natural resources. Too often, where the indigenous inhabitants have resisted, they have been deprived of their means of subsistence, and their ecosystems have been systematically destroyed.

Violation of Human and Environmental Rights

Early in 1990 and 1991, the *Mapuche/Pehuenche* communities held open meetings to determine their position in regards to a proposed hydroelectric project consisting of a series of dams that would flood their lands, disrupt their culture, and force them to resettle. Initially, all traditional leaders agreed to resist the destruction that loomed ahead. To undermine the unified stance against the dams, the project sponsor Endesa designed a strategy of lies and alcohol to co-opt traditional leaders and families. The use of rumors, false information regarding indigenous rights under national law, threats, false promises, and large quantities of wine and spirits, would gradually achieve its purpose of fostering division within the *Pehuenche* communities.ⁱⁱⁱ

The communities were ill-equipped to face external pressure, and lacked information to respond to the challenge. The result was that some families decided to barter their land rights, while others resisted. This outcome reflected the success of Endesa's strategy in dividing the communities.

There was no dialogue exploring the customary law of the community and Chilean laws, and therefore, the community did not know (and had no means to find out) the extent of its rights under Chilean law. Moreover, the Chilean State, by failing to provide accurate information and support, neglected its international duty under human rights law to provide special protection to indigenous peoples rights. This element worked against unity, as fear and mistrust began to appear and grow. Moreover, the community lacked autonomy to exclude strangers from its territory, as the roads are regarded as public, and fences deemed as limited to containing animals.

Dam construction in the ancestral domains of the *Mapuche/Pehuenche* has caused serious impacts on the community and its cultural ecosystem, which range from loss of political power to threats against the very existence of the group. The loss of the *Pehuenche's* ability to determine the meaning of their natural spaces, as the sacred *BioBio* river is transformed to an artificial lake, signifies the loss of their political ability to freely determine the forms in which reality is understood and communicated, a basic requirement for the affirmation of a peoples' right to exist as a culturally distinct ethnic group.

One of the features of the *Pehuenche* culture is their semi-nomadic way of life, which divides living spaces according to seasons. In summer, communities move towards the high mountains of the Andes to collect seeds from millenary *Araucaria* trees, the *Pehuen*, and to celebrate religious ceremonies. The *Pehuen* is so central to affirmation of group identity that the people self-identify themselves as *Pehuen-che* (*che* = people). In winter, they return to their low-land abodes to endure the rain and snow. The construction of the dam will flood the last remaining low-lands in the region, permanently and irreversibly disrupting this eco-cultural pattern.

The *Pehuenche* believe, particularly the elders, that the damming of the river will force *Punalka*, the spirit of the River, to leave their community, which will in turn bring misery to the land and to them. This apprehension is affecting the mental health of community members, as religious beliefs are central to the affirmation of *Pehuenche* self-identity. The flooding of their ancestral lands will also result in the loss of ceremonial spaces (the *Nguillatun* fields), and the destruction of cemeteries. All these developments threaten the existence of *Pehuenche* culture as a distinct, ethnic expression of humanity.^{iv}

IFC support for the Pangué Dam and the Hair Report

The construction of the first in the series of proposed dams was made possible through the leverage of international capital brokered by the World Bank Group's International Finance Corporation (IFC).^v The *Pangué* dam was chosen to be the first because its environmental impacts were believed to likely be less intense than those that will be caused by construction of the *Ralco* Dam. The *Pangué* Dam is an obvious "foot in the door" for the coming dams, as its engineering design required the creation of a huge reservoir upstream that could regulate downstream flows.

The IFC contended that the project provided for an environmental impact assessment and ensured maintenance of a minimal ecological flow. Given the absence of environmental regulations in Chile at the time, the standards set by the IFC assumed great importance. Confusion over applicable environmental and social standards, and inability to manage conflictual relationships with client corporations, however, revealed the IFC's lack of capacity to design and oversee implementation of environmentally sensitive projects.

