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Title/Style of Cause: Julia Huenteo Beroiza, Rosario Huenteo Beroiza, Nicolaza Quintreman Calpan, Berta Quintreman Calpan and Aurelia Marihuan Mora v. Chile
Doc. Type: Decision
Decided by: First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez, Florentin Melendez.
Commissioner Jose Zalaquett Daher, a Chilean national, did not take part in the discussion or vote on the present case, in accordance with Article 17(2) (a) of the IACHR's Rules of Procedure.
Dated: 11 March 2004
Citation: Huenteo Beroiza v. Chile, Petition 4617/02, Inter-Am. C.H.R., Report No. 30/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by: APPLICANTS: Roberto Celedon Fernandez, Sergio Fuenzalida Bascunan and Marcos Orellana
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I. SUMMARY

1. On December 10, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by Roberto Celedón Fernández and Sergio Fuenzalida Bascuñan (in representation of the Department of Human Rights and Indigenous Studies of Arcis University) and Marcos Orellana (in representation of the Center for International Environmental Law (CIEL)), (hereinafter “the petitioners”), alleging violation by the State of Chile (hereinafter, “the State” or “the Chilean State”) of the rights protected by Articles 4, 5, 8, 12, 17, 21, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) to the detriment of Mercedes Julia Huenteo Beroiza, Rosario Huenteo Beroiza, Nicolaza Quintremán Calpan, Berta Quintremán Calpan, and Aurelia Marihuan Mora, by reason of the implementation of the Ralco Hydroelectric Plant Project by Empresa Nacional de Electricidad S.A. (ENDESA).

2. In the same communication the petitioners made a request for precautionary measures, in order to prevent irreparable harm to the rights of the alleged victims. The latter request was designed to prevent the company from flooding the lands occupied by the alleged victims, as part of the construction of the dam.

3. At a hearing before the IACHR, the parties formally expressed their interest in reaching a friendly settlement of the instant matter, and signed a framework document for reaching said agreement. The parties reached a final agreement on October 17, 2003.

4. In the instant report, adopted under Article 49 of the American Convention, the IACHR summarizes the alleged violations, outlines the agreement reached by the parties, and decides to publish the report.

II. PROCESSING BY THE COMMISSION

5. The Commission received the original petition containing the request for precautionary measures on December 10, 2002. The petition was transmitted to the Government on December 12, 2002 with a deadline of 2 months to respond to the arguments of the petitioners. In that same communication the Commission requested the Government of Chile, "bearing in mind the nature of the matter... [to] refrain from taking any steps that might alter the status quo in the matter, until the organs of the inter-American system of human rights have adopted a final decision." The petitioners were notified of that communication on the same date.

6. On December 19, 2002, the Permanent Mission of Chile to the OAS wrote to the Commission asking it to "explain precisely the content and scope of the request made to the State" in the communication of December 12. The Commission replied to this request in a note of December 23, 2002, explaining that "the purpose of the request made to the State of Chile is to ensure that the decisions of the organs of the inter-American system of human rights are not rendered meaningless efforts to protect the human person. Accordingly, the State should refrain from any act that might broaden or exacerbate the dispute and impair the effectiveness of any decision that the Commission might potentially adopt."

7. In the same communication, the Commission said that the foregoing was without prejudice to the possibility that the parties might reach an agreement satisfactory to their interests on the basis of respect for the human rights recognized in the American Convention and other applicable instruments.

8. On February 4, 2003, the petitioners requested a hearing to discuss the measures adopted by the Government in accordance with the request of the IACHR to maintain the status quo. On February 7, the Commission received a request from the Government to hold a hearing on this petition.

9. On February 19, 2003, the State requested an extension to reply to the petition. On February 25, the State submitted its observations on the petition, which were transmitted to the petitioners on March 20, 2003, with a deadline of one month to present their observations.

10. On February 26, 2003, in the framework of its 117th regular session, the IACHR held a hearing to discuss the possibility of a settlement between the parties in this matter. As a result of the talks initiated at that hearing and continued in private by the parties, on February 28, 2003 the State sent the Commission a document signed by both parties entitled "Framework Agreement between the State of Chile and the Petitioning Mapuche Pehuenche Families of the

Upper Bío Bío for a Proposed Friendly Settlement”. In that agreement the parties set a deadline of 60 days for drafting a friendly settlement agreement.

11. On April 23, 2003 the petitioners requested an extension to reply to the observations of the State transmitted on March 20. On May 2, 2003, the State requested from the IACHR an extension of the 60 days set in the “Framework Agreement” to sign the friendly settlement agreement. The request was accompanied by a communication from the petitioners agreeing to said extension.

12. On June 16, 2003, the petitioners sent the IACHR a copy of a letter presented to the Secretary General of the OAS at the General Assembly of the Organization held in Santiago, Chile in June 2003, in which they accused the State of failure to comply with the deadlines agreed for signing the friendly settlement agreement.

13. The petitioners again wrote to the IACHR on July 2, 2003, to report that the company was moving ahead with the dam construction work, which was a breach of the measure ordered by the IACHR.

