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File Number(s):	Report No. 75/09; Petition 286-08
Session:	Hundred Thirty-Fifth Regular Session (3 – 8 August 2009)
Title/Style of Cause:	Ngobe Indigenous Communities and their members v. Panama
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Paolo G. Carozza.
Dated:	5 August 2009
Citation:	Ngobe Indigenous Communities v. Panama, Petition 286-08, Inter-Am. C.H.R., Report No. 75/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANTS: Ernesto Lopez and Karine Rinaldi
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I. SUMMARY

1. On March 7, 2008, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition lodged by the organizations Cultural Survival and Alianza para la Conservación y el Desarrollo (Alliance for Conservation and Development) (hereinafter “the petitioners”). On May 13, 2008, the IACHR received a separate petition lodged by Ernesto López and Karine Rinaldi (hereinafter “the petitioners”). Both petitions were lodged on behalf of the members of several communities of the Ngöbe Indigenous People in the Changuinola River Valley, in the province of Bocas del Toro (hereinafter “the alleged victims,” “the Ngöbe,” or “the communities”), against the Republic of Panama, (hereinafter “the Panamanian state,” “Panama,” or “the State”). The petitions allege that the State, without prior consultation, awarded a concession for the construction of a hydroelectric dam within Ngöbe ancestral lands which has caused serious damage to the land, the environment and to the Ngöbe way of life; as well as the illegal resettlement of Ngöbe families, and the presence of police forces in the area to control any opposition to the hydroelectric project.

2. The petitioners claim that the Panamanian state is responsible for the violation of rights enshrined in Articles 5 (right to human treatment), 7 (right to personal liberty), 8 (right to a fair trial), 13 (freedom of thought and expression), 19 (rights of the child), 21 (right to property), 22 (freedom of movement and residence), 23 (right to participate in the government) and 25 (judicial protection) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”). The petitioners claim that they met the requirement of exhaustion of domestic remedies by having lodged an amparo petition that, to

date, the Supreme Court of Justice has not admitted, which constitutes an exception to the admissibility requirement based on unjustified delay.

3. The State, for its part, contends that the petition must be declared inadmissible because there has been no violation of the human rights of the alleged victims, due to the fact that the Ngöbe communities are located in a protected area and not on ancestral lands, and because some of the affected residents of the area who had been resettled had also received compensation. The State also contends that the requirement of exhaustion of domestic remedies established in Article 46(1) of the American Convention has not been met.

4. After analyzing the positions of the parties and the requirements established in Articles 46 and 47 of the Convention, and without prejudging the merits of the case, the Commission concludes that the petition is admissible with regard to alleged violations of Articles 5, 7, 8, 13, 19, 21, 22, 23 and 25 of the American Convention and in accordance with Article 1(1) of the same instrument. Additionally, based on the principle of *jura novit curia*, during the stage of analysis on the merits the Commission will analyze the possible violation of Articles 2, 16 and 24 of the American Convention. The Commission thus decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

A. Processing of the Petition

5. The Commission received the first petition on March 7, 2008, and assigned it number 286-08. The second petition was received on May 13, 2008, and it was assigned number 123-08. Both petitions were grouped under number 286-08 since they dealt with the same facts and the same allegations of human rights violations. Both petitions also requested the adoption of precautionary measures to safeguard the integrity of the territory occupied by the communities, to guarantee the life and personal integrity of the members of the communities, and to remove the police forces present in the area.[FN1]

[FN1] On June 18, 2009, the Inter-American Commission granted precautionary measures in favor of the Ngöbe communities for the purpose of preventing irreparable damage to the communities' right to property and to their security. The IACHR requested the Panamanian State to suspend construction and other activities related to the concession until the organs of the Inter-American human rights system adopted a final decision regarding the matter that is the subject of this petition. The IACHR also requested that the Panamanian State adopt the necessary measures in order to guarantee the freedom of movement, the life and the personal integrity of the members of the Ngöbe communities in order to prevent acts of violence or intimidation.