Environmental NGOs began to heavily criticize the IFC for its involvement in the *BíoBío* hydroelectric project. They denounced non-compliance with applicable World Bank operational directives, such as those regarding the protection of wildlands, involuntary resettlement, indigenous peoples, and assessment of cumulative impacts. In November 1995, the Grupo de Acción del *BíoBío* (GABB), with support from the Center for International Environmental Law (CIEL) and hundreds of other NGOs from around the world, filed a request for inspection before the World Bank's Inspection Panel. On behalf of the *Pehuenche* and on its own right, the GABB argued that there was no other forum in which to express and prove violation of the IFC's internal policies.

Although the Panel, whose terms of reference exclude IFC-funded projects, declared the request for inspection inadmissible, the filing triggered a process of reform within the IFC that lasts until today. The President of the World Bank, James Wolfensohn, decided to allow an independent review of the project; he appointed Jay Hair (then President of the International Union for the Conservation of Nature - IUCN) to prepare a report. The findings of the review team were kept secret by the IFC, which claimed that privileged commercial information belonging to its client was involved. Endesa, in turn, had threatened to sue the IFC if it released the report.

More than a year later, during July 1997 – one month *after* the Ralco EIA was finally approved – a heavily edited version of the “Hair Report” became public. It reported gross non-compliance with relevant applicable World Bank environmental and social standards and the failure of the IFC to supervise the project. The report concluded that the IFC did not have in place “the necessary institutional operating systems, or clarity in its policy and procedural mandate, to manage complicated projects”.^{vi} Significantly, the Hair Report also documented failure by IFC management to disclose material information to its Board of Directors.

The Hair Report confirmed the findings of anthropologist Theodore Downing, who had conducted an independent evaluation of the Pehuen Foundation for the IFC. Marketed as a first-of-its-kind arrangement in South America, the Pehuen Foundation was supposed to share benefits from the dam projects with local indigenous communities. Instead, Downing concluded that the *Pehuenche* were subsidizing the *Pangue/Ralco* Project with their resources, economy, and culture!^{vii}

Downing submitted his report to the IFC on May 6, 1996, elaborating on the Foundation's failures to provide for the long-term, sustainable development of the *Pehuenche*. The IFC immediately responded by seeking to prevent public disclosure of the report and threatening Downing with legal action if he disclosed it in any way. Downing's response was to file a claim before the American Anthropological Association (AAA) denouncing serious violations by the IFC and the project sponsor of the human rights of the *Pehuenche*, and his own rights as an anthropologist and consultant. The AAA confirmed Downing's allegations. It challenged the IFC to compensate the *Pehuenche* for damages done and to adopt a permanent policy for protecting the human rights of people adversely affected by IFC projects.^{viii}

In view of these findings, the IFC decided to condition the issuance of further loans on the adequate resolution of all outstanding environmental and social issues. Endesa responded by prepaying its loan. This significantly diminished the IFC's leverage in project implementation, as it only retained an insignificant equity share in the *Pangue* Dam.

After the Hair Report, the IFC embarked in an internal process of institutional reform, which continues to this day. The reforms included a substantial increase in staff (from two to 80 people) in charge of the environmental clearance process, the clarification and drafting of applicable environmental and social standards, and an initial effort towards the mainstreaming of environmental concerns in lending operations. More significantly, the *Pangue* Dam provided impetus for the creation of an accountability mechanism within the IFC known as the Office of the Compliance/Advisor

Ombudsman (CAO). It remains to be seen whether the institutional reforms will lead to significant changes on the ground.

There is little cause for optimism. In July 2002, downstream municipalities flooded by water releases from the *Pangue* dam's reservoir during heavy rain, together with *Pehuenche* families, filed a complaint with the CAO, noting that after years of investigations, reports, and rhetorical statements, the situation on the ground remained unchanged. The complaint specifically requested that the IFC and the project sponsor design and disclose an emergency action plan to deal with heavy rains and earthquakes (several volcanoes are close to the dams) that threaten the safety of downstream communities. The complaint also requested the disclosure of several already existing documents, including the loan agreement, the Hair report, and studies of downstream impacts.

