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Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water

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1. INTRODUCTION

The Mapuche peoples are the third largest indigenous group of South America. Like other indigenous groups whose worldview and customs are at odds with the prevailing western-style socio-economic model, they are often caught between cultural preservation and development. Their struggles are exacerbated in developing countries, like Chile and others in Latin America, where neo-liberal development policies have made the promotion of accelerated, market-driven economic development the governments’ single most important goal and raison d’etre.¹

Although the recognition of indigenous rights is gaining some momentum across Latin-America, indigenous control over management of natural resources in traditional lands remains a contentious issue. Existing Latin American laws frequently fail to strike a balance between economic development and indigenous rights to resources. Law and policy

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tend to favour macroeconomic notions of development and per capita growth regardless of actual or potential infringement of international human rights including, \textit{inter alia}, the right to water.

This paper is based on the contention, included in the 1997 \textit{Proposed American Declaration on the Rights of Indigenous Peoples}, that "traditional collective systems for control and use of land, territory and resources, including bodies of water and coastal areas, are a necessary condition for [indigenous peoples'] survival, social organization, development and their individual and collective well-being."\textsuperscript{2} It intends to present and analyze some of the issues facing the Mapuche peoples of Chile as they fight to maintain control of water resources in their territories. The right to water is chosen, amongst other human rights also at stake in the case under study, as it is illustrative of the struggle for control of scarce natural resources that is at the centre of human rights conflicts involving indigenous peoples.\textsuperscript{3}

2. \textbf{ORGANIZATION}

Part I is a general survey of the international law on the human right to water and indigenous peoples. Part II is a case study. Its focus is on the Panguie-Ralco Dams case and the experience of the Mapuche peoples of Chile with hydroelectric development in their traditional territories. It will illustrate how development activities can translate into human (indigenous) rights violations when the law and regulations favour economic development interests and, as a result, deprive indigenous communities of control over their ancestral lands and resources.

The case study also includes a review of the legal and policy framework for water rights and water management in Chile. There, the information gathered appears to indicate that the current neo-liberal approach to the expansion and enhancement of public services, combined with a system of private property rights in water, is inadequate to ensure widespread enjoyment of the right to water and to restore the imbalance resulting

\textsuperscript{2} Organization of American States (OAS), Inter-Amer. C.H.R., 1333\textsuperscript{rd} Sess., 95\textsuperscript{th} Regular Sess. (Feb. 26, 1997). Negotiations on the 1997 proposal are ongoing. For an account of the negotiations and their outcome see \url{www.dialoguebetweennations.com}.

\textsuperscript{3} Although some Mapuches have migrated to urban centres in search for better opportunities, most have remained in what is left of their traditional lands and have adapted their customs to sedentary lifestyles including small-scale subsistence farming. Their plight is representative of the impacts and pressures that both small-scale farming and indigenous communities are faced with when countries undertake to develop natural resources in the areas that these communities reside in. Despite this paper's focus on the Mapuche, given that non-indigenous small-scale farming communities share with indigenous peoples the threat of encroaching development, its observations and conclusion may be applicable to both.
from development activities in indigenous territories, placing the country at odds with current requirements of international human rights law on water.

Part III summarizes the author's conclusions.

PART I

THE RIGHT TO WATER AS HUMAN RIGHT

Though fundamental for human survival, until recently, the right to water had only received scattered attention and was not explicitly defined and recognized under the main American and global human rights' instruments. That scenario has changed dramatically since the Economic, Social and Cultural Rights Committee of the United Nations Economic, Social and Cultural Council (the Committee) issued *Comment 15 on the Right to Water* in November 2002.5

The Committee is the body set up by the Economic, Social and Cultural Council to monitor implementation of the *International Covenant on Social, Economic and Cultural Rights* (ISECR – the Covenant). To assist State parties in fulfilling their obligations, it issues specific recommendations and interpretations clarifying the scope and requirements of the rights included in the *Covenant*. Such is the case of *Comment 15 on the Right to Water* where, for the first time, the Committee defines concrete and measurable steps that governments must take to comply with their obligations under Arts. 11 and 12 of the *Covenant* with regards to water.7 *General Comment 15* is thus devoted to defining the human right

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4. According to one World Bank source, privatization of water services in Chile resulted in a 40% increase in the price of water and sewage services. Given that water, and water access, as economically valuable goods and services, will flow towards those with the greater ability to pay, indigenous peoples and other poor communities are less likely to benefit from the implementation of neo-liberal law and policy than the wealthier sectors of society. Clarke *et al.*, *Has Private Participation in Water and Sewerage Improved Coverage? Empirical Evidence from Latin America* (World Bank Policy Research Working Paper No. 3445, Nov. 2004). As one author points out, privatized water services are very unlikely to produce anything like a real market since users are generally not able to negotiate the price. J.W. Dellapena, *The Importance of Getting Names Right: The Myths of Markets for Water* 25 WM. & MARY ENVTL. L. & POL'y REV. 317 (2000).


to water as intrinsic to the right to an adequate standard of living and the right to the highest attainable standard of health of arts. 11 and 12." Its issuance and subsequent developments may have a significant impact on those countries which, like Chile, have ratified the Covenant. 9

1. International Covenant on Economic, Social and Cultural Rights; General Comment 15 on the Right to Water

After a general affirmation of the right to water as an indispensable human right, Comment 15 describes that right as containing freedoms and entitlements. While on the one hand, all persons are said to have the right to continuous access to existing and new quality supplies in minimum sufficient quantities, on the other, the Comment imposes three types of obligations on State parties, i.e. to respect, protect and fulfill the right to water. These obligations require, among other things, that the States refrain from interfering with the enjoyment of the right to water including interference with customary management arrangements (respect). They also translate into the need to prevent interference from third parties through adequate measures directed at safeguarding water quality and quantity, and generally, from any activities that would result in unequitable access (protect). In order to fulfill their obligations, States must take positive steps "to adopt the necessary measures directed towards the full realization of the right to water" (para. 26). Specifically regarding indigenous peoples, those steps might include "[providing] resources for indigenous peoples to design, deliver and control their access to water" (para. 16 d). In all cases, access to a "minimum essential amount of water, that is sufficient and safe for personal and domestic uses" (para. 37 a) must be ensured on a non-discriminatory basis.