6. Within the framework of a request for information with regard to the precautionary measures requested, on May 23, 2008, the IACHR forwarded to the State a copy of the relevant parts of the first petition and requested that, within a period of 15 days, the State provide

information with regard to the situation of alleged urgency and irreparable damage to which the petitioners made reference and with regard to the petition in general. The response of the State, addressing the precautionary measures requested as well as matters regarding the admissibility of the petition, was received on June 13, 2008.

7. On August 20, 2008, within the framework of the processing of the petition, the IACHR forwarded copies of the relevant parts of the complaint to the State and requested that, in accordance with Article 30 of the Rules of Procedure of the IACHR, the State submit its observations within a period of two months. The State's response was received by the Commission on November 20, 2008.

8. Furthermore, the IACHR received information from the petitioners regarding the admissibility of the petition and the precautionary measures requested on the following dates: April 7, 2008, May 13, 2008, July 22, 2008, July 30, 2008, September 24, 2008, October 29, 2008, January 15, 2009, July 1, 2009 and August 4, 2009. Those communications were duly transmitted to the State.

9. The IACHR also received observations from the State with regard to the admissibility of the petition and to the precautionary measures requested on the following dates: June 19, 2008, October 3, 2008, October 21, 2008, November 20, 2008, May 22, 2009 and June 26, 2009. Those communications were duly transmitted to the petitioners.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

10. The petitioners allege that the State is responsible for violating the above mentioned human rights by having approved on May 2007, the sale of a 20-year concession for an area of 6,215 hectares (approximately 13,351 acres) to the company AES-Changuinola (hereinafter "AES-Changuinola" or "the company"), a subsidiary of Allied Energy Systems Corporation (AES). The concession, approved by the National Authority For the Environment [Autoridad Nacional del Ambiente (ANAM)], authorizes the construction of a series of hydroelectric dams in the Teribe-Changuinola River area, in the province of Bocas del Toro, and transfers to the company the authority to manage the area of the Palo Seco Protection Forest, where the first of these dams, called Chan -75 (hereinafter "the dam" or "Chan-75"), is under construction. The petitioners allege that neither the State nor the company obtained the consent of the communities for the approval of the concession, for the corresponding environmental impact studies or to begin construction of the hydroelectric projects.

11. The petitioners allege that dam Chan-75 would flood four communities - Charco la Pava, Valle del Rey, Guayabal y Changuinola Arriba - where approximately 1005 people reside, and who would have to be moved from the settlements where they currently reside. Furthermore, the petitioners point out, another 4,000 Ngöbe residents of the nearby communities of Nance de Riscó, Valle de Riscó, Guayacán and Bajo La Esperanza are under the risk of losing their transportation routes, their farmland, and the migratory fish species on which they depend for their subsistence.

12. The petitioners also point out, that there is no demarcation of or title deed to the lands where the Ngöbe communities currently reside, that the present settlements date back to the 1950s, but that, nevertheless, the settlements are located within what has always been their ancestral lands. Moreover, the petitioners assert, in 1983 the Panamanian State created the Palo Seco Protection Forest (BPPS) which included the lands where the Ngöbe presently reside, without their knowledge or consent. The petitioners add that although the lands of these communities were excluded from the Ngöbe-Buglé Comarca or Reserve, which the State created in 1997, they were still part of the so called “attached areas” which enjoyed the same rights as the communities inside the Reserve, and were lands that the State had committed itself to demarcate, at a later stage, on behalf of the Ngöbe communities.

13. The petitioners claim that the State delegated to AES-Changuinola the responsibility for consulting with the Ngöbe regarding the construction of the dam and about implementing a resettlement program. The petitioners point out that on two occasions, in August and in November 2007, representatives from the company together with representatives of ANAM, carried out consultations with the communities which consisted of explaining the economic benefits of building the dam and the type of lands where the Ngöbe would be resettled. The petitioners assert that the members of the Ngöbe communities expressed their opposition to being resettled.

14. The petitioners allege that throughout 2007, despite the opposition expressed by the members of the communities, the company applied pressure on some individual members of the communities to have them transfer their lands to the company in exchange for inadequate monetary compensation. The petitioners allege that through fraudulent and coercive means, some Ngöbe families were resettled and inadequately compensated in order to begin construction of dam Chan-75. At the same time, the petitioners state, other Ngöbe families have remained on their lands and refuse to be resettled. The petitioners claim that the supposed process of consultation and compensation carried out by the company did not respect Ngöbe social and political structures or their decision-making processes, therefore ignoring the collective nature of the rights they exercise over the lands where they live.