In addition, the complaint called for creation of a screening mechanism based upon prior environmental and social performance that the IFC would henceforth be obliged to use to select client companies. This screening mechanism would distinguish the IFC from commercial banks, and thus justify its existence as a public international organization with sustainable development responsibilities. It would provide the IFC with leverage to ensure respect for the environmental and social covenants included in loan agreements. Pursuant to the screening mechanism, companies such as Endesa, that have misrepresented material facts to the public or to the IFC, pre-paid their loans to avoid environmental and social responsibilities, or violated domestic or international law, would be barred from entering into further agreements with the IFC.

The Ombudsman agreed to accept and investigate the complaint with a view to providing effective remedies on the ground. The IFC immediately reacted, and within ten days it released its remaining equity stake in *Pangue*. The CAO nevertheless followed up with an assessment report that was issued in May 2003. It identified several areas where the IFC should strive to resolve outstanding issues, including, *inter alia*, monitoring downstream impacts, disclosing emergency response plans, disclosing the Hair and Downing reports, and expanding its due diligence to include environmental and social performance.^x Addressing more systemic issues, the CAO recommended that the IFC investigate whether it acted in the best interests of its shareholders in this case. Despite apparent good intentions, the CAO has remained unable to resolve outstanding problems related to the dam project among the *Mapuche/Pehuenche*. This institutional incapacity is due both to opposition from IFC management and to the inherent limitations within the mandate and powers of the CAO.

Litigation before the Spanish Real Audiencia

When the *Pangue/Ralco* hydroelectric project was acquired in 1999 by a Spanish transnational corporation, Endesa-Spain, opponents of the dam were encouraged to search ways to hold the corporate officers accountable for the human rights violations resulting from their decisions. They focused on Article 607 of the Spanish Penal Code, which is used to implement the Genocide Convention, and which provides that someone who, with the intent to destroy, in whole or in part, an ethnic group, and inflicts on the group or any of its members conditions of existence that place their life in peril or severely disturb their health, or who *undertakes forceful displacement of the group or its members* or adopts any measure that tends to impede their way of life or reproduction, or provokes any other lesion, has committed the crime of genocide.

Further legal research revealed that the distinction introduced during preparation of the Genocide Convention between genocide and ethnocide may be inapplicable to the realities of indigenous peoples. This perspective derives from the fact that the cultural and physical existence of an indigenous group does not typically represent separate spheres of existence. Rather they are symbiotically united in a relationship that depends on nature for its continuity. Thus, forced

resettlement and destruction of ancestral and sacred domains do not only affect the culture of indigenous group, but their very existence.

Additional anthropological inquiry has found that the *Mapuche/Pehuenche* are physically integrated with the natural environment, in material and spiritual ways that define their cultural and corporal identity.^x Their historical experience has been tied to the symbolic meaning attributed to natural components of their land, rivers, volcanoes, Araucaria trees, etc. These natural elements form part of their family, and the spirits of their ancestors are believed to dwell among them. Therefore, any usurpation or physical destruction of their territories represents an attack on their cultural foundation and existence.

At the time Endesa-Spain took control over the *Ralco* project, the jurisdictional decision of the *Real Audiencia* (which is the relevant Spanish court) in the *Pinochet* case opened further opportunities for pursuing action against perpetrators of international crimes. Although organizations in Spain supported the *Pehuenche*, such as the Balearic Islands Parliament, however, the lack of economic resources and the difficulties involved in proving genocidal intent were insurmountable obstacles to establishing corporate accountability in the courts of Spain.