Comment 15 takes particular note of indigenous and small-scale farming communities. According to its introductory remarks, the right to water in the case of indigenous and rural communities must be approached from the much more complex duty of ensuring that those peoples are not "deprived of [their] means of subsistence." Freedom from interference with traditional and customary access and management practices through, for


example, encroachment and pollution (para. 16 c and d), is therefore a key area of concern. Thus, as far as indigenous peoples are concerned, beyond continued efforts to expand water services and access to water (obligation to fulfill), compliance with the obligations to respect and protect, including refraining from taking any measures that may be considered retrogressive (para. 19), should become crucial components of a country's efforts to guarantee equality in the enjoyment of the right to water.10

Notwithstanding the encouraging developments referred to above, no complaint procedure is currently available for violations of the economic, social and cultural rights under the Covenant.11 This, of course, includes the right to water defined as intrinsic to other economic, social and cultural rights such as the right to health and adequate standards of living.12 However, the universality and indivisibility of first and second generation human rights and freedoms (civil and political, and, economic, social and cultural rights) have received widespread acceptance as fundamental to international human rights law. That link is highlighted, for example, in the Preamble to the Protocol of San Salvador and the 1993 Vienna Declaration and Programme of Action which clearly states that "[a]ll human rights are universal, indivisible and interdependent and interrelated."13 The connection is particularly important when the right to water can be thus tied to a human right of the type that does not pose issues of justiciability, such as the right to life, and the right to equal protection under the law recognized, inter alia, in the American Declaration, the American Convention and the International Covenant on Civil and Political Rights. Thus, in a practical application of the principle of indivisibility and to avoid the issues of justiciability that cloud the effec-


tive enforcement of social, economic and cultural rights, quite often, and particularly in the case of indigenous peoples, complaints pertaining to the right to water will be subsumed in claims relative to the right to life or other justiciable human rights.

2. Indigenous Peoples and the Right to Water

_In these times of growing scarcity and competition regarding access to water resources, water rights become a pivotal issue in the struggle of local indigenous and peasant organizations to defend their livelihoods and secure their future._

The right to water is central to the cultural and material survival of indigenous communities. As is the case with the natural environment in general, water is intrinsically tied to their distinctiveness and to the protection that the recognition of that distinctiveness entails. Not only is the right to water intrinsic to the right of indigenous peoples to survive as human beings but, also, the manner in which the right is exercised, i.e. according to traditional mores and customs, is part of their culture and also deserving of protection as a human right. Inevitably, in the case of those communities the protection of the right to water includes respect for existing patterns of traditional use and management.

In the developing world, natural resources’ development is increasingly taking place in, or very close to, traditional indigenous areas. While resulting in much needed revenues and the potential for enhanced standards of living for other sectors of the population, for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation. This is particularly true with regards to water which is much more vulnerable to pollution, depletion and diversion than the air or soil. The negative impact of development on indigenous communities is often enhanced by their lack of access to water services either due to the communities’ remote location, their inability to pay, or a combination of the two.

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15. Water pollution is not easily contained. It can result from direct discharges and also from discharges into the air and land. Moreover, underground water is exhaustible. Only water (and not air or land) can be completely diverted or removed from its original location.
The above was forcefully put forth in the *Indigenous Peoples Kyoto Water Declaration (Water Declaration)* of March 2003 where indigenous representatives voice the concerns of their peoples in relation to water issues. In it, they manifest their strong opposition to current practices and market-driven approaches to water management in the following terms:

*Throughout Indigenous territories worldwide, we witness the increasing pollution and scarcity of fresh waters and the lack of access that we and other life forms... have to our waters, including oceans. In these times of scarcity, we see governments creating commercial interests in water that lead to inequities in distribution and prevent our access to the life giving nature of water.*

*When water is disrespected, misused and poorly managed,... [w]e know that our right of self-determination and sovereignty, our traditional knowledge, and practices to protect the water are being disregarded violated and disrespected.*

The vital relationship between indigenous cultures and water is thereby linked to a duty to conserve and manage water “as caretakers with rights and responsibilities to defend and ensure the protection, availability and purity of water.” This has lead to a re-assertion of the right to self-determination and of “the right to freely exercise full authority and control of [indigenous] natural resources including water.”

In addition to the above, as stated in the introduction, “traditional collective systems for control and use of (...) bodies of water” are specifically recognized as fundamental to indigenous survival and well-being in the *American Declaration on the Rights of Indigenous Peoples* sponsored by the Organization of American States (OAS). Adoption of the *Declaration*, however, is pending.
3. The Inter-American System

The operation and decisions of the Inter-American Human Rights System are particularly relevant to the case of Chile’s Mapuche. This is so, not only because the Inter-American Commission has already had the opportunity to become involved in the Pangue-Ralco case, but because the System’s bodies are perhaps the most active international institutions currently dealing with indigenous issues.

The System is governed mainly by two human rights documents: the American Declaration on the Rights and Duties of Man (1948)\textsuperscript{21} and the American Convention on Human Rights (1969).\textsuperscript{22} Both documents were adopted and operate under the auspices of the Organization of American States (OAS), a regional organization working under the umbrella of the United Nations.\textsuperscript{23} In addition to the two basic human rights instruments mentioned above, a relevant development of the 1969 Convention is the Protocol in the Area of Social, Economic and Cultural Human Rights of 1988 (Protocol of San Salvador).\textsuperscript{24} Although neither one, the Declaration nor the Convention and its Protocol, contain an explicit recognition of the right to water, water figures prominently as a theme and basis for action of the OAS,\textsuperscript{25} and the organization has openly welcomed Comment 15 on the right to water.\textsuperscript{26} Also, as was mentioned above, the Draft American Declaration on the Rights of Indigenous Peoples\textsuperscript{27} takes specific account of indigenous rights to water.

In what relates to the case under study, the strength of the Inter-American System lies in the activism displayed by its governing and supervisory bodies, the General Assembly, the Inter-American Commission and the Inter-American Court on Human Rights in cases related to indigenous peoples and with discrimination. Although, with the exception of the right to education and certain labour rights (art. 19), the Pro-
tocol of San Salvador is not justiceable and the Declaration on Indigeneous Rights has yet to be adopted, the Inter-American Commission has intervened in numerous cases involving indigenous peoples and natural resource development and management issues. The Court has also had several opportunities to pronounce itself on indigenous and natural resources issues under the provisions of the American Declaration and the American Convention.

Of particular importance in this context is the Dann v. United States case (also known as Western Shoshone case) decided and published by the Inter-American Commission in 2002. In that case, which concerned indigenous rights to land and resources, the Commission made clear its willingness to consider the Draft Declaration on Indigenous Rights as a valid source of law “to the extent that [in the present opinion of the tribunal] the basic principles reflected in provisions of the draft Declaration ... reflect general international legal principles.”

Activism within the Inter American System has also taken the form of Country Reports where, acting in its monitoring capacity, the Inter-American Commission has often been quite critical of the countries’ performance regarding their treatment of indigenous peoples.