15. The petitioners point out that early in January 2008, the company began removing trees from the lands where the dam was to be built. The petitioners allege that the State has suppressed any show of opposition against the Chan-75 project. As an example, the petitioners point out that during a demonstration carried out on January 3, 2008, police officers used force, physically injuring women and children and arresting 54 persons, including 13 minors, two of them infants. The petitioners claim that the State ordered the arrest of any person who demonstrated against the dam, that they had restricted the right of the Ngöbe to freely leave their territory, and that access to the entrance of the BPPS had been denied to all persons except to construction workers, residents of the communities or to individuals who had the authorization of ANAM. Furthermore, the petitioners also allege the persecution by police officers of three Ngöbe leaders, that members of the communities who were protesting the destruction of homes by the company were arrested, and that members of the communities had been threatened to leave their communities so that explosives could be detonated in the area.

16. The petitioners point out that, although the construction of the dam is in its initial stages, the Ngöbe have already suffered the destruction of their environment, of their way of life, their culture, their health and of their personal integrity. Since January 2008, the petitioners say, in addition to the destruction of their forest, the Charco la Pava and Valle del Rey communities have experienced discomfort due to the noise from the construction site and to the detonation of explosives that, sometimes, take place after midnight. According to the petitioners, Ngöbe families have reported that due to the dust generated by the use of heavy machinery, several children have started to suffer from frequent and acute respiratory illnesses. They also indicate that the quality of the water in the river has deteriorated due to sedimentation in the creeks and rivers on which the Ngöbe rely for their daily chores. In addition, the petitioners point out that the Ngöbe live in an environment of fear and insecurity because of the constant police patrols which were hired by AES-Changuinola to, supposedly, provide security to the residents of the construction zone.

17. The petitioners also point out that these incidents have taken place even though they lodged an amparo petition before the Supreme Court of Justice of Panama on December 22, 2007, challenging the approval of the Chan-75 project, and despite having lodged several complaints regarding the hydroelectric project, as well as having filed requests for reparation with various institutions such as the Ministry of Social Development, the Public Defender's Office, the National Authority of Public Services and the National Authority for the Environment. Those efforts, the petitioners say, have not produced any results and with regard to the amparo petition lodged in the Supreme Court of Justice, to date, the petition has not been admitted because it is still in the procedural stage of analysis.

B. Position of the State

18. For its part, the State requests that the petition be declared inadmissible because it does not establish any human rights violations and because domestic remedies have not been exhausted.

19. The State affirms that the Chan-75 dam is located within the Palo Seco Protection Forest (BPPS) which is designated as a "protected area" but not as "ancestral land" or an "Indigenous Reserve", and, therefore, Ngöbe ancestral lands are not being affected and adding that those lands were populated some time around the sixties "due to the nomadic nature of these ethnic groups." At the same time, the State asserts the legality of the concession for the dam through government resolutions that approve the Chan-75 Project Environmental Impact Study, and subsequent modifications, as well as giving approval to the contract between ANAM and AES-Changuinola, and the partial concession to the company of management authority over an area within BPPS.

20. The State points out that the Ministry of Social Development together with the Secretary of Energy have met with indigenous leaders to discuss the construction of the Chan-75 dam and the impact on the social development of the residents who must be resettled and the impact on the development of energy sources in the country. The State points out that in the strategies developed by the national government, there are alternative solutions for the Ngöbe which

consist of providing mobile health care, registration for individuals who are not yet properly registered and the massive distribution of food.

21. The State contends that the petitioners have ignored the compensations made by the company to some of the residents of the area who have negotiated with the company. Furthermore, the State points out that new environmental impact studies have been designed with regard to new resettlements of residents in adjacent areas which will be evaluated by ANAM. The State also points out that it is in direct communication with the company in order to oversee the resettlement of the inhabitants and the necessary compensation.