The Chilean Administration's Intervention of CONAMA and CONADI

With support from Chile's central government, Endesa inaugurated the *Pangue* Dam in March 1997. With the first dam in operation, the company began to prepare for construction of the *Ralco* Dam. It was predicted to be the most destructive of all the projected dams: its reservoir would irreversibly extinguish endemic wildlife, permanently mar the *BioBio* River, and forever usurp critical symbolic space and territory of the *Pehuenche* people.

A media campaign funded by Endesa stressed the lack of alternatives for meeting the energy demands of Chile's growing economy. Thus, it presented the situation as an issue of national security, where a few environmental and cultural impacts would have to be endured for the country to develop and modernize.

The construction of the *Ralco* dam, however, presented a different legal scenario from the *Pangue* dam. The Chilean Parliament had approved the Indigenous Peoples Law in 1993 and the Environmental Framework Law in 1994. These statutes presented formidable hurdles to Endesa. For example, the environmental impact assessment (EIA) presented in March 1996 by the project sponsor under the environmental law was initially rejected by all 22 public agencies that evaluated it. Only with the direct intervention of then-President Eduardo Frei would Chile's environmental agency, the Comisión Nacional del Medio Ambiente (CONAMA), approve the EIA in June 1997. Significantly, approval of the dam was explicitly conditioned on observance of the rights recognized under the Indigenous Peoples Law.

The *Ralco* EIA was conducted under a procedure not regulated by law, but agreed to by CONAMA and Endesa. In June 1997, indigenous *Pehuenche* families appealed to the civil courts of Santiago to nullify the decree that approved the EIA. Indeed, the Chilean constitution provides that administrative acts must follow correct legal procedure, or be nullified. During the course of the trial, the Judge heard the parties and also visited the site. During September 1999 he ordered a halt to major work on the dam. Weeks later, this order was reversed on appeal from Endesa and CONAMA. The Judge finally delivered his decision in May 2003 (when the dam was about 80% completed), holding that the EIA was null and that Endesa could not fill the reservoir. Endesa and CONAMA appealed, but later withdrew the action to overturn the decision as part of the 2003 settlement before the IACHR.

In addition to the environmental law hurdles, the 1993 Indigenous Peoples Law recognizes that land is the basis for indigenous peoples' culture and existence, and provides special protection to land by requiring the consent of each family for the transfer of land rights, as well as approval by the Comisión Nacional de Desarrollo Indígena (CONADI), the Chilean government institution with responsibility for indigenous people. Even in such cases, the indigenous peoples law provides that land rights may only be exchanged for rights over land of similar value and characteristics, *i.e.* a land-for-land exchange.

CONAMA, Endesa and CONADI all acknowledged that the indigenous law ensured each family the right to decide whether or not to exchange their land rights. Endesa undertook a campaign to lure and pressure families to convey their rights, as the reservoir could not be (legally) filled otherwise. Grandiose promises, pervasive poverty, large amounts of alcohol, threats and lack of legal support all conspired to induce many families to sign exchange agreements.

Mauricio Huenchulaf, who was publicly opposed to Ralco, then headed CONADI. Under his direction, CONADI undertook an investigation of these exchange agreements and found that the *Pehuenche* did not know the terms of the agreements they were ostensibly entering into. Further, CONADI determined and publicly expressed its conclusion that implementation of the *Ralco* Project would constitute an act of ethnocide against the *Pehuenche* people.

These findings motivated the Frei administration to remove Huenchulaf and appoint Domingo Namuncura to head CONADI. Under the indigenous peoples law, the Council of CONADI had the responsibility of approving or rejecting the land exchange agreements. President Frei, to ensure that the exchanges would be approved, removed two non-indigenous members of the Council that had voiced opposition to the dam. But to the surprise of the administration, Mr. Namuncura also made public his intention to reject the land exchanges. The day before the scheduled session of the Council, Mr. Namuncura was also removed from office. Indigenous members of the Council still tried to hold the session, but the police changed the locks of the offices of CONADI and sealed off access.