14. On the same date the petitioners presented their observations on the reply of the State of February 25, 2003. Both communications were transmitted to the State on July 2 with a deadline of one month to reply to the observations of the petitioners on the reply of the State. Furthermore, the Commission gave the State five days to report on its compliance with the request to maintain the status quo.

15. On July 31, 2003, the petitioners submitted a new request for precautionary measures, based on the alleged disregard of the request made by the IACHR to the State to maintain the status quo. On August 1, 2003, the IACHR granted the requested precautionary measures, and requested the State to:

Refrain from taking any steps that might alter the status quo in the matter, until the organs of the inter-American system of human rights have adopted a final decision on the case, in particular, avoiding or suspending any judicial or administrative action that entails eviction of the petitioners from their ancestral lands.

16. The Commission gave the State five days to submit information on compliance with the measures requested.

17. On August 4, the State requested an extension of 30 days to reply to the petitioners’ observations of July 2, 2003; it was given an extension of 15 days on August 6, 2003.

18. On August 14, 2003, the IACHR received the reply of the State to the request for precautionary measures of August 1, 2003. The reply of the State was forwarded to the petitioners on August 26, 2003, with a deadline of 15 days to submit their observations.

19. On August 25, 2003, the Commission received the observations of the Government on the reply of the petitioners of July 2.

20. On September 17, the Commission received a communication from the State attached to which was a “Memorandum of Understanding” signed by the Government and the petitioning Pehuenche families in the instant case. In this document the parties reach an agreement on how the points established in the “framework agreement” signed on February 28, 2003, should be met. Furthermore, the parties undertake to present the friendly settlement agreement on the instant case to the IACHR “no later than October 17, 2003”.

21. On October 17, 2003, the Commission received the reply of the petitioners to the observations of the State regarding the precautionary measures.

22. Also on October 17, the State transmitted to the Commission the document “Final friendly settlement agreement between the State of Chile and the petitioning Mapuche Pehuenche families of the Upper Bío Bío”, together with four appendices.

III. THE FACTS

23. The petitioners are members of the Mapuche Pehuenche people of the Upper Bío Bío Sector in the Eighth Region of Chile. On October 5, 1993, the ENDESA Company received approval for a project to build a hydroelectric plant in Ralco, the area where the petitioners live.

24. After conducting the environmental impact assessment for the project, the National Environment Commission (CONAMA by its initials in Spanish) approved the construction of the hydroelectric plant. At the same time, CONAMA said that under the Indigenous Peoples Act (Law 19.253) the relocation of the indigenous population could only proceed with the consent and willingness of those concerned. Accordingly, the indigenous property concerned could only be swapped for another property that satisfied the indigenous person involved, whereupon the original property would cease to be encumbered as indigenous land, and that classification would transfer to the new land given in exchange. The Act also provides that the swapping of lands or any other encumbrance on indigenous lands may only be carried out with the approval of the National Corporation for Indigenous Development (a State institution).

25. Construction of the dam commenced in 1993, despite the opposition of all of the Mapuche Pehuenche people that lived in the area. As construction of the dam progressed, most of the Mapuche Pehuenche families that lived in Upper Bío Bío agreed to swap their lands, except for the alleged victims mentioned in this petition. By the time the petition was lodged with the IACHR construction of the dam was 70% complete.

26. On March 10, 2000, the President of Chile issued, under the Electricity Act, a permanent electrical concession in favor of ENDESA and granted, in accordance to law, a flooding easement on behalf of the company. The petitioners consider that this decree is a direct violation of the Indigenous Peoples Act and, accordingly, filed an appeal for protection. This appeal was decided on November 21, 2001, by the Santiago Court of Appeals, which rejected it on a technicality but said that the application of the Electricity Act did not excuse compliance with the Indigenous Peoples Act. This judgment was confirmed by the Supreme Court of Chile on January 23, 2002.

27. On April 5, 2002, the Ministry of Economy, at the request of ENDESA, appointed a Commission of “good men” tasked with conducting an appraisal of the lands inhabited by the five indigenous women mentioned as victims in the petition, as well as a portion of land belonging to the Quepuca-Ralco indigenous cemetery.

28. This “Commission of good men” was appointed in accordance with the Electricity Act, which permits the permanent physical occupation of lands for hydroelectric purposes through imposition of a flooding easement. The petitioners submitted in their petition that the application of this law is a way of avoiding compliance with the Indigenous Peoples Act, which only permits occupation of indigenous lands through swaps.

29. Furthermore, on lodging the petition, the petitioners said that once the appraisals have been carried out, their results have been reported, and the company has deposited the amount determined, the company would be able to request the competent court to award it physical possession of the lands, if need be with the use of public force.

30. When this “Commission of good men” arrived to carry out the appraisal, the indigenous women barred them access. On the following day, these persons flew over the area in a helicopter, and in that way conducted the appraisal. On April 20, 2002, the petitioners filed an appeal for protection against the decision of the Ministry of Economy, which ordered the appraisal. This appeal was refused for being filed late.

31. On June 10, 2003, the Santiago Court of Appeals admitted an appeal for protection filed by ENDESA against the Superintendent for Electricity and Fuel for having withheld the land appraisal report in keeping with the measure requested by the IACHR.