Though masked under other rights such as life and property, the case law and opinions of the Inter-American System seem to be increasingly supportive of indigenous claims. They also seem to point at an enhanced governmental duty to protect the environment as part of the recognition of the protection and respect due to indigenous rights, including the right to resources and water. Whether the message has already been received

28. Id.
31. In 2001 the Inter-American Court had the opportunity to pronounce itself in a case concerning indigenous rights to natural resources in traditional lands: the case of the Mayagna (Sumo) Awas Tingi Community v. Nicaragua (the Awas Tingi case). Although the case relates to forestry, it provides a good insight to the Court’s position vis a vis indigenous rights to resources. The Awas Tingi case was filed by the Inter-American Commission on behalf of a Nicaraguan indigenous community. The Commission requested the Court to decide whether the State violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention, in view of the fact that Nicaragua had not demarcated the communal lands of the Awas Tingi Community, nor had it adopted effective measures to secure the property rights of the community to its ancestral lands and natural resources. In the opinion of the Commission, Nicaragua had also violated the rights of the community in granting a logging concession on community lands without the assent of the community, and by not providing an effective remedy in response to the community’s protests regarding its property rights. In its judgment for the Awas Tingi, the Court found that the right to property under the American Convention includes the protection of traditional indigenous lands and resources. Nicaragua was therefore in violation of Art. 21 of the Convention. In formulating its judgment, the Court stated that:
and acted upon in Chile is something that will be explored below through the account of the Pangue-Ralco Dams case and an analysis of the country’s water laws.

PART II: CASE STUDY

A. HUMAN RIGHTS IN CHILE

At this stage and before looking into the details of the case study involving the Mapuche in Chile, it may be useful to get a brief overview of the country’s past and present disposition towards human rights and international law. Thus, one finds that when it comes to the recognition and protection of human rights, Chile has a mixed record, particularly regarding indigenous peoples. Its record is, in part, the legacy of the dictatorial government that ruled Chile for most of the seventies and part of the eighties, and also the result of aggressive development policies that did not, and do not necessarily take into account social or environmental impacts. In particular, indigenous peoples were, and — according to some authors — still are, thought of as backward and their assimilation, if not actively promoted, preferred.

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. (para. 149).

A similar approach was taken by the Inter-American Commission in the Saramaccan case where it granted precautionary measures to protect indigenous lands against mining and logging operations in Suriname (Case 12.338); the Dann case brought by an indigenous band against the United States; and others. The findings of the Commission’s reports on the situations of indigenous peoples in countries like Ecuador and Paraguay are also representative of that body’s position in relation to indigenous peoples’ rights over land and resources. Such is also the view reflected in the work of the UN’s Special Rapporteur on Indigenous Peoples. Erica-Irene A. Daes, Indigenous peoples’ permanent sovereignty over natural resources, Preliminary Report of the Special Rapporteur (submitted in accordance with Sub-Commission Res. 2002/15).


33. As stated in the Preparatory Documents for the Draft American Declaration on the Rights of Indigenous Peoples, “the groups share a common basic problem. The inferiority and disdain with which these cultures have been treated since the time of the conquest has generated a commonality in the basic problems which affect these peoples. Certain problems such as: the direct attempts at physical or cultural genocide; the legal or de facto disregard for their institutions or rights; the usurpation of their lands or their right to collective and permanent use of their habitat; their legal or de facto condition as second-class citizens; the rejection or ignorance of their cultural and pedagogical practices; and consequently, the generalized destruction and erosion of their standards of living; have in some way, usually intensively, threatened or affected all of the indigenous tribes and their members.” Document 1: Justification And Recommendation To The General Assembly Of The Oas On The Preparation Of An Inter-American Instrument On This Matter (March 1989);
Notwithstanding the above, Art. 5 of Chile’s Political Constitution subjects the State’s sovereign powers to “respect for the essential rights that emanate from human nature.” It also requires the State to respect and promote those rights that are guaranteed under the Constitution and ratified international treaties in force.

Accordingly, Chile is a member of the OAS and thus bound by the American Declaration on the Rights and Duties of Man. Following the return of democracy, it ratified the American Convention and accepted the jurisdiction of the Inter-American Commission and the Inter-American Court, subject to reservations in relation to the right to property of art. 21. In regards to the right to property of art. 21, Chile reserves exclusive powers to interpret the concepts of “public use” or “social interest” in cases involving expropriation. These reservations are of significance in view of the special relationship that ties indigenous peoples to land and resources and the shifting nature of the concepts of public use and social interest. Moreover, as will be explained below, private property under Chilean law includes property over water.

While the country has ratified the UN Covenant on Social, Economic and Cultural Rights, it has not ratified its regional equivalent, the Protocol of San Salvador. However, Chile is also bound by the UN Covenant on Civil and Political Rights and by the International Convention on All Forms of Racial Discrimination.

34. As in much of the continent, first under colonial rule and then by the newly independent countries, indigenous peoples were fought against over control of their lands and resources. Once defeated, the surviving peoples were largely ignored. The Chilean approach to assimilation is described in J. Aylwin O., “Los Conflictos en el Territorio Mapuche: Antecedentes y Perspectivas [on file with the author]. See also R. Lillo Vera, Conflictos ambientales en territorios indígenas [on file with the author]; and, Chile, R. Valenzuela for Comisión de Verdad Histórica y Nuevo Trato, “Políticas Públicas y Desarrollo Indígena en Chile” Documento de Trabajo, Abril de 2002 [on file with the author].


36. Art. 21 of the Convention reads:

   Article 21. Right to Property
   1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
   2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

Specifically regarding indigenous rights, despite increasing pressure and declarations to that effect, Chile has yet to ratify Convention 169 of the International Labour Organization on Indigenous and Tribal Peoples Rights (ILO 169).  

B. THE MAPUCHE

The Mapuche peoples of South America trace their roots back to pre-colonial times when they were free to roam a territory that reached all the way from the southern tip of the American continent to the Inca Empire in the North, approximately half of Chile and Argentina today. In the Mapuche language, "mapu" signifies "land" and "che" people. They are the "people of the land," and their language, religion and traditions all speak to the group's strong ties to the natural environment which in their view is one and indivisible.

After several hundred years of fighting the colonial and modern republics' domination and encroachment, the Mapuche peoples were scattered and driven out of approximately two thirds of their ancestral lands, and forced into subsistence farming lifestyles, if not sheer poverty. However, the Mapuche still represent about 8% of Chile's population and account for another 200,000 in Argentina, making them the third largest indigenous peoples' group in South America. Today, they are actively seeking the recognition of their rights, including the rights to those lands and resources, particularly water, to which they are spiritually, culturally and materially connected.


40. B. Morton, supra note 33; L. Nesti, supra note 38.

41. L. Nesti, supra note 38.

42. For an interesting account of Mapuche history and that peoples' resistance to colonization and domination by a Mapuche historian see, R. Marhikewun, The Mapuche Nation - History <http://members.aol.com/mapulink3/mapulink-3e/map-his.html>.