The Frei administration next appointed a non-indigenous person, Rodrigo Gonzalez, to direct CONADI. The new Council met and approved the exchange agreements submitted for its consideration. The notorious intervention in CONADI by the Frei administration was thus accomplished. For the indigenous peoples and their supporters in Chile, however, the legitimacy of CONADI has been in question ever since.

Denial of Justice in Domestic Chilean Courts

Not all indigenous families consented to barter their land rights. Seven families affirmed their rights to remain in their ancestral lands and declared that no amount of gold would suffice to lure them away.^{xi} Their resistance placed the *Ralco* hydro-electric project in legal jeopardy, as the Indigenous Peoples Law clearly recognized that for indigenous peoples, "land is the principal foundation of their existence and culture", and that due to the "national interest", indigenous lands could only be bartered for similar lands, subject to the owner's consent and the approval of CONADI. These rights are unambiguously enshrined in the Indigenous Law, and thus the *Ralco* dam could only proceed legally with the consent of each and every affected indigenous family.

To defeat the rights of indigenous families protected by the Indigenous Law, in February 2000, the Frei administration resorted to the authority of the *D.F.L. 1 on Electric Services* --passed by General Pinochet's Military Junta in 1982-- and issued two decrees granting electric concessions to Endesa. The General Comptroller of the State approved the legality of these decrees on President Frei's last day

in office. These decrees meant that Endesa was finally in a position to proceed with major work necessary for construction of the dam, and that the Chilean government had granted authorization to flood ancestral *Pehuenche* lands. The fact was, however, that Endesa had already initiated major construction works in 1998, by virtue of simulated contracts, in violation of the Indigenous Peoples Law.^{xii}

Representatives of indigenous communities in Chile met in Santiago a few weeks after publication of the decrees. All the representatives present in the meeting decided to initiate legal and political action against what they considered the death of the indigenous law and genocide against the *Pehuenche* people.

The resisting *Pehuenche* families requested the Court of Appeals of Santiago to uphold their rights under the 1993 Indigenous Law. They argued that the *land for land* exchange system envisaged by the 1993 law was violated by the superimposition of the energy norms, which contemplate *land rights for cash*. Further, the families requested the Court to uphold the special protection of their land rights against a forceful eviction procedure contemplated in the energy law decree.

The Court of Appeals dismissed the actions in November 2001, but stated that all governmental agencies and private actors had to respect the special protection afforded by law to indigenous land rights. Although the Supreme Court confirmed this judgment, only a few months later, in March 2002 the newly elected administration of President Ricardo Lagos set in motion the forceful eviction process contemplated in the energy law decree. The families requested the Court of Appeals to ensure respect for their rights under the indigenous law, but the Court refused to hear the case. The families then requested the Supreme Court to review and overturn this decision, but the Supreme Court also declined to hear the case.

Last Recourse: Petition to the Inter-American Human Rights Commission

After the highest courts in Chile declined to hear their applications, the families initiated action before the Inter-American Human Rights Commission (IACHR) in December 2002. The petitioners alleged that the Chilean administration, with the complicit support of the Chilean judiciary, violated substantive provisions of the Inter-American Convention on Human Rights, to which Chile is a party. The petitioners further argued that although Chile has a special duty to protect indigenous land rights, the State allowed the construction of a dam that would irreversibly and permanently destroy indigenous lands and place the *Pehuenche* culture in peril.

More specifically, the families claimed that the Chilean State violated its treaty obligations to respect the right to life, culture, religion, and land of indigenous peoples. The petition provided evidence on how the State further violated the *Pehuenche's* rights to property and judicial protection. On these grounds, the petition requested declaratory judgment, reparations, and assurances of non-repetition.