32. On July 28, 2003, ENDESA proceeded to deposit with the court the amounts corresponding to the indemnifications set by the “Commission of good men” and requested the court to award it possession of the lands.

IV. THE FRIENDLY SETTLEMENT

33. The parties formally expressed their intention to seek a friendly settlement in this case on February 26, 2003, at a hearing held in the framework of the 117th regular session of the Commission. As a result of the talks initiated at that hearing and continued in private by the parties, on February 28, 2003, the State sent the Commission a document signed by both parties entitled “Framework Agreement between the State of Chile and the Petitioning Mapuche Pehuenche Families of the Upper Bío Bío for a Proposed Friendly Settlement”. That agreement provided:

Framework Agreement between the

State of Chile

and the Petitioning Mapuche Pehuenche Families of the Upper Bío Bío

for a Proposed Friendly Settlement

....

Agreement Framework

1. Measures to improve the legal institutions protecting the rights of indigenous peoples and their communities.

Recognizing that the indigenous question is an affair of State whose solution is essential to ensure social unity and peace, as well as public order, it is necessary to strengthen the legal institutions for protection of indigenous peoples through the following measures:

- a) Constitutional recognition of the indigenous peoples that exist in Chile, who preserve unique ethnic and cultural expressions that enrich the national identity, in order to raise to constitutional rank principles to which Chile adheres at the national and international level.
- b) Ratification by Chile of ILO Convention 169. The parties, comply with the decision of the Constitutional Court and agree on the scope of the concept of indigenous peoples contained in said decision.

2. Measures designed to strengthen the territorial and cultural identity of the Mapuche Pehuenche people, as well as mechanisms for participation in their own development.

- a) Creation of a municipality in the Upper Bío Bío sector
- b) Agree on mechanisms to solve the land problems that affect the indigenous communities in the Upper Bío Bío sector.
- c) Strengthen indigenous participation in the Upper Bío Bío Indigenous Development Area (ADI).
- d) Agree on mechanisms designed to ensure the participation of indigenous communities in the management of the Ralco Forest Reserve.

3. Measures to foster development and environmental conservation in the Upper Bío Bío sector.

- a) Agree on mechanisms to ensure that indigenous communities are informed, heard, and taken into consideration in follow-up and monitoring of the environmental obligations of the Ralco Hydroelectric Project.
- b) Strengthen economic development in the Upper Bío Bío sector, in particular in its indigenous communities, through mechanisms that are acceptable to the petitioners.
- c) Agree on mechanisms to facilitate and improve tourism development of the reservoirs in the Upper Bío Bío for the benefit of the indigenous communities.
- d) Agree on binding mechanisms for all state organs to prevent the construction of future megaprojects, in particular hydroelectric projects, on indigenous lands in the Upper Bío Bío.

4. Agree, as soon as possible, on urgent measures with respect to the lawsuits against indigenous leaders who have been prosecuted for acts connected with the construction of the Ralco Plant.

The petitioning families note for the record that this item is essential for them on humanitarian grounds and for reasons of solidarity.

5. Measures to satisfy the private demands of the Mapuche Pehuenche families concerned.

The Government of Chile shall act as guarantor between the families concerned and ENDESA, in order to ensure that the latter provides a satisfactory response to the private demands with respect to lands, financial compensation, and educational needs.

6. The parties declare that the agreement is a single whole in which each item has the same value.

7. The parties agree on the following working timetable:

a) A deadline of 60 days from the signing of this instrument for drafting a friendly settlement agreement.

b) Development of a working protocol on the mechanisms and deadlines for implementation of each of the agreed measures.

c) The parties agree to inform the IACHR in writing of the terms of the final agreement within the deadline agreed in paragraph a) and, thereafter, to report on progress in the implementation of said agreement in the month of June 2003.

d) Furthermore, the parties agree, in the framework of the OAS General Assembly to be held in Santiago, to request for a hearing from the IACHR in order to provide it with a progress report.

SIGNED: Jaime Andrade Guenchocoy – Under Secretary of the Ministry of Planning and Cooperation (Mideplan), Executive Coordinator of Indigenous Policies and Programs –, Alejandro Salinas Rivera – Director for Human Rights, Ministry of Foreign Affairs –, Berta Quintremán Calpan, Mercedes Huenteao Beroiza, Hilda Riquelme Huenteao, Reinaldo Beroiza Huenteao, Roberto Celedón Fernández, and Marcos Orellana Cruz.

34. On September 17, 2003, the Commission received a communication from the State with the attachment “Memorandum of Understanding” signed by the Government and the petitioning Pehuenche families in the instant case. This document provided:

MEMORANDUM OF UNDERSTANDING

GOVERNMENT – PEHUENCHE FAMILIES

...

FIRST: On February 26, 2003, before the Inter-American Commission on Human Rights, the State of Chile and the petitioning Pehuenche property owners of the Upper Bío Bío here present in connection with the Ralco matter, signed the document Framework Agreement for a Proposed Friendly Settlement, pursuant to which the Government of Chile would act as guarantor between the above-mentioned families and the ENDESA Company, in order to seek a satisfactory response to their private demands in connection with lands, financial compensation and educational needs arising from their relocation.