22. The State contends that the complaints lodged with regard to police actions were submitted to the Public Defender's Office and that ANAM has fully cooperated and provided all the information required in order to explain the facts that were the subject of the complaints. The State points out that it has also been in contact with the Office of the Public Defender, which, according to the State, has determined that the conflicts that at times arose in the region have been resolved and that the resettlement process is being carried out in complete order and with respect for the human rights of the inhabitants of the area.

23. The State maintains that the incidents that took place during the demonstrations of January 3, 2008, did not constitute police repression and, it points out that, according to a police report, the incident was brought under control with the use of non-lethal force. The State alleges that the petitioners deliberately ignored the efforts made by the Magistrate of Valle de Riscó and by the Chief of the Bocas del Toro Police Region to try to establish a dialogue with the demonstrators and to have them clear out from the road they were occupying, and pointing out to them that it was not advisable to expose their children to possible physical and psychological injury by participating in the demonstration.

24. The State asserts that after the Ngöbe demonstrators were dispersed, the adults were taken to a police sub-station and the children were placed under the care of personnel from the Ministry of Social Development. Therefore, the State categorically denies that the children were beaten. In the same vein, the State denies that Ngöbe leaders were threatened or that the freedom of movement of any of the inhabitants of the area was in any way restricted.

25. The State contends that that there are domestic legal processes available that have not been exhausted and, therefore, the petition does not meet the admissibility requirements.

IV. ANALYSIS

A. Competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae* of the Inter-American Commission.

26. The petitioners are authorized by Article 44 of the American Convention to lodge petitions before the IACHR. The petition identifies as alleged victims, communities belonging to the Ngöbe indigenous people and their members[FN2], whose rights, enshrined in the American Convention, the State had committed and undertaken to respect and protect. With regard to the State, the Commission points out that Panama is a State Party to the American Convention since

May 8, 1978, the date in which it deposited its instrument of ratification. Therefore, the Commission has competence *ratione personae* to examine the petition.

[FN2] The alleged victims belong primarily to four communities that are part of the Ngöbe Indigenous People – Charco la Pava, Valle del Rey, Guayabal and Changuinola Arriba – which, altogether, account for 1,005 people. In addition, other ngöbe communities mentioned – Nance de Riscó, Valle de Riscó, Guayacán and Bajo la Esperanza, with a population of 4,000 people – would also be impacted by the same actions of the State alleged by the petitioners. All these communities are located in specific geographic areas and their individual members can be identified. In this regard, see I/A Court H.R., Matter of The Communities of Jiguamiandó and Curbaradó regarding Colombia. Judgment dated March 6, 2003, ninth clause; Matter of the Peace Community of San José de Apartadó regarding Colombia. Judgment dated June 18, 2002, eighth clause; Matter of the Peace Community of San José de Apartadó regarding Colombia. Judgment dated November 24, 2000, seventh clause; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case. Judgment of August 31, 2001. Series C No. 79, para. 149; Matter of Pueblo indígena de Sarayaku regarding Ecuador. Judgment dated July 6, 2004, para. 9.

27. The Commission is also competent *ratione loci* to hear the petition, given that it contains allegations of violations of rights protected under the provisions of the American Convention that allegedly took place within the territory of a State Party.

28. The petitioners allege that the State has violated rights enshrined in the American Convention; therefore, the Commission is competent *ratione temporis*, since the obligation of the State to respect and guarantee rights protected under the provisions of the Convention was already in force at the time the facts alleged in the petition took place. Finally, the IACHR is competent *ratione materiae* because the petition alleges violations of human rights protected by the American Convention.

B. Other requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

29. Article 46(1) of the Convention establishes that, for a petition to be admissible, it is necessary that all remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2) establishes that this requirement is not applicable when: a) the domestic legislation of the State concerned does not afford due process of law to protect the right that has allegedly been violated; b) or when the alleged victim has not been allowed access to the remedies under domestic legislation, or has been prevented from exhausting them, and c) when there has been unwarranted delay in rendering a decision on the remedies already mentioned. The jurisprudence of the Inter-American system clearly indicates that, where pertinent, only those remedies that are appropriate and effective in resolving the matter in question must be exhausted.