44. Id.
Although the return to democracy in Chile brought along some improvement in the relations between indigenous groups and government, it also brought with it renewed faith in the neo-liberal economic model and a strong emphasis on private investment in all sectors of the economy, including public services, development of natural resources, and construction of infrastructure. The implementation of neo-liberal economic policies have resulted in increased pressure and demands over indigenous lands, water, and other resources resulting in numerous confrontations between indigenous peoples and the government as illustrated below by the Pangue-Ralco case.

C. THE PROJECT

In 1989 the Chilean government approved an ambitious hydro-electric development plan for the upper Bio Bio River area on traditional Mapuche lands: The Pangue-Ralco Project. The Pangue-Ralco project consisted of the construction and operation of a series of dams to be built along the Bio Bio River as well as of the additional support infrastructure for electricity generation. The project was to be undertaken by a newly privatized company, ENDESA, with funding from the International Financial Corporation (IFC), a subsidiary of the World Bank Group. Once completed, the project would supply 570 MW of electricity to mostly urban areas and would represent over 10% of the country’s supply.

Thus, the local Mapuche, who for centuries had lived in the upper Bio Bio practically undisturbed, became involved in a struggle to protect their land and water resources that lasted over 12 years until the recent signature of an agreement between the government and the Mapuche.
and between ENDESA and the last Mapuche families whose lands were affected by the dams' construction, put an end to the dispute.\textsuperscript{50}

D. THE CONFLICT

Once the plans for the Pangue-Ralco project became known, with the support of non-governmental organizations, environmentalists and the government agency in charge of indigenous affairs (CONADI-National Corporation for Indigenous Development)\textsuperscript{51} Mapuche representatives raised concerns about the environmental and social impacts of building the proposed series of dams on the Bio Bio. They argued that since the first dam, Pangue, was designed to work in conjunction with a large upstream reservoir-dam (Ralco), the government ought to consider the cumulative environmental and social effects of building the two dams before giving approval to Pangue. Among the concerns cited were the project's impacts on the Bio Bio River, its ecosystem, and on the communities dependent on it. It was argued that the natural flow of the river would be disturbed and that the quality of the water would be altered and would no longer be suitable for existing human and traditional uses. The project also required the displacement of the Mapuche families of the area, whose lands were to be flooded.\textsuperscript{52}

Pangue resulted in a highly visible court battle between the Mapuche, environmentalists, and other water rights' holders on one side, and ENDESA on the other. At issue was the right of ENDESA to alter the Bio Bio river's flow in a manner that could potentially injure other water rights' holders. Strengthening the case against the dam's construction was the argument advanced by down-stream farmers who saw the potential reduced and uneven water flows as a threat for agriculture and their livelihoods. However, breaking ranks with its traditional protection of consumptive rights' holders\textsuperscript{53} and reversing the Appellate Court's decision, Chile's Supreme Court decided in favour of ENDESA. Based on a report from the Water Authority stating that Pangue did not pose a threat

\textsuperscript{50} Tierra Pehuencche ahora es de Endesa, DIARIO EL SUR (Chile), Feb. 19, 2004.

\textsuperscript{51} CONADI was conceived under the auspices of the Nueva Imperial Agreement. Its subsequent creation by Law 19.253 of 1993 (the Indigenous Law) was welcomed by Chile's indigenous peoples who found that it's composition, including 8 elected indigenous representatives, was an important step towards the recognition of their rights. After a series of measures taken by the Chilean government, including replacement of several members and directors, the Commission's reputation suffered significantly and its independence from the administration is seriously questioned.

\textsuperscript{52} L. Nesti, supra note 38. In addition to the impacts mentioned above, the Pangue dam would retain most of the natural nutrients that the river discharged in the Arauco Gulf, one of Chile's prime fishing grounds. See generally, M. Baquedano, \textit{La Batalla de Ralco}, INSTITUTO DE ECOLOGfA POLfTICA (LOM Ediciones Ltda., Santiago de Chile, Chile) (2004).

\textsuperscript{53} For an explanation of the different categories of water rights see footnote 91 and accompanying text.
to downstream rights’ holders, the Supreme Court’s decision cleared the way for the dam’s construction and dismissed the plaintiffs’ claims as exaggerated and premature.\textsuperscript{54}

Continued opposition to the project could not stop construction of the first of the dams planned, the Pangue dam, including building of access roads and relocation of families. Moreover, once Pangue had been completed in September of 1996, ENDESA forged ahead with its plans to build the Ralco dam 27 kilometers up-stream from Pangue. The expected social and environmental impacts of Ralco were far greater than Pangue’s, including the displacement of 91 families. Mapuche opposition grew and, amidst much turmoil which included scandalous allegations of foul play on the part of the World Bank and the International Financial Corporation,\textsuperscript{55} the families refused to be relocated.

Ralco confronted Chilean authorities with a conflict between the 1982 Electrical Services Law, which included sweeping powers to expropriate lands in the public interest,\textsuperscript{56} and Law 19.253 of 1993 on indigenous protection and development (the Indigenous Law).\textsuperscript{57} According to the latter law, relocation could only take place with the consent of the affected indigenous peoples. In addition, compensation could not take the place of an actual re-assignment (swap) of lands which would also be subject to approval by CONADI.\textsuperscript{58} While the Electrical Services Law

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\textsuperscript{54} Cited in C.J. Bauer, Slippery Property Rights: Multiple Water Uses and the Neoliberal Model in Chile, 38 NAT. RESOURCES J., 109 (1998). Case law in Latin America is not commercially published and generally available as in North America. With some exceptions, the author had to rely on secondary sources.

\textsuperscript{55} The World Bank and the IFC were repeatedly denounced by members of the civil society for approving the project without a full EIA as required by World Bank policy, and for alleged abuses resulting from the project’s implementation. On November 1995 the Grupo de Acción por el Bio Bio presented a claim before the Bank’s Investigation Panel requesting a formal investigation. Although the petition was denied by the Panel, the Bank’s President, J. Wolfensohn, ordered a special investigation headed by Dr. Jay Hair, an anthropologist. A similar, parallel, investigation was commissioned to another anthropologist, Dr. Theodore Downing, by the IFC concerning the Pehuen Foundation, an agency set up as a result of the IFC loan to provide local development support and offset the project’s socioeconomic impacts. Both reports arrived at similar and highly critical conclusions, condemning the World Bank and the IFC for not following internal policy and documenting abuses resulting from the project’s implementation. Although the results were initially withheld from the public and, particularly, the directly impacted Mapuche, increasing public pressure resulted in the release of the information and a public mea culpa on the part of the World Bank. AMERICAN ANTHROPOLOGICAL ASSOCIATION, COMMITTEE FOR HUMAN RIGHTS, THE PEHUENCE, THE WORLD BANK GROUP AND ENDESA S.A., <http://new.aaanet.org/committees/cfhr>; C. Opaso, The Bio-Bio Project: A Lesson Not fully Learned by the World Bank <http://www.dams.org/kbase/submissions>.