SECOND: The negotiation process under the aforesaid Framework Agreement paved the way for consensus on the majority of issues. However, the talks were interrupted before a final agreement acceptable to both parties was reached.

THIRD: Despite the interruption of the talks, the willingness and interest of the undersigned to reach a final agreement satisfactory to the parties remains, and this has made it possible to rekindle the stalled dialogue and negotiation process.

FOURTH: In this context, the Pehuenche property owners and the ENDESA Company, with the participation of the Government, have reached an understanding on the direct compensation that the aforesaid company would grant them in accordance with the terms mentioned in the instrument signed this day by the individually named Pehuenche property owners, the ENDESA Company, and the Minister and Secretary General of the Presidency.

FIFTH: The Government, for its part, shall adopt the measures necessary for the Treasury to purchase, through the competent agencies, 1,220 hectares on the Fundo El Porvenir, located in the Upper Bío Bío, which is currently the property of Banco Estado (sic), to be transferred free of charge to the families of the Pehuenche property owners here present, individually mentioned in Appendix 1 of the present instrument, as indirectly injured parties of the Ralco Power Plant Project. Furthermore, the Government shall study the measures necessary to improve access to the aforesaid property and the possibility of creating a forest reserve on the remaining land on said property.

SIXTH: The Government, through the Agricultural Development Institute and in accordance with the rules in force, shall provide technical assistance to any development projects that are carried out on the lands of the current Fundo El Porvenir and that ensure its habitability and harness its development potential.

SEVENTH: The Government, through the Ministry of Housing and Urban Development, and in accordance with the legal framework in force, shall implement a Housing Program whereunder it shall grant housing subsidies for the construction of homes for the Pehuenche property owners here present, who are relocated as a consequence of the agreed land swaps, as well as for their families, who are individually mentioned in Appendix 1 of the present instrument.

EIGHTH: The Government, through the competent agencies and in accordance with the legal framework in force, shall adopt the measures necessary to grant eight ex gratia pensions and 22 study scholarships to the relatives of the Pehuenche property holders here present, who are individually mentioned in Appendix 2 of the present instrument.

NINTH: The Pehuenche property owners here present declare that the conditions agreed in the present instrument and those contained in the Memorandum of Understanding mentioned in the Fourth Clause provide a definitive solution to item 5 (“Measures to satisfy the private demands of the Mapuche Pehuenche families concerned”) of the “Framework Agreement for a Proposed Friendly Settlement” signed by them and the State of Chile on February 26, 2003, before the Inter-American Commission on Human Rights of the OAS.

Consequently, with the foregoing, the parties reach consensus on all points of the aforementioned Framework Agreement, enabling them to reach a final friendly settlement agreement without any points of disagreement left pending between the parties within the deadline mentioned in the following clause.

TENTH: The Pehuenche property owners here present, assisted by their attorneys, shall, together with the Government, present the instrument described in the aforementioned friendly settlement to the Inter-American Commission on Human Rights no later than October 17, 2003.

ELEVENTH: The Government shall continue to exercise power of oversight through the competent agencies in order to ensure full and timely compliance with the environmental rating report on the Ralco Power Plant Project.

TWELFTH: The instant Memorandum, along with the undertakings, obligations and rights it establishes for those here present shall be extinguished should the deadline provided in the tenth clause of the present instrument expire before the formalization and presentation to the Inter-American Commission on Human Rights of the Final Friendly Settlement Agreement, unless all of the undersigned expressly agree by common consent to its extension.

SIGNED: Berta Quintremán Calpan, Mercedes Huenteao Beroiza, Rosario Huenteao Beroiza, Aurelia Marihuan Mora, Alex Quevedo Langenegger, Roberto Celedón Fernández and Francisco Huenchumilla Jaramillo – Minister, Secretary General of the Presidency –.

35. On October 17, 2003, the State transmitted to the Commission the document “Final friendly settlement agreement between the State of Chile and the petitioning Mapuche Pehuenche families of the Upper Bío Bío”, together with four appendices. The text of the agreement says:

FINAL FRIENDLY SETTLEMENT AGREEMENT BETWEEN THE STATE OF CHILE AND THE PETITIONING MAPUCHE PEHUENCHE FAMILIES OF THE UPPER BÍO BÍO

...

III. FRIENDLY SETTLEMENT AGREEMENT

1.- Measures to improve the legal institutions protecting the rights of indigenous peoples and their communities.

The State of Chile reiterates its respect for the rights of indigenous peoples and their communities, as well as its will to promote, through the mechanisms provided under the country's laws, full recognition and protection for said rights. In this context, recognizing that the indigenous question is an affair of State, and convinced that its adequate solution is essential to ensure social unity and peace, it has been agreed to implement the following measures to strengthen the legal institutions for protection of indigenous peoples, together with the activities mentioned in each case:

a) Constitutional recognition of the indigenous peoples that exist in Chile, who preserve unique ethnic and cultural expressions that enrich the national identity, in order to raise to constitutional rank principles to which Chile adheres at the national and international level.

The parties note for the record the efforts made by the Government of Chile and the indigenous communities to accomplish the foregoing.