30. The Commission will examine the exhaustion of domestic remedies taking into consideration that the petitioners allege that as a consequence of the approval of the concession to build the Chan-75 dam within the lands where the communities currently live, the collective rights of the Ngöbe indigenous communities in the Changuinola River Valley area, Bocas del Toro, were violated because 1) the collective property rights to the lands where they live were ignored; 2) there was no effective prior consultation carried out that took into account the traditional social structure of the communities or their decision-making processes; 3) the integrity of their territory has been impacted by the start of construction activities which have contaminated the environment and caused negative physical effects among the members of the communities; and 4) any peaceful demonstration in opposition to the hydroelectric project has been suppressed which has led to the persecution, attacks, and arrest of members of the communities and restrictions on their right to move freely within their territory.

31. The petitioners argue that they met this requirement when they lodged an amparo petition before the Supreme Court of Justice on December 22, 2007, against the Director-General of the National Authority for the Environment (ANAM) for having issued the resolution approving the construction of the Chan-75 Dam without the free, prior and informed consent of the Ngöbe.

32. The petitioners point out that, before lodging the amparo petition, they had filed a number of claims regarding the concessions to the company, the hydroelectric project, and, also, requesting reparation, with the Ministry of Social Development, the Office of the Public Defender, the National Authority of Public Services and the National Authority for the Environment. With regard to the police presence in the area after the demonstration of January 2008, the petitioners point out that the Mayor of Changuinola filed a complaint with the Assistant Police Commissioner in Bocas del Toro about the use of intimidation tactics by the police. Those efforts did not produce any results.

33. For its part, the State asserts that there are legal remedies in progress that have not been exhausted; however, the State does not specify what those legal remedies are or at what stage of implementation they are. The State did not refer specifically to the amparo petition lodged by the petitioners.

34. The Commission takes note that the amparo petition mentioned by the petitioners alleged the violation of fundamental rights of the Ngöbe communities established by the Constitution of Panama[FN3] as a result of several alleged facts inter alia: the approval of the Concession of Partial Management Authority Over the Protected Area of Palo Seco, which allowed the resettlement of the Ngöbe communities without having produced a Relocation Plan for the Chan-75 Project and without the free, prior and informed consent of the communities; the eviction of community members with police presence; ignoring the territorial rights of the communities; the environmental damage caused; and the harassment and pressure that members of the communities feel that the police authorities exert on them in order to leave their lands in exchange for inadequate compensation.[FN4]

[FN3] Amparo petition lodged with the Chief Justice of the Supreme Court of Justice by Donaldo Sousa and Susana Serracín, on December 22, 2007, (this document is included in the

case file before the IACHR). Among the constitutional provisions on which this petition is based, is Article 127 of the Constitution of Panama which establishes:

The State will guarantee indigenous communities that it will set aside the necessary lands and the collective ownership of the same, for their social and economic benefit. The law will regulate the appropriate procedures to be followed in order to achieve this objective, and establish the limits within which the private appropriation of land will be prohibited.

[FN4] Amparo petition lodged with the Chief Justice of the Supreme Court of Justice by Donaldo Sousa and Susana Serracín, on December 22, 2007, (this document is included in the case file before the IACHR), Section 3, (with regard to facts on which this petition is based): subparagraphs 1 through 12.

35. Therefore, the IACHR considers that the petitioners, having lodged an amparo petition alleging the same facts that are alleged in the petition before the Commission, have exhausted the domestic remedies available in Panama. The Commission points out that a State that alleges that the domestic remedies available have not been exhausted has the obligation to prove the effectiveness of the remedies it contends have not been exhausted. Since the State has not presented any information with regard to the amparo petition lodged by the petitioners, or with regard to the existence of some other remedy that the petitioners should have exhausted, the Commission concludes that the State has not proven the effectiveness of the legal remedies available in Panama. The State has not indicated the existence of any other remedy that the petitioners should have exhausted.

36. Based on the fact that, to date, the above mentioned amparo petition has not been admitted by the Supreme Court of Justice of Panama because it has been in the analysis stage since it was lodged on December 22, 2007, and on the fact that the Court has not processed the remedy “without delay” as established by domestic legislation[FN5], the exception established in Article 46(2) of the American Convention applies, due to the unwarranted delay in rendering a decision on the amparo petition. In the analysis on the reasonableness of the duration of a legal process, it is necessary in certain circumstances to take into account the interest that is allegedly affected; which is in this case, the alleged continuation of threats to the physical, social and cultural integrity of members of an indigenous people that is affected.

