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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 141/09; Petition 415-05
Title/Style of Cause:	Diaguita Agricultural Communities v. Chile
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Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo G. Carozza. Commissioner Felipe Gonzalez, a Chilean national, did not take part in the deliberations or the decision on this petition, in keeping with article 17(2)(a) of the Rules of Procedure of the Commission.
Dated:	30 December 2009
Citation:	Diaguita Agricultural Communities v. Chile, Petition 415-05, Inter-Am. C.H.R., Report No. 141/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANTS: Nancy Adriana Yanez and Sergio Fernando Campusano Vilches

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I. SUMMARY

1. On January 10, 2007, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") received a petition lodged by Nancy Adriana Yánez of the Observatory on Indigenous Peoples' Rights and Sergio Fernando Campusano Vilches (hereinafter "the Petitioners") on behalf of the Diaguita Agricultural Community of the Huasco-Altinos (hereinafter "the alleged victims", "the Huasco-Altinos" or "the Community"), against the Republic of Chile, (hereinafter "the "Chilean State", "Chile" or the "State"). In the petition, it is alleged that the State granted environmental approval for execution of the Pascua Lama Mining project and the modifications thereto on the ancestral territory of the Diaguita Indigenous Community, without taking the community's views into account.

2. The petitioners allege that execution of the project in the middle of the ancestral territory would adversely affect practice of their traditional livelihood, disrupt their customs and way of life, bring harm to the environment in their habitat and would deprive them of the essential natural resources required to ensure their economic, social and cultural rights. They contend that execution of the project would imperil their ability to provide food for themselves and make a living and, consequently, threaten their survival and territorial and cultural integrity, by jeopardizing the whole ecosystem sustaining this territory. They claim that the Chilean State is responsible for violation of the rights enshrined in Articles 21, 8 and 25 of the American

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Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in connection with Articles 1(1) and 2 of said instrument.

3. The State, for its part, maintains that the petition should be found inadmissible insomuch as no violation of the human rights of the members of the Huasco-Altinos Diaguita Indigenous Community has occurred, based on lack of prior exhaustion of domestic remedies and untimely filing of the petition.

4. After examining the positions of the parties and the requirements set forth under Articles 46 and 47 of the Convention, and without pre-judgment as to the merits of the case, the Commission concludes that the petition is admissible with regard to alleged violations of Articles 21, 8 and 25 of the American Convention, in connection with Article 1(1) and 2 of said instrument. Additionally, in application of the iura novit curia principle, the Commission shall examine, during the merits stage, whether violations of Articles 13, 23, 24 and 26 of the American Convention may have occurred. The Commission shall serve notice of this decision to the parties, publish it and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

5. The Commission received the petition on January 10, 2007 and assigned it the number 415-07. On June 17, 2009, the Commission received a request for precautionary measures, recorded under the number 191. On May 11, 2007, the IACHR forwarded to the State a copy of the relevant parts of the petition, requesting that it submit information thereon within a period of two months. The State's reply was received on October 12, 2008. A copy of said communication was duly forwarded to the petitioners.

6. Additionally, the IACHR received information from the petitioners on the following dates: February 5, 2008 and October 28, 2008. Copies of said communications were duly conveyed to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. According to the petition, the Agricultural Community of the Huasco-Altinos is made up of individuals who descend from the Diaguita Indigenous Communities. Their social structure is based on occupying their ancestral territory and engaging in production activities, which are characterized as silvo-pastoral.[FN2] The territory of the Community covers a surface area of 395,000 hectares and is made up of individually-owned lands or lands passed down in a family from generation to generation and communal lands, which are registered as community property under the name of the Estancia de los Huasco- Altinos ['the Ranch of the Huasco-Altinos'].[FN3]