The Government of Chile undertakes to insist on a constitutional reform before the National Congress and will present a new bill to that end. This new initiative will be accompanied by a widespread awareness-raising process on its contents, as well as creation of forums for dialogue and invitations to indigenous organizations and communities as directly concerned parties, as well as Chilean society as a whole, in order to achieve broad consensus on its contents.

The government will adopt the following measures for this purpose:

- (1) Initiate a dialogue process with indigenous organizations and communities consisting of regional seminars and/or congresses on the content of the constitutional recognition bill.
- (2) Engage all political parties (government and opposition, as well as parliamentary blocs) in a dialogue process before and during the parliamentary debate on the reform bill.
- (3) Promote national awareness on the importance of constitutional recognition for the rights of indigenous people through regional and national seminars, as well as widespread dissemination through the mass media.

b) Ratification by Chile of ILO Convention 169.

The Government of Chile, in accordance with the undertakings given to the indigenous peoples in the Nueva Imperial Agreement, will also initiate a broad dialogue process on the contents of International Labour Organization (ILO) Convention 169, and create areas of understanding with a view to achieving the necessary parliamentary consensus for its adoption.

The parties are aware that the use of the category "indigenous peoples" is in keeping with the provisions of the Chilean Constitution and, as the Constitutional Court has ruled, in no way can their recognition signify the creation of State within a State.

In order to accomplish this objective the Government of Chile will carry out the following activities to disseminate and promote the principles and contents of the Convention:

- (1) Dialogue with all political parties and parliamentary blocs in order to build consensus and secure ratification of the Convention by the Senate.

(2) Promote and foster dialogue with ILO officials at a seminar or by other means, in order to obtain precise clarification of the contents and scope of this international instrument.

(3) National and regional seminars attended by concerned sectors of Chilean civil society, indigenous organizations, and universities to address the contents of ILO Convention 169 and its application in countries that have ratified it.

2.- Measures designed to strengthen the territorial and cultural identity of the Mapuche Pehuenche people, as well as mechanisms for participation in their own development.

a) Creation of a municipality in the Upper Bío Bío sector.

The parties note for the record that the Government of Chile, bearing in mind the aforementioned Framework Agreement and the legitimate aspiration of the indigenous communities of the Upper Bío Bío, submitted to the National Congress on August 25, 2003, a bill for the creation of the Municipality of Upper Bío Bío, in the Eighth Region of Bío Bío.

The Government of Chile will encourage the passage through parliament and adoption of this bill in order to bring about the creation of the municipality as soon as possible.

The foregoing notwithstanding, the parties agree that the approval of the aforesaid bill depends on consensus achieved in the National Congress and, as a law to be adopted by a qualified quorum, requires the vote in favor of an absolute majority of the members of each legislative chamber.

In order to disseminate information on the municipal administration system, the Government will organize and hold within 60 days after the signing of the instant Friendly Settlement Agreement an information seminar on municipal administration and all the background information connected with the possible creation and functioning of a municipality. The seminar will be for all the indigenous communities of the Upper Bío Bío, and will be held by the appropriate State institutions.

b) Agree on mechanisms to solve the land problems that affect the indigenous communities in the Upper Bío Bío sector.

Without disregarding or underestimating the value of the progress made to date regarding a solution to the problems concerning indigenous lands, the parties agree on the need to expedite said process.

The following measures are agreed to that end:

(1) The Government of Chile, through the competent agencies and by means of a public bidding process, shall arrange the contracting of an external legal team whose task shall be to implement the measures necessary to settle the outstanding legal disputes involving Pehuenche lands, based on the records collected and on-site validation activities arising from Real Estate Survey of the Upper Bío-Bío conducted by Centro EULA-Chile of Universidad de Concepción.

(2) Furthermore, the procedures shall be retained for recovery of indigenous lands through the mechanisms provided by Article 20 (a) and (b) of the Indigenous Peoples Act and through the procedures applied by the Ministry of National Properties (Ministerio de Bienes Nacionales).

c) Strengthen indigenous participation in the Upper Bío Bío Indigenous Development Area (ADI).

The parties, valuing the creation of the Indigenous Development Area (ADI) of the Upper Bío Bío as an expression of the will of the State to promote development for indigenous communities, agree on the need to improve said instrument in order to enable more effective participation of the members of said communities in the management and stimulation of their development.

The following measures are agreed to that end:

(1) The Government of Chile will arrange for the creation of a Board of Directors for the Indigenous Development Area, whose composition, structure and *modi operandi* shall be proposed by the communities that inhabit the Upper Bío Bío sector, with a view to their approval by the Office of the Governor of the Eighth Region.

(2) This Board shall be the interlocutor of the Government for discussion and analysis of development policies, plans, programs and projects that concern the Indigenous Development Area.

(3) Mideplan, through the programs in place, will provide support for the installation of participatory indigenous institutions, with a view: a) to create or improve existing management models in the aforesaid Development Area; b) create support networks; and, c) install, create and strengthen indigenous organizations in the ADI.

(4) To complement the above, Mideplan will implement, through existing programs, a line of action on "Training for Indigenous Communities and Leaders", in which members and leaders of indigenous communities throughout the Development Area will take part.

d) Agree on mechanisms designed to ensure the participation of indigenous communities in the management of the Ralco Forest Reserve.