[FN5] See, Judicial Code of Panama, Title III, Chapter I: Article 2620: The court to which the petition is addressed will admit it without delay, as long as it is properly prepared and is not obviously out of order and, at the same time, it shall require that the authority being accused to forward the records or, if not possible, a report of the material facts of the petition.

37. The IACHR has previously observed that, although the Constitution of Panama recognizes the property rights of indigenous communities, in reviewing them for purposes of admissibility, it is evident that the Ngöbe have not had access to the procedures that the Constitution deems necessary in order for indigenous communities to obtain the legal recognition and protection of their lands do not exist, as is the case of those communities that are part of a Reserve; consequently, the indigenous communities outside the system of Reserves have not had

access to a permanent and effective mechanism to request and secure legal recognition of their lands.[FN6] Therefore, the exception established in Article 46(2) of the Convention also applies in this case given that the domestic legislation of Panama does not provide for due process of law for the protection of the rights that the petitioners allege have been violated.

[FN6] See, IACHR, Report No. 58/09 (Admissibility) Petition 12.354, Kuna de Madungandi and Emberá de Bayano Indigenous Peoples and their members (Panama), April 21, 2009, para. 49.

38. Last, it should be pointed out that invoking the exceptions to the exhaustion of domestic remedies established in Article 46(2) of the Convention, is closely tied to the finding of possible violations of certain rights enshrined in the Convention, such as the guarantee of access to justice. However, by its very nature and purpose, Article 46(2) is a norm with autonomous content vis a vis the substantive norms of the Convention. Therefore, the determination of whether or not the exceptions to the requirement of exhaustion of domestic remedies established in that norm are applicable in the case in question, must be made prior to and separate from the analysis of the merits of the petition, since it is based on an analytical standard different from the one applied to determine any violation of Articles 8 and 25 of the Convention. It should be made clear that the causes and effects that have prevented the exhaustion of domestic remedies in this case, will be examined, where pertinent, in the report that the Commission will issue with regard to the merits of the controversy in order to determine if they constitute violations of the American Convention.

2. Deadline to submit the petition

39. As established in Article 46(1)(b) of the American Convention, in order for a petition to be considered for admissibility it must be lodged within a period of six months from the date the alleged victim is notified of the judgment that exhausts the domestic remedies. Article 32 of the Rules of Procedure of the Commission establishes that “in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.”

40. In this case, the Commission has already ruled on the applicability of the exception to the requirement of exhaustion of domestic remedies. Considering that the petitioners lodged an amparo petition alleging the violation of the same human rights as they allege in their petition before the IACHR, and the fact that, that the amparo petition has not been admitted in more than a year; and also considering the evolution and continuity of the situation alleged in the claim, and the date on which the petition was presented before the IACHR, the Commission considers that the petition was lodged within a reasonable period of time. Therefore, the requirement regarding the deadline for lodging the petition has been met as established in Article 32 of the Rules of Procedure.

3. Duplication of proceedings and international res judicata

41. Articles 46(1)(c) and 47(d) of the Convention establish that for a petition to be admissible, the subject of the petition or communication must not be pending in another international proceeding for settlement, or be substantially the same as one previously studied by the Commission or by another international organization.

42. It is not evident from the case file that the subject of the petition is pending in another international proceeding for settlement, or that it is substantially the same as one previously examined by the Commission or by another international organization.

43. Therefore, the Commission concludes that the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the alleged facts

44. For purposes of admissibility, the Commission must decide if the alleged facts could characterize a violation of rights, in accordance with the provisions of Article 47(b) of the American Convention, or if the petition is “manifestly groundless” or “obviously out of order” in accordance with subparagraph (c) of the same article. The criteria for evaluating those requirements are different than the criteria used to make a determination on the merits of a petition. The Commission must carry out a prima facie evaluation to determine if the petition establishes the grounds for a violation, possible or potential, of rights protected by the Convention, but not to establish the existence of a rights’ violation. This determination constitutes a preliminary analysis which does not imply prejudging the merits of the matter.