The petitioners also requested precautionary measures to prevent irreparable harm to the life and property of the indigenous families that affirmed their legally protected rights to remain on their lands. They argued, *inter alia*, that the pressure of Endesa and the lack of protection from the government, coupled with the lack of material resources to meet basic needs, had created a desperate situation for resisting families. Moreover, they presented evidence on how the Lagos administration had initiated summary procedures to evict them forcibly from their ancestral domains, in open violation of the Indigenous Law, adding an element of extreme urgency to the need for provisional measures to prevent irremediable harm.

The IACHR handled the petition for precautionary measures expeditiously, as it became aware of the serious violation of rights and the irreparability of the pending harm. On December 12, 2002, the IACHR requested the government of Chile to abstain from undertaking any action that would modify the *status quo* until the Inter-American human rights system promulgated a final decision.

In response, the Chilean government informally suspended procedures contained in the Electricity Law for the forceful removal of the indigenous families. In short, these procedures involved the appointment of a commission to determine the market value of the lands at issue, provide legal notification of such valuation and consign the value in the local tribunal's account, and then request the police to assist in forceful removal.

Additionally, however, the government rejected allegations of human rights violations on several grounds. First, it denied that domestic recourse had been exhausted and asserted that the petition before the IACHR was therefore inadmissible. Second, it argued that the petition was inadmissible because the facts, and more specifically the governmental acts complained of, did not affect the treaty rights of the indigenous families. The government then argued that the construction of a hydroelectric power plant had a clear "social interest", and that the property rights of the *Pehuenche* families were subordinate to this "social interest".

The Friendly Settlement

In February 2003, in a hearing before the IACHR in Washington DC, the petitioners and the government agreed to explore a "friendly settlement". Discussions among the Parties took place at the OAS, CIEL, and the Chilean Mission to the OAS. This dialogue occurred against the background of unceasing construction, which had advanced approximately 75-80% since 1998. They culminated in a document that laid out a timeline and terms of reference for negotiations to be finalized in Chile. Although conversations continued in Chile, and although in May 2003 the 6th Civil Judge of Santiago decided that the *Ralco* EIA was null, the timeline soon passed without much prospect for a final agreement. Besides the broader political demands that would assure non-repetition of similar events, a major issue dividing the parties was the amount of compensation to be paid by the project sponsor, Endesa-Spain.

In June 2003, the stalemate was broken when the Court of Appeals of Santiago agreed to hear an action by Endesa against the government. Endesa argued that the suspension of the legal notification of the lands' valuation was arbitrary and illegal, and that it violated its constitutional rights. The Chilean government declined to defend itself; instead, it complied with Endesa's demands and proceeded with the valuation. Then on July 28, 2003, Endesa transmitted the money specified in the valuation into the local tribunal's account, and the process of forceful eviction was set in motion.

In light of these events, the *Pehuenche* petitioners requested precautionary measures from the IACHR, noting that the government had failed to comply with its obligation to maintain the *status quo*. On August 1, 2003 the IACHR once again requested precautionary measures from the Chilean government, and in particular that the government "avoid or suspend any judicial or administrative action that implies the eviction of the petitioners from their ancestral lands".

That same month, the Special Rapporteur on Indigenous Peoples of the United Nations Human Rights Commission Rodolfo Stavenhagen visited the *Upper BioBio* and met with *Pehuenche* families, their lawyers, and government representatives. His presence in the region and his carefully worded statements to the media gave renewed force to the precautionary measures requested by the IACHR. To some extent, they also prompted the parties to return to the negotiating table.

Finally in October 2003, negotiations concluded by way of a “friendly settlement”.^{xiii} It provided for *Pehuenche* families to receive reparations for relinquishing their legal rights to natural resources that will be flooded by the dams. For the *Pehuenche*, reparations symbolize the responsibility of the Chilean government under international law for human rights violations they have suffered. The families received rights over lands of good quality, technical support to promote agricultural productivity, educational scholarships, and monetary compensation in the order of US\$300,000 per family. In turn, they agreed to transfer their rights to ancestral lands and to discontinue legal action.