The parties, appreciating the special ties of the members of the Mapuche Pehuenche communities to the lands that comprise the Ralco National Reserve, agree that it is advisable to enable the participation of those communities in the management of the reserve.

The following measures are agreed to that end:

(1) The Government of Chile shall arrange the signing of a "partnership" agreement between the National Forestry Corporation, Eighth Region (CONAF VIII Región) and the families that traditionally occupy those lands.

(2) The aforementioned agreement will include: a) recognition of ancestral land-use rights in the Ralco National Reserve, *inter alia*, as regards the *veranadas* (areas where the Pehuenche live in the summer), *piñoneo* (monkey puzzle nut harvest), and tourism resources of the Pehuenche families that currently and traditionally occupy the areas inside and adjoining the reserve; b)

determination of the responsibilities of the parties in protection and conservation activities for the natural resources involved; and, c) a Development and Investment Plan to enable Pehuenche participation and the conservation of the natural resources in the Reserve.

3.- Measures to foster development and environmental conservation in the Upper Bío Bío sector.

a) Agree on mechanisms to ensure that indigenous communities are informed, heard, and taken into consideration in follow-up and monitoring of the environmental obligations of the Ralco Hydroelectric Project.

Bearing in mind the declarations of the parties in this regard,[FN1] the following measures are agreed:

(1) The Government of Chile will adopt measures so that, in addition to the publicity mechanisms employed thus far, the results of audits will also be divulged via the following means: a) Copies sent to the Municipality of Santa Bárbara for public consultation and to the prospective Municipality in Upper Bío Bío; b) publication of reports on the National Environment Commission (CONAMA) web site; c) facilities granted for consultation of reports at the Office of the Executive Director of CONAMA and at the CONAMA Regional Offices in Bío Bío and La Araucanía. d) the same facilities granted by the National Corporation for Indigenous Development (CONADI) to consult such reports, in particular at the office of said institution in the Upper Bío Bío; e) copies of reports sent to the indigenous communities of the Upper Bío Bío and to a representative or organization designated by the petitioning families.

(2) Furthermore, the Government of Chile undertakes to make information and the follow-up and supervision process even more transparent, through the participation of a local resident representing the parties and the Mapuche Pehuenche community in the visits of teams of independent auditors. This representative could submit his observations to CONAMA on the reports issued, and those observations would be published on the CONAMA web site, provided that they are in keeping with the principles of seriousness and timeliness and are expressed in suitable terms.

(3) In addition, consultations with local residents and community members in the sector will be included as part of the normal procedure on the periodic visits conducted by CONAMA, in order to canvass their opinions on the environmental impact caused by the implementation of the project.

b) Strengthen economic development in the Upper Bío Bío sector, in particular in its indigenous communities, through mechanisms that are acceptable to the petitioners.

1. The Government of Chile undertakes to create a Comprehensive Productive Development Program in the Upper Bío Bío sector, that coordinates the efforts of all public and private sector organizations underway in the zone.

2. Furthermore, the Government of Chile undertakes to use its good offices with ENDESA in order to verify payment of the financial compensation offered for the development of the communities affected by the Ralco Hydroelectric Project, distinct to those mentioned in the memoranda of understanding mentioned in item 5 of the present instrument; without prejudice to

the foregoing the Government of Chile shall monitor compliance in full with the conditions set down in the environmental rating report on the aforementioned project. The aforesaid undertaking shall be accomplished by means of a letter to the Board of Directors of ENDESA, a copy of which is attached to the present instrument.

c) Agree on mechanisms to facilitate and improve tourism development of the reservoirs in the Upper Bío Bío for the benefit of the indigenous communities.

Bearing in mind the declarations of the State of Chile on this point[FN2], in order to promote and facilitate tourism development in the zone, the Government of Chile will arrange the design and development of a land-use plan, which will determine the permitted uses for lakeshore areas, taking into consideration the on-site characteristics and the operations of the power plant. As this land-use plan will encompass lands located in the Eighth and Ninth Regions, the agencies responsible for it, subsequent to consultation, will be the Regional Secretariats of the Ministry of Housing and Urban Development of the two regions involved.

Within three years after the Hydroelectric Plant comes onstream an independent audit will be carried out to verify compliance with the conditions set down in the Environmental Rating Report with respect to the impact of the Ralco dam reservoir on the Upper Bío Bío sector. The audit will propose the appropriate measures necessary to correct any unforeseen effects that might have occurred, in particular in the tourism development of the reservoir shores. This audit will be commissioned, after consultation with the indigenous communities concerned, by the National Environment Commission.

d) Agree on binding mechanisms for all state organs to prevent the construction of future megaprojects, in particular hydroelectric projects, on indigenous lands in the Upper Bío Bío.

The parties, conscious that the purpose of the State is to foster the common good, to which end it must help to create social conditions to enable all members of the national community to accomplish their highest possible spiritual and material aspirations, agree on the pertinence of applying the mechanisms available in the framework of the rule of law for the protection of indigenous lands.

In this context, the Government of Chile ratifies its will to preserve the indigenous lands of the Upper Bío Bío, to which end all available instruments and measures under the country's body of laws shall be applied.