\textsuperscript{56} Ley General de Servicios Eléctricos, D.F.L. 1 de 1982, Cap.V. Chile, Diario Oficial de 13 de septiembre de 1982.

\textsuperscript{57} Ley Indigena 19.253, Establece normas sobre protección, fomento y desarrollo de los indígenas, y crea la Corporación Nacional de Desarrollo Indigena, <www.mapuexpress.net/leyindigena/leyindigena.htm>.

\textsuperscript{58} Id., art. 13.
was passed during the neo-liberal hype of the Pinochet era, the Indigenous Law represents the country's awakening sensitivity to indigenous issues that accompanied the return to democracy. The disconnection between the two policy orientations that those laws represent and the prioritization of unobstructed economic development was evidenced in Chile's handling of the Pange-Ralco case.

Despite CONADI's objections to relocation and the opposition of the Mapuche families, after an initial rejection of the Environmental Impact Assessment (EIA) by the Chilean environmental agency, ENDESA got final conditioned environmental certification for Ralco in June 1997. From that moment on, the company started taking steps towards securing the necessary land rights for the project, including direct negotiations with the affected peoples as well as pressing for expropriation under the Electrical Services Law. The company also secured the final concession permits for Ralco in two controversial decrees issued by the Ministry of the Interior. Decrees 31 and 32, issued in March 2000, on the same day in which the Lagos administration took office, were based on an interpretation of the Indigenous Law that contradicted CONADI's position regarding expropriation of indigenous lands. According to the decrees, the authorization and consent of art. 13 of the Indigenous Law could only apply to voluntary disposition of indigenous property and not to other legally protected uses of land, including expropriation for hydropower development under the Electrical Services Law. The new interpretation cleared the way for continued concessionaire's activities in the area. Decrees 31 and 32 of 2000 and the resulting concession were denounced as illegal in the National Assembly and before the Courts.

CONAMA's approval and the Decrees prompted another wave of litigation. In a suit brought by the Mapuche against CONAMA, its Director, and ENDESA, the Courts were requested to declare the EIA process and

59. CONADI's Director, Mauricio Huenschulaf, who had adopted a strong position in support of the rights of the Mapuche affected by Ralco, was subsequently fired. According to Huenschulaf's declarations to the press, he had become an obstacle for the implementation of the government's economic development plans. Renunciado director de la Conadi justigo duramente al gobierno, El Diario Austral (Chile) April 27, 1997. His successor, Domingo Namuncura, was also forced to resign. CONADI's position was backed by the opinion of other government agencies.

60. CONAMA, Resolución Exenta No. 010-97. FEDERACIÓN INTERNACIONAL DE DERECHOS HUMANOS (FIDH), LOS MAPUCHE-PHUENCHE Y EL PROYECTO HIDROELECTRICO RALCO EN EL ALTO BIO BIO: UN PUEBLO INDíGENA AMENAZADO <www.fidh.org/rapports/r256e.htm>.


62. The fact that throughout the project's completion ENDESA proceeded regardless of governmental authorization has been noted in several reports and documents including the Special Rapporteur's Report, supra note 47.
approval null and void due to procedural irregularities. With the support of two parliamentarians, the Mapuche presented a “protection recourse” before the Courts against the project’s approval. The complainants alleged infringement of the Indigenous Law. While the first suit was not resolved until 2003, the latter one was dismissed by the Appellate Court which did not find abuse of discretion in the Executive’s decision to allow the project to proceed. However, in its decision, the court was careful to state that the application of the Electrical Services Law did not preclude the full application of the Indigenous Law, i.e., that CONADI’s approval would still be required. The Court’s decision and its findings were later echoed by the Supreme Court which decided the issue on appeal on January 23, 2002.

The numerous recourses and court cases did not stop the project’s progress. Despite the ongoing legal wrangling, faced with increasing pressure most of the Mapuche families eventually negotiated with the company, thus removing a significant obstacle for the progress of Ralco. In fact, even while the resolution of the remaining suits was pending, the Chilean Ministry of Interior, following the procedure defined in the Electrical Services Law, set up a “Commission of Good Men” (CGM) to estimate the value of the remaining disputed lands which, once complete, would allow ENDESA to deposit the funds in trust with the Courts and proceed with forced relocation and flooding of the Mapuche lands.

After protesting the set up of the CGM in several ways, including blocking the Commissioners’ access to the area to be appraised, in December 2002 a few Mapuche women whose lands and families were the last remaining obstacle for the completion of Ralco filed a complaint before the Inter-American Commission for Human Rights (ICHR). Though access to water was at its core, the complaint was based on articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 12 (freedom of conscience and religion), 17 (rights of the family), 21 (right to prop-

64. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 20. For an explanation of the “protection recourse” see C.J. Bauer, supra note 54.
65. Cited in Federación Internacional de los Derechos Humanos (FIDH), Informe No. 358/3, March 2003, Misión Internacional de Investigación, Chile, “Pueblo Mapuche: Entre el olvido y la exclusión” at 31.
66. Id. According to the 2003 FIDH Report the affected Mapuche families filed a new complaint before the Supreme Court, this time alleging denial of justice against the procedure set up by the Ministry of Finance to appraise their property for expropriation. The claim was rejected in June 2002.
property) and 25 (right to judicial protection) of the American Convention on Human Rights. At the time of the petition, Ralco was 70% complete. Therefore, the petitioners requested the Inter-American Commission to issue precautionary measures to avoid the serious and irreparable harm that would ensue from the continuation of Ralco, particularly as a result of the imminent flooding of the reservoir. The precautionary measures were granted and the Inter-American Commission requested Chilean authorities to abstain from undertaking any actions and to stay any proceedings that could result in the eviction of the Mapuche from their traditional lands until the petition had been reviewed and the agencies of Inter-American System had had a chance to issue their decisions.67

The Inter-American Commission never got to consider the merits of the case.68 The complaint eventually resulted in an Amicable Agreement between Chile and the petitioners that the Inter-American Commission approved on March 11, 2004. The Amicable Agreement was preceded by negotiations, brokered by the Chilean Secretary to the Presidency, where ENDESA and the petitioners came to a final agreement on the terms of the compensation due to the affected Mapuche families. The final Mapuche-ENDESA-Government Compensation Agreements (the September 16th Agreements) were signed on September 16, 2003.69

E. THE AGREEMENTS

The Amicable Agreement between Chile and the Mapuche families contains commitments by the government of Chile to undertake action in four main areas:

1. Institutional and legal strengthening regarding the protection of indigenous peoples and their communities, including constitutional recognition and ratification of ILO 169.