The Chilean government also committed to implementing several measures of more general application. The most important commitments were to:

- Strengthen national laws that guarantee respect for indigenous rights, including a **constitutional reform** that would culminate in legal recognition of Chile’s indigenous peoples;
- **Ratification of the International Labour Organisation (ILO) Convention 169** on indigenous peoples’ rights;
- Improve and strengthen legal processes for delineating the territory of the *Mapuche/Pehuenche* people and ensuring their meaningful participation in official development processes, including through the **creation of a municipality** in the Upper *BíoBío*; and
- Promulgation of specific measures to ensure environmental protection of the Upper *BíoBío*, including **guarantees of no other hydro-electric projects in the region**, and community monitoring over the operation of the dam.

Conclusion

In the Alto *BíoBío*, change has traditionally occurred slowly. Although Spanish Conquistadores do not threaten local communities with guns or canons anymore, the transnational corporation Endesa-Spain is continuing the enterprise of conquest in *Mapuche* territories by destroying the symbolic *BíoBío* River. This is not an isolated incident in the Americas, where the lure for oil, gas, minerals, timber, and energy often results in the involuntary displacement of indigenous peoples from their ancestral domains and causes severe and lasting environmental damage.

Today there is greater awareness within the international community regarding fundamental, inalienable rights that belong to all human beings, regardless of color, creed, income or citizenship.^{xiv} The progressive development of international human rights law provides some basic minimum standards for the protection of human dignity, below which no ‘development’ project can be legally or morally justified.

By failing to uphold special protections for indigenous culture and land rights (including cemeteries and ceremonial sites), the Chilean government violated the fundamental rights of the *Pehuenche*.^{xv} Although Chile’s center-left democratic governments vowed to uphold the rule of law, the pressure of powerful corporations, coupled with a narrow view of development, left those promises unfulfilled. “Moreover, the *Ralco* case clearly shows the social tensions that arise between a “modernizing” development model and the social, environmental and cultural costs to the people who bear the burden of this economic transformation.”^{xvi}

The case also shows that the rule of law may not hold when the interests of powerful domestic elites, transnational corporations, and international financial institutions collude to achieve a particular development objective. As this article has shown, the *BíoBío* project is illegal on a number counts: the project sponsor violated the water law as it lacked the water rights needed to operate the dam; violated the electricity law, as it requested operating permits belatedly; violated the indigenous peoples law, as it simulated contracts and disregarded fundamental *land to land* exchange requirements; violated the environmental framework law, as the EIA was conducted through an irregular procedure; violated the

Chilean constitution, which prescribes the nullity of irregular administrative acts and which guarantees fundamental human rights; and violated the Inter-American Convention of Human Rights, which guarantees the right to life, land, and culture. In spite of all these illegalities, the project moved ahead, with the full support of the Chilean Administration and Judiciary.

The denial of fundamental rights underscores the critical significance of having recourse to an international human rights mechanism like the IACHR, as well as the importance of having pro-bono legal assistance to access international remedies. In the Americas, the Inter-American Court of Human Rights^{xvii} and the IACHR^{xviii} have upheld indigenous peoples' rights to their ancestral domains, thus providing a critical safeguard against illegitimate State conduct. In so doing, the Court and the Commission have further contributed to illuminating the linkages between human rights and the environment.

The *BioBio* case also had a profound impact on the institutional reforms undertaken by the IFC, particularly in the creation of the CAO. Such accountability mechanism is important to solving problems that affect local communities, as well as to ensuring compliance with safeguard policies, including with respect to indigenous peoples and environmental protection. Ironically, the *BioBio* case also reveals the CAO's limitations, including chiefly the CAO's lack of resources or authority to implement its recommendations. Simply put, if IFC management does not want to cooperate with the CAO, the CAO will be unable to deliver its mandate.