In particular, to prevent and/or condition the future installation of megaprojects on indigenous lands in the Upper Bío Bío, the Government, through the competent agencies and in accordance with the provisions of the Article 34 of the Indigenous Peoples Act, will promote the amendment of the appropriate land-use planning instrument, so that the indigenous lands of the Upper Bío Bío are categorized as an area of protected natural or cultural heritage resources and, accordingly, are declared non-development or restricted development areas.

4.- Agree, as soon as possible, on urgent measures with respect to the lawsuits against indigenous leaders who have been prosecuted for acts connected with the construction of the Ralco Plant.

The petitioning families note for the record that this item is essential for them on humanitarian grounds and for reasons of solidarity.

Having analyzed the lawsuits pending that are either directly or indirectly connected with the construction of the Ralco Plant, the parties agree that currently the only one in which Government organs are party through the exercise of public criminal action is that which concerns Mr. Víctor Manuel Ancalaf Llaupe, in a summons presented against him by the Governor of the Province of Bío Bío. The case is being heard by Mr. Diego Simpertigue as the Visiting Magistrate, and is currently at the plenary stage with a final decision at first instance due to be issued soon.

There are also two other lawsuits pending against Mr. Víctor Manuel Ancalaf Llaupe in which government agencies are not party. Furthermore those lawsuits have no connection with the matter that this instrument concerns.

The parties note for the record that, based on the principle of separation of powers that governs the rule of law, the executive branch is barred from intervention in cases on which a judicial decision is pending.

The State of Chile understands and appreciates the concern of the petitioning Pehuenche families for the plight of the aforementioned indigenous leader on the humanitarian and solidarity grounds that they invoke. It also respects the belief that the families express with respect to the innocence of the accused in the action proceeding against Mr. Ancalaf Llaupe, which is pending a judicial decision.

In light of the foregoing, the parties agree on the following measures:

- (1) The State of Chile shall seek to ensure strict observance with the rules of due process guaranteed in Article 8 (right to a fair trial) of the American Convention on Human Rights, and underscores that it has a duty to ensure that the accused enjoys all of his rights under the Constitution and the law.
- (2) Once final judgments have been delivered in the lawsuits in which Mr. Víctor Ancalaf Llaupe is currently under prosecution or has been sentenced, in the event those judgments entail prison terms, the Government of Chile undertakes to study the application of all the instruments that the law provides to invoke the benefits guaranteed to all persons deprived of liberty by decision of the courts, and furthermore, to examine the adoption of the appropriate measures applicable to his case.
- (3) At the request of the petitioning Mapuche Pehuenche families, the Government of Chile expresses its disposition to seek, via the appropriate legal and administrative procedures, to procure humanitarian assistance on behalf of the family of Mr. Ancalaf Llaupe.

(4) Inter-cultural sensitization programs for officials of the judiciary and other institutions concerned with indigenous areas, in order to enhance the sense of cultural belonging imparted in the attention provided to indigenous persons who seek the services of the justice administration.

(5) Bring into being as soon as possible a Technical Cooperation and Assistance Agreement with the agencies charged with the reform of the rules of criminal procedure, particularly with a view to improving access to justice and suitable compliance with due process requirements with respect to indigenous people.

5. Measures to satisfy the private demands of the Mapuche Pehuenche families concerned.

The parties declare that the Government of Chile has met the undertaking given in item 5 of the Framework Agreement signed before the Inter-American Commission on Human Rights, and has brokered a satisfactory response to the private demands with respect to lands, financial compensation, and educational needs, as well as verifying compliance in good faith with the agreements reached between the Pehuenche families and the aforesaid company.

The Government of Chile reiterates its undertaking to act as guarantor and to ensure full compliance with the obligations adopted by Endesa to satisfy the private demands of the petitioners.

The parties declare that as a result of the combined effort of the parties involved and with participation of the Government of Chile, the petitioning families and ENDESA have reached a satisfactory agreement on the direct compensation that the aforesaid company will grant to meet the demands with respect to lands, financial compensation, and educational needs mentioned in the Memorandum of Understanding signed in Santiago, Chile on September 16, 2003, the text of which is enclosed in Appendix 1 of the present instrument, which is understood to comprise part of the instant Agreement.

In this connection, the parties note for the record before the Commission, that all the necessary legal instruments have been signed to give effect to the agreements set down in the above-mentioned Memorandum of Understanding, whose specific level of compliance is described in the document attached as Appendix 2.

Furthermore, the parties declare that the Government of Chile and the petitioning families have agreed on a set of measures or actions designed to provide to the latter certain benefits in addition to the direct compensation assured by Endesa. Those undertakings are included in the Memorandum of Understanding between the Government of Chile and the petitioning families signed in Santiago on September 16, 2003, the text of which is enclosed in Appendix 3 of the present instrument whose level of performance is described in the document attached as Appendix 4.

The parties expressly agree that the compensation and measures agreed in the aforementioned instruments provide full satisfaction to the private demands of the petitioning families with respect to lands, financial compensation, and educational needs. Furthermore, as an expression of good faith the petitioning families undertook to abandon the lawsuits pending in the Chilean

courts, and to renounce any other action before them, with the sole exception of those that might arise from the obligation to comply with what has been agreed.