2. Strengthening of the cultural and territorial identity of the Mapuche-Pehuence, and adoption of mechanisms to allow the Mapuche-Pehuence to participate in their own development.

67. OEA, Comisión de Derechos Humanos, Informe No. 30/04, Petición 4617/02, Solución Amistosa, M.J. Huenteao Beroiza y Otras, Chile, March 11, 2004.
68. Note that the Commission would have had to interpret the meaning and scope of Chile’s reservation regarding the right to property.
69. For details of the Mapuche-ENDESA-Government of Chile Agreement of September 16, 2003, see <www.mapuexpress.net/publicaciones/memorandum-ralko2.htm>. The government of Chile and the Mapuche signed a simultaneous agreement where the government undertook several supplemental commitments aimed at securing the lands for ENDESA; <www.mapuexpress.net/publicaciones/memorandum-ralko.htm>.

4. Resolution of pending legal proceedings against indigenous leaders for their activities in connection to the Ralco case.\textsuperscript{70}

It also refers to the terms of the September 16\textsuperscript{th} Agreements with ENDESA and the government as final settlement of the subsisting individual claims in consideration of which the petitioners desisted of all existing and future legal and administrative claims with the exception of those required to execute the settlement agreement. No direct reference is made to the Mapuche’s right to control and manage water or other resources.\textsuperscript{71} Instead, the government commits to enhancing indigenous participation in the management of a limited area of the Upper Bio Bio, while maintaining strong governmental control and presence.\textsuperscript{72} In a highly controversial move, it does, however, commit to creating binding mechanisms to ensure that no mega-projects, and particularly hydroelectric projects, take place on indigenous lands of the Upper Bio-Bio Region.\textsuperscript{73}

The September 16\textsuperscript{th} Agreements, hailed by some as a successful end to the decade long Ralco conflict, were immediately denounced by Mapuche leaders and organizations who accused the government and ENDESA of negotiating in bad faith.\textsuperscript{74} They also took many observers by surprise, particularly since in the months preceding the finalization of the Agreements, the tide seemed to be turning in favour of the Mapuche.\textsuperscript{75} Indeed, in May 2003 the Courts decided to nullify Ralco’s EIA. Later the same year, the Inter-American Commission responded

\textsuperscript{70} During the conflict a considerable number of indigenous protesters were detained, charged and incarcerated, some under counter-terrorism laws (Ley 18,314) that are a legacy of the Pinochet dictatorship, or before military tribunals. For a list detainees in connection to Ralco and other resource-related conflicts, including Mapuches, see: FIDH, Informe No. 358/3, March 2003, Misión Internacional de Investigación, Chile, “Pueblo Mapuche: Entre el olvido y la exclusión.” See also, Publicaciones – Artículos/Opiniones Presos Políticos Mapuches <www.mapuexpress.net/publicaciones5.htm>; Chile, Coordinadora Mapuche Arauco-Malleco, Oficina de Derechos Humanos, “Wallmapuche, Informe Anual de Derechos Humanos 1999” Feb. 2000 [on file with author].

\textsuperscript{71} Some may find an indirect recognition of such rights in the government’s commitment to pursuing ratification of ILO 169.

\textsuperscript{72} OEA, Comisión de Derechos Humanos, Informe No. 30/04, Petición 4617/02, Solución Amistosa, M.J. Huenteao Beroiza y Otras, Chile, March 11, 2004, ss. 2 and 3.

\textsuperscript{73} Id.; For a partial transcript of the Senate’s objections to this commitment see: Compliance Report to CIDH, “Informe sobre el estado del Acuerdo de Solución Amistosa - Anexo II” Oct. 14, 2004; <http://www.derechosindigenas.cl/Observatorio/documentos/ralko_271004.htm>.

\textsuperscript{74} See compilation of press releases, opinions and declarations by the Mapuche community and its leaders in <www.mapuexpress.net/publicaciones/ralko.htm>.

\textsuperscript{75} J. Aylwin, “Ralco: Un conflicto mal resuelto y sus lecciones” <www.mapuexpress.net/publicaciones/aylwin-ralko.htm>.
positively to the request for precautionary measures, and, while on mission in Chile in July, the UN Special Rapporteur on Indigenous Rights, Prof. R. Stavenhagen, had issued declarations voicing his concern regarding Chile’s handling of the Ralco case. 76

In addition to the doubts and skepticism surrounding the September 16th Agreements, the Amicable Agreement approved by the Inter-American Commission may be a weak source of protection for the Mapuche. Though backed by the Inter-American Commission’s supervisory powers, the Amicable Agreement consists of a series of promises which may prove of little effectiveness in achieving any substantial progress, particularly given their declaratory, political nature and the traditionally strong opposition to the recognition of indigenous rights in Chile. Although the government commits to applying its best efforts to promoting the adoption of constitutional amendments, legislation, and programs directed at protecting indigenous rights in the four areas mentioned above, its best may still not be enough to overcome internal and external opposition to the adoption of such measures. On the other hand, the Amicable Agreement certainly does not entail any significant gain with regards to the group’s right to water which is altogether absent from its wording. 77

Already, some of the government’s attempts at fulfilling its promises have brought into question the validity of the Amicable Agreement and the Inter-American’s Commission’s jurisdiction. Accordingly, in the debate concerning its implementation, several legislators challenged the Executive’s power, exercised in the negotiation of the Agreement, to commit to re-drawing municipal boundaries and to subjecting development-related decisions to consultation with indigenous groups. In their view, the country’s sovereignty and national unity had been seriously compromised. 78

In addition to internal opposition to the Amicable Agreement, a progress report presented by the Mapuche to the ICHR in October 2004 severely criticizes the government of Chile for its unilateral approach and lack of cooperation regarding the Amicable Agreement’s implementation. Ac-

77. The Amicable Agreement does not contain an express reaffirmation of indigenous rights to land and resources.
According to the Oct. 2004 report, despite the promises made by the government of Chile, no attempts have been made to establish any channels of communication, exchange and consensus building with the Mapuche. The government is accused of foot-dragging on several fronts, including the constitutional recognition of indigenous peoples, ratification of ILO 169, and the satisfactory resolution of legal proceedings against indigenous leaders for their activities in connection to Raico, such as the prosecution of Mr. V. Ancalaf under special “anti-terrorist” laws. Indigenous groups are also accusing the government of trying to undermine indigenous rights over traditional lands through an attempt to amend Art. 17 of the Indigenous Law, regarding the indivisibility of small tracts of land.