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[FN2] In the petition it is explained that the Huasco-Altino Agricultural Community makes a living by grazing goats and mules and farming, which is possible because of their use of important and extensive land in the mountain range, where they move between pastures at different altitudes in winter and summer. This economic activity is supplemented by small-scale agriculture, low-tech mining and hunting and gathering.
[FN3] In 1993, Law 19.233 was enacted reaffirming the right of these community entities to organize in a particular way, based on respect for their tradition of collective organization and culture. Under this law, in 1997 the community property of "Communidad Agrícola de los Huasco Altinos" was regularized and recorded on pages 1063, under the No. 929, in the Property Register of the Recorder of Real Property of Vallenar. Petitioner's brief submitted to the IACHR on January 10, 2008. pg. 3.
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8. The petitioners indicate that "within the general boundaries of the Estancia of the Huasco-Altinos, the Ranch Valeriano or Colorados was surveyed to measure 87,332.985 hectares and the Ranch Chollay or Chañarcillos, owned by Nevada Ltd and where part of the Pascua Lama project would be located, was surveyed to measure 50,712.108 hectares, benefitting private individuals outside of the Community."[FN4] They note that a pending civil law suit was filed in 2002 with the court of Vallenar,[FN5] whereby the Agricultural Community of the Huasco-Altinos is seeking annulment of the purchase of Chollay ranch by the Nevada Mining Company, subsidiary of Barrick company in Chile. They further note that the point has been made during the course of the civil proceeding that the ranch at issue is "pro-indiviso" territory and as such any disposal of that territory requires approval of the general assembly of the Community.

[FN4] See petition dated June 10, 2007. Pg. 8.
[FN5] First Court of Vallenar, Case Number 50728-2002.
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9. With regard to the Pascua Lama Mining Project, the petitioners indicate that in 2001, the Regional Commission on the Environment, Atacama Region (hereinafter "COREMA"), issued a Non Reviewable Resolution Nº 039 [Resolución Exenta] approving the "Pascua Lama" project, the main purpose of which was to mine gold, silver and copper ore, and build a doré (unrefined gold-silver bullion bars) plant in Argentina. According to the petitioners, the Community had no knowledge whatsoever of the Environmental Impact Evaluation of the Pascua Lima Mining Project conducted in 2001, nor was it invited to take part in the citizen participation process when said project first came up, and thus was unable to exercise its rights.

10. They indicate that on December 6, 2004, Nevada Mining Company Ltd., represented by Mr. Alejandro Labbé S., submitted a plan titled "Modifications Pascua-Lama Project" to the Environmental Impact Evaluation System (E.I.E.S.), as provided by Law 19.300 on the General Rules of the Environment. The new plan amends the original "Pascua-Lama" project and envisions mining a new ore deposit called Penelope, located about 2.5 Km southeast of the main deposit, on Argentinean territory.[FN6] The estimated investment is between $1.4 and $1.5 billion. The petitioners add that the Environmental Impact Study (EIS) also sets forth the

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following modifications: an increased extraction rate from 37,000 tons per day to 48,800 tons per day; increased processing rate beginning in the fourth year, from 33,000 tons per day to 44,000 tons per day; a change in water diversion site on the river del Estrecho; relocation of the waste rock management and treatment system in order to ensure gravity drainage; and expansion of the camp located in Chile. Water diversion flow, vehicular flow from Chile, and the quantity and quality of drainage to be managed and treated, remain unchanged.

[FN6] According to the petition, the project is located in the Municipality of Alto del Carmen, province of Huasco, Region Three of Atacama in Chile, on the border with Argentina.

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11. On this issue, the petitioners argue that the Pascua Lama project is located in the middle of the ancestral territory of the Diaguita Indigenous Community and is being implemented at the headwaters of the River del Estrecho and the El Toro River and envisions the mining of a deposit located under glaciers, which feed into the Huasco Valley watershed. The original project included the removal of 13 hectares of ice from Esperanza, Toro 1 and Toro 2 glaciers, and dumping it all at Guanaco glacier.

12. The petitioners contend that the Environmental Impact Study and the modifications thereto, do not take into consideration the socio-cultural impact of the project on the lives and customs of the Diaguita Community, or the mitigation and compensation measures that will be taken as a result of any damage and alterations that may come about, despite the recommendations put forth by the COREMA and the National Corporation of Indigenous Development (CONADI).[FN7]

[FN7] Regarding this issue, the petitioners indicate that COREMA recommended that further information be provided on: a) The social and economic structure of this population group, particularly on silvo-pastoral activity, farming, and seasonal movement for grazing in summer and winter; b) Typical ethnic and cultural manifestations of the community, where social, economic, religious and legal aspects converge; c) Adverse effects on natural resources, particularly the El Transito River, which provides water for the crops and lives of the residents of the lower valley; d). Adverse effects on archaeological heritage sites, as it is common knowledge that some of these sites have been damaged (“cancha de los indios”) by the building of an airplane landing strip, which contradicts information provided in the EIS; e) Specific mechanisms the company will use to develop the interaction between the indigenous population of the sector, respecting farming and grazing and the socio-cultural structure of this population, and introducing mitigation measures