6.- The parties declare that the agreement is a single whole in which each item has the same value.

(1) The undersigned parties recognize and accept that it is understood that the undertakings adopted in the instant Final Friendly Settlement Agreement, which might require legal or administrative initiatives and/or budgetary resources for their implementation, will be carried out in the framework of the workings of the state apparatus and in accordance with the Chilean legal system, and that the effort will be made at all times to ensure the most prompt and comprehensive performance possible of the measures agreed.

(2) The parties declare their complete satisfaction with the instant Final Friendly Settlement Agreement and agree that its terms and contents are based on full respect for the human rights recognized in the American Convention on Human Rights, and that they express the standing commitment of the Government of Chile to protect and safeguard those rights.

(3) Therefore, the petitioning families express that the full and comprehensive fulfillment of the instant Agreement will remove the motives for the petition lodged against the State of Chile and that no other matters subsist that might require the intervention of that Commission.

7.- Reports to the Inter-American Commission on Human Rights.

Without prejudice to the foregoing, the parties agree to report periodically to the Inter-American Commission on Human Rights on compliance with the commitments adopted in the instant Final Friendly Settlement Agreement. The first report will be transmitted four months after the date of signing of the Agreement and thereafter reports will be transmitted on a semi-annual basis until every point of the agreement has been met in full.

Signed: Berta Quintremán Calpan, Rosario Huenteao Beroiza, Mercedes Julia Huenteao Beroiza, Aurelia Marihuan Mora, Francisco Huenchumilla Jaramillo – Minister, Secretary General of the Presidency –, Marcelo Carballo Ceronia – Under Secretary for Planning and Cooperation, Executive Coordinator of Indigenous Policies and Programs –, Amira Esquivel – Director for Human Rights, Ministry of Foreign Affairs –, Roberto Celedón Fernández and Sergio Fuenzalida Bascuñan, attorneys.

Santiago, October 13, 2003.

[FN1] The parties declare that under the body of laws in force in the country, normal supervision and follow-up on the project is carried out by the public agencies that within the limits of their competencies took part in the environmental impact assessment of the project. Furthermore, the project will be audited by two independent firms, whose main role is to support the public agencies in the verification of full compliance with all the provisions, standards and requirements contained in the environmental rating report on the project, a process coordinated by the National Environment Commission (CONAMA). The parties, furthermore, point out the importance to continually seek positive environmental impact in accordance with the terms and conditions of

said environmental rating report. Without prejudice to the foregoing, the parties agree on the pertinence of facilitating access for indigenous communities to the follow-up and supervision reports of the external auditors and those issued by the respective public agencies.

[FN2] The Government of Chile mentions in advance and by way of explanation that, according to the studies and technical reviews carried out in the Environmental Impact Assessment associated with the Ralco Hydroelectric Project, the monthly water level variations in the Ralco dam reservoir caused by seasonal effects are moderate, given that the maximum readings occur in exceptional circumstances associated with hydrological conditions characterized by very high inflows during the peak rainfall period (May to August). Therefore, under normal conditions, the velocity of the variation in water level in the dam is low and poses no problems even under the exceptional circumstances mentioned, since the change in water level in the dam is sufficiently slow so as not to pose a threat to human life and activities or to the aquatic life. In the event that tourism activities associated with the dam are developed, they will mainly occur in the months of January and February and since they are secondary to the prime objective of the dam, which is production of hydroelectric energy, they should be adapted to the operating regime derived from that prime objective. This adaptation would not be problematic in any case, since monthly water level variations are negligible in January and February.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

36. The IACHR reiterates that, in accordance with Articles 48(1)(f) and 49 of the Convention, this procedure is intended to reach "a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention." By agreeing to carry out this procedure, a State indicates that it will endeavor, in good faith, to comply with the provisions of the Convention pursuant to the principle of *pacta sunt servanda*, which binds States to honor their treaty obligations. The Commission also wishes to reiterate that the friendly settlement procedure provided for in the American Convention allows individual cases to be concluded on a noncontentious basis and, in past cases that have involved several countries, it has proven to be an important dispute settlement mechanism that can be used by both parties.

37. The Commission wishes to acknowledge the efforts of the State of Chile to reach a friendly settlement of the instant matter. Furthermore, the IACHR recognizes the importance of the measures that the State has undertaken to carry out to ensure recognition of the rights of the entire Mapuche people in Chile. The Commission will closely monitor compliance with the approved agreement.

VI. CONCLUSIONS

38. On the basis of the preceding considerations and in accordance with the procedure set forth in Articles 48(1)(f) and 49 of the American Convention, the Commission wishes to reiterate its profound thanks to the parties for their efforts as well as its satisfaction with the friendly settlement agreement reached in this case in accordance with the purposes and provisions of the American Convention.

39. Based on the considerations and conclusions contained in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the friendly settlement agreement reached in this matter.
2. To continue follow-up and supervision of each and every item of the friendly settlement agreement, and in this context to remind the parties of their undertaking to report regularly the IACHR on compliance with the instant friendly settlement.
3. To publish this report and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 11 day of March 2004. (Signed): Clare K. Roberts, First Vice President; Susana Villarán Second Vice President; Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez, Commissioners.