Chile also received negative reviews from the UN Committee on Economic, Social and Cultural Rights for its treatment of indigenous peoples. On November 26, just days after the Supreme Court’s pronouncement in the Ancalaf case reaffirmed the indigenous leader’s prison sentence for his activities in connection with Raico, and after reviewing Chile’s first report on the status of economic, social and cultural rights under ISECR, the Committee expressed regret over the existence of unsettled claims in connection with indigenous lands and resources and generally urged the country to address indigenous issues. On the matter of criminal prosecution of indigenous leaders, it stated its deep concern “about the application of special laws, such as the Law of State Security (No. 12.927) and the anti-terrorism law (No. 18.314), in the context of the current tensions over the ancestral lands in the Mapuche areas.”

Chile’s lack of progress in fulfilling its obligations under the Amicable Agreement is particularly surprising in light of the fact that, by the beginning of 2001, the country had embarked in an ambitious exercise to review the history and present situation of the relation between its in-

79. At the time of the October 2004 report, Mr. Ancalaf had been found guilty of participating in the destruction of pieces of ENDESA’s equipment and was facing the prospect of spending 5 years and 1 day in prison. Contrary to the Mapuche’s expectations and underscoring the accusations made in the October report, his sentence was confirmed by Chile’s Supreme Court on November 22, 2004. <http://www.nodo50.org/azkintuwe/noviembre29_1.htm>. The application of special anti-terrorist and national security laws to indigenous activists was an issue of special concern to the UN Special Rapporteur, Prof. Stavenhagen. Though predating it for almost a year, Prof. Stavenhagen’s report echoes most of the general concerns voiced in the progress report. Report of the Special Rapporteur, supra note 47.


digienous peoples and the State with a view to improving those relations. Chile’s “Truth and New Treatment Commission” was created by Decree of President Lagos in January 2001 with a mandate to undertake an in-depth investigation of indigenous issues in Chile and to elaborate recommendations for the elaboration of a “New Treatment Policy.” The Commission issued its recommendations in October 2004.

Although, given Chile’s past record, the Commission’s recommendations could be considered ambitious, the explanation to the country’s lack of tangible progress could perhaps be found in the fact that the government’s response to the recommendations, known as the “New Treatment Policy,” was too broad and general in scope. For example, although it specifically refers to the issue of land and water in terms of “restitution,” the New Treatment Policy does little more than reaffirm the government’s commitment to making advancements in the recognition of rightful indigenous ownership. On the other hand, while the Commission’s recommendations were quite specific with regards to the scope of the constitutional amendment in relation to the status of indigenous lands and resources, the policy only commits to the recognition of indigenous peoples as a distinct group. A similar declarative approach is taken with regards to other issues such as the ratification of ILO 169, and ensuring that the provisions of the Indigenous Law are respected.

F. THE ISSUE OF WATER RIGHTS

While most of the attention on Ralco concentrated on the impact of flooding on Mapuche lands and its significant social and environmental impacts, very little attention was directed to the underlying issue of competing rights to water. However, those rights were central to the final resolution of the case. In fact, although ENDESA owned a substantial portion of the necessary water rights for the operation of Ralco, according to the Chilean Water Agency, in order to proceed with the completion of the project as planned, and despite the EIA’s approval, ENDESA had to secure additional water rights as indicated by that agency to CONAMA during the EIA approval process. Like with Pangue, obtaining those rights proved to be another source of conflict between ENDESA, the government and the Mapuche.

85. See web-page of A. Navarro, supra note 61.
As will be explained in detail below, under Chilean law water rights are subject to private appropriation. In the case of Ralco, although ENDESA was said to own around 90% of the water rights in Chile, the missing rights were the object of yet another courtroom battle with Berta and Nicolasa Quintreman, two of the fiercest Mapuche opponents to the dam and parties to the petition before the Inter-American Commission. Several judicial and administrative actions were undertaken in relation to the missing rights with the intervention of, among others, Chile’s Antitrust Commission, the Water Agency, the Electricity Commission and CONAMA. However, notwithstanding Mapuche opposition and a recommendation by the Antitrust Commission contrary to the issuance of additional water rights to ENDESA, the Chilean Water Agency issued the remaining necessary rights after a change in the project’s design allowed ENDESA to side-step the part of the dispute that involved the Quintreman sisters.

With the approval of the Amicable Agreement, the September 16th Agreements and the acquisition of the remaining water rights, as of March 2004, Ralco was set for final completion. However, notwithstanding the Agreements, in March and April 2004, conversations were still underway regarding the treatment to be given to a Mapuche cemetery located in the area to be flooded as required in the EIA’s approval. A compromise solution under the terms of the environmental approval was being brokered by CONADI when ENDESA decided to close the dam’s flood gates and to fill in the targeted area, including the Mapuche cemetery. ENDESA’s actions again triggered a wave of protests before international and domestic fora but could not stop Ralco’s inauguration on September 27, 2004.

The history of the Pangue-Ralco case, including the contradictory opinions of the intervening Chilean agencies and their sudden and multiple changes of heart, leaves many questions unanswered. Regarding the protection of indigenous water rights, it is surprising to find that one single commercial entity, such as ENDESA, can have virtually unchallenged ownership over the majority of water rights in an area that is predominantly indigenous. The present case seems to be indicative of a certain divorce between the existing system for allocation of water rights and the

86. For a complete account see, M. Ba quedano, supra note 52.
88. As discussed below, water rights in Chile are divided into consumptive and non-consumptive rights. ENDESA’s rights are mostly of the second category. However, their exercise has a significant impact on consumptive water-rights.
laws and regulations governing environmental and indigenous protection, with the water law heavily favouring commercial uses over subsistence and traditional indigenous uses as well as over environmental protection. In order to better understand and assess the degree of protection given to the right to water as a human right in Chile, it is therefore important to take a look at the general framework and operation of Chilean water laws.

G. PROVIDING ACCESS TO WATER THROUGH THE NEO-LIBERAL MODEL

Chile’s 1980 Constitution, still in force, wholly embraces neo-liberal market economics. Among other things, it strengthens and expands property rights to include rights over water. Accordingly, the Water Code of 1981 (the Code) puts water rights in the same category as all other property rights that enable the owner to use, enjoy and dispose of the water at his or her will (derecho real). It also classifies those rights into consumptive and non-consumptive depending on whether or not the rights’ holder can consume all the water in the course of his/her activities. Non-consumptive rights’ holders can use the water but must return it to its source. The Code recognizes all rights acquired or granted under previous laws but not through traditional uses, which are subject to special proof requirements. New rights can be freely acquired from the Water Agency as long as they are physically and legally available. There are no restrictions as to who may own water or in what quantities. Water rights are completely separate from the right to land and can be freely sold, transferred or mortgaged. There is also no priority of use rules for allocation and no requirements imposing any duties to put those rights to work in any way.