45. With regard to the allegations about the failure to recognize the collective property rights of the alleged victims, as well as the lack of prior consultations before approval of the Chan-75 Project, the Commission points out that the allegations could characterize a possible violation of Article 21 of the American Convention.

46. With regard to the allegation that the alleged lack of prior consultation concerning the Chan-75 Project violated the right to take part in the conduct of public affairs, and the right to seek, receive and disseminate information relating to the matter, the Commission considers that they could characterize alleged violations of Articles 23 and 13 of the Convention.[FN7] The Commission points out that the petitioners’ allegations as to the violation of the right to freedom of expression under article 13 state that the lack of previous consultation with the communities allegedly restricted their access to information about activities that would affect their rights and additionally, there has also been the alleged repression and persecution of community members that have expressed their opposition to the construction of the Chan-75 dam.

[FN7] See, IACHR, Report No. 62/94, Petition 167/03 (Admissibility), Kichwa Indigenous People of Sarayaku and their Members, October 13, 2004.

47. With regard to the allegations that the peaceful demonstrations against the Chan-75 Dam resulted in the repression, persecution and arbitrary arrest of Ngöbe community members, the IACHR considers that they would tend to characterize possible violations of Articles 5 and 7 of the American Convention. With regard to the allegations that these alleged violations had an impact on Ngöbe children, the IACHR considers that they could characterize alleged violations of Article 19 of the Convention.

48. The Commission also points out that, in applying the principle of *iura novit curia*, the above mentioned allegations with regard to repression of all forms of opposition to the Chan-75 Project tend to characterize a possible violation of Article 16 of the American Convention. Furthermore, with regard to the alleged effects of construction activity at the Chan-75 site on the environment and on the physical health of members of the communities, the IACHR considers that they tend to characterize alleged violations of Article 5 of the American Convention.

49. With regard to the allegations that the Ngöbe were not able to freely leave their territory or to receive visits from persons from outside the communities, the IACHR considers that they tend to characterize possible violations of Article 22 of the Convention.

50. With regard to the allegations that the domestic remedies in Panama have proven ineffective, the IACHR considers that they tend to characterize possible violations of Articles 8 and 25 of the American Convention. When applying the principle of *iura novit curia*, the IACHR considers that those allegations also tend to characterize a presumed violation of Article 2 of the Convention. In addition, the Commission notes that, if proven, those allegations, implying the lack of access to justice of the alleged victims because of their ethnic background, could characterize a violation of Article 24 of the American Convention.[FN8]

[FN8] See, IACHR, Report No. 62/94, Petition 167/03 (Admissibility), Kichwa Indigenous People of Sarayaku and its Members, October 13, 2004; IACHR, Report (Admissibility) Petition 12.354, Kuna de Madungandi and Emberá de Bayano Indigenous Peoples and their Members (Panama), April 21, 2009.

51. Consequently, The Commission considers that the requirements established in Article 47(c) of the American Convention have been met.

V. CONCLUSION

52. The Commission concludes that it is competent to hear the complaint, that the petition is admissible in accordance with Articles 46 and 47 of the Convention for the alleged violation of Articles 5, 7, 8, 13, 19, 21, 22, 23 and 25 of the American Convention in connection with Article 1(1) of the same instrument. In addition, by application of the principle of *iura novit curia*, in the merits stage the Commission will analyze the possible application of Articles 2, 16 and 24 of the Convention.

53. Based on the foregoing arguments in fact and in law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition admissible with regard to Articles 5, 7, 8, 13, 19, 21, 22, 23 and 25 of the American Convention in connection with article 1(1) of the same instrument. In addition, by application of the principle of *iura novit curia*, in the merits stage the Commission will analyze the possible application of Articles 2, 16 and 24 of the Convention.
2. To forward this report to the petitioners and to the State.
3. To continue with its analysis on the merits of the case.
4. To publish this report and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 5th day of the month of March, 2009.
(Signed): Luz Patricia Mejía, President; Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro and Paolo G. Carozza, members of the Commission.