Ultimately, the *BioBio* case entails an important story of local empowerment, where poor indigenous families stand up to defend their land rights and spirituality. After years of struggle, they obtained compensation for the harm and injustice they suffered, as well as assurances that no other hydro-electric projects would be undertaken in their territories. It remains to be seen whether the Government of Chile will honor its commitments and discharge its obligations under the "friendly settlement" approved by the IACHR.

* Marcos A. Orellana, Senior Attorney, Center for International Environmental Law (CIEL). CIEL acted as counsel to the *Pehuenche* families in the case before the IACHR. Comments by Owen J. Lynch and Daniel Magraw are greatly appreciated.

ⁱ The *Mapuche* (*mapu*=land; *che*=people) is a generic term that encompasses distinct tribes, including the *Pehuenche*. This piece uses the term *Mapuche* when referring to events that involved several tribes or the territory at large, while reserving the term *Mapuche/Pehuenche* or *Pehuenche* for communities directly affected by the *BioBio* dams.

ⁱⁱ J. Bengoa, *Historia de un Conflicto* [History of a Conflict] (1999), pg. 21. Mr. Bengoa is Member of the United Nations Sub-Commission on Promotion and Protection of Human Rights.

ⁱⁱⁱ See D. Namuncura, *Ralco, Represa o Pobreza*, [Ralco, Dam or Poverty] (Editorial LOM), 1999.

^{iv} See J. Moraga, *Agua Turbia, La Central Ralco en el Alto BioBio*, [Shady Waters, The Ralco Facility in the Upper BioBio], Observatorio Latinoamericano de Conflictos Ambientales, 2001, pgs. 29-30.

^v See D. Hunter, et. al., "The BioBio's Legacy: Institutional Reforms and Unfulfilled Promises at the International Finance Corporation", in D. Clark, et al., Eds, *Demanding Accountability*, 2003.

-
- vi Pangue Audit Team, *Pangue Hydroelectric Project (Chile): An Independent Review of the International Finance Corporation's Compliance with Applicable World Bank Group Environmental and Social Requirements*, at para. 18.
- vii T. Downing, *Independent Review of the Pehuen Foundation*, May 7, 1996, para. 28.
- viii B. Johnston, Report of the Committee for Human Rights of the American Anthropological Association, *The Pehuenche, The World Bank Group and ENDESA S.A.*, April 20, 1998, pg. 15 of 35
- ix CAO, Assessment Report, *Complaint filed against IFC's Investment in Endesa Pangue S.A.*, May 2003.
- x R. Morales, Ed., *Ralco, Modernidad o Etnocidio en Territorio Mapuche*, IEI-UFRO, Temuco, 1998.
- xi The women that decided to resist formed the group *Mapu Domuche Nehuen* (Women with the Force of the Earth).
- xii R. Abeliuk, *Expert Legal Report on Lease Contracts between Endesa and Family Quipaiñán -Piñaleo*, 1998.
- xiii Informe No. 30/04, Petición 4617/02, Solución Amistosa, Mercedes Julia Huenteao Beroiza y otras, Chile, 11 de marzo de 2004. Available at www.ciel.org.
- xiv See generally, M. Orellana, *Indigenous Peoples, Mining, and International Law*, International Institute for Environment and Development (IIED), 2002.
- xv FIDH, International Federation for Human Rights, August 2003, No 358/2; *The Mapuche People: Between Oblivion and Exclusion*, pg. 42.
- xvi R. Stavenhagen, *Report Of The Special Rapporteur On The Situation Of Human Rights And Fundamental Freedoms Of Indigenous People*, E/CN.4/2003/90, 21 January 2003, para. 36.
- xvii See *Awas Tingni* case (merits), 31 August 2001.
- xviii See *Western Shoshone* case (USA), Report 75/02, 27 December 2002; See also, case *Maya Indigenous Communities of Toledo District* (Belize), Report 96-03, Case 12. 053, 24 October 2003, and generally IACHR, *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, Doc. 62 (October 20, 2000).