A result of this scheme is that the recognition of the Mapuches’ right to their traditional lands does not include a concomitant recognition of the right to water. The September 16th Agreements, for example, do not refer to water as part of the property to be compensated. Water had already been carved out of the deal by operation of the water legislation. In fact,

90. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 24, last paragraph.
92. Id. at art. 6.
93. Id. at arts. 12-15.
94. Id. Libro I, Tit. III, De la adquisición del derecho; Libro II, Tit. I, De los procedimientos administrativos.
it is estimated that only 2% of the total water rights in indigenous territories in Chile belong to indigenous persons.95

Chilean water law and practice seem to be particularly discriminatory against indigenous peoples and the poor. The manner in which, according to the Code, new rights to water are to be assigned by the Water Agency creates conditions for appropriation of water rights that may leave large sectors of the population, and in particular the Mapuche and other indigenous and poor communities, completely excluded from the process. Under the law, any person desiring to acquire water rights may apply to the Water Agency for free adjudication of available rights. The Agency is then required to publish the request once in the official gazette or in a regional publication. The publication serves as notification to those parties that could be potentially injured by the required allocation. Only under exceptional circumstances, at the discretion of the regional authority and when the identity of those potentially injured is known, will personal notification be served. Personal notification is also optional if the number of potentially injured parties makes notification too cumbersome. The procedure to contest a petition for allocation of rights uses similar formalities in an adversarial setting.96 Such a system for allocation and adjudication of matters pertaining to water rights demands certain skills and familiarity with the administration which may not always be available in or to indigenous and poor communities. It also provides a very limited window of opportunity for opposing the allocation of new rights. Overall, its set up does not appear to comply with the requirements that current law and policy have come to view as essential for ensuring meaningful public and indigenous participation in natural resources' management and decision-making.97 The result is a process that is altogether biased towards sophisticated water-market operators. Moreover, once a right is allocated it enjoys the full protection due to property rights, a category which will not be easily struck down in the courts through indigenous rights-based challenges, particularly since the Chilean Indigenous Law is silent on the issue of indigenous rights to resources.

96. Water Code, art. 20, and 130-150 (Chile).
PART III

A. CHILE, THE MAPUCHE AND COMMENT 15

The practical outcome of the scenario described is that traditional indigenous access to water and management practices can be freely—and legally—interfered with. Thus, by providing a legitimate avenue for third-party interference with traditional indigenous water rights, in addition to being heavily biased in favour of economic uses, Chilean water law could be found to contravene the general duties to respect and protect the right to water under Comment 15.

Chile’s wholehearted adoption of neo-liberal economics as reflected in its Water Code can be seen as being in outright contradiction with the spirit of Comment 15 which is very explicit in saying that “water should be treated as a social and cultural good, and not primarily as an economic good.”98 Both the letter of the Code, which does not prioritize access for basic human needs, and the practice of Chilean authorities as evidenced in the Pangue-Ralco case, are heavily in favour of economic uses of water. This is underscored by the fact that the National Water Policy of 1999 limits the role of the State to that of “creating adequate economic conditions” for the development of private water services and to “supporting” the fulfillment of the population’s basic water needs through subsidies and other measures.99

The author found no evidence on record of a substantive effort to mitigate or compensate the negative impacts of the operation of the water legislation on indigenous peoples through a systematic plan to “provide resources for indigenous peoples to design, deliver and control their access to water.”100 In fact, as mentioned before, rather than having a deliberate plan to ensure the provision of sufficient and safe water on an equitable basis to all the population, the Chilean strategy towards fulfilling that duty relies on the operation of the market, with the government taking the back seat. Water availability is thus a result of the operation of the free market and not of the implementation of a national water strategy specifically geared at ensuring access to water to all the population as required by the Committee under paragraph 37(f) of Comment 15. However, it is common knowledge that the market tends to favour the highest bidder. Unless the government is prepared to take an aggressive and systematic approach to filling in the access gaps left by the market,

98. Comment 15, para. 11.
99. Chile, Ministerio de Obras Públicas, Dirección General de Aguas, Política Nacional de Aguas, 1999, ss. 3.4.3 and 3.4.5.
100. Comment 15, para. 16(d).
the legal framework for water management in Chile will provide no assurances of equal access to water.

So far, the only evidence of an effort in the direction of providing access to water to indigenous communities is the establishment of an Indigenous Land and Water Fund devoted to financing access to lands and resources under the Indigenous Law. However, as was verified by the UN Special Rapporteur, the Fund is cash strapped and its modus operandi inefficient. The Fund is inadequate to address growing indigenous needs, and may only serve to slow down the pace of encroachment and deprivation. Perhaps the best illustration of the lack of initiative of the government in this regard is provided by the Amicable Agreement of the Pangue-Ralco case, which is silent on the issue of providing the new Mapuche settlements or communities with adequate water supplies. Given this scenario, it is likely that Chile may also have a hard time proving progress in complying with the requirement to fulfill the right to water of Comment 15.

B. CONCLUDING REMARKS

As the Pangue-Ralco case illustrates with regards to the Mapuche peoples, existing legal arrangements on water access and management in Chile do not seem to be able to withstand a Comment 15-based challenge. The result of the combined application of neo-liberal water and natural resources development law and policy in Chile is a relegation of indigenous customary water rights and water management practices in favour of economic development uses where water is deemed to achieve its maximum potential value. At least in relation to the Mapuche, which constitute a considerable segment of the country’s population (approximately 8%), neither the orientation of the Chilean law, nor its practical implementation can be said to be in keeping with the immediate or progressive duties that Chile is subject to under Comment 15 on the Right to Water.

103. According to the Report issued by the Truth and New Treatment commission in July 2003, to that date, the final resolution of water-rights petitions initiated by CONADI on behalf of indigenous peoples between 1995 and 2000 was still pending. Comisión Verdad Histórica y Nuevo Trato, supra note 102.
As has been copiously documented by several international and domestic agencies and NGOs that in the particular case of indigenous peoples, lack of adequate access to water (besides its impact on health, the right to food, and adequate standards of living) contributes to the erosion of their culture by severing their ties to the land and other elements of their natural environment. In denying the right to water to indigenous peoples, Chile is therefore exposing itself to other, non water rights-based, claims of human rights violations.

The government of Chile could take advantage of Comment 15’s call to formulating new water strategies and take a second look at its water laws vis a vis indigenous rights. A discussion on indigenous rights to water in Chile would also benefit from a serious attempt at dealing with the broader issues of self-government and indigenous control of traditional lands and resources. As stated by the UN Special Rapporteur:

*The great challenge now is to strike a balance between the country’s economic and social development and the protection of the right of indigenous communities to an ethnic identity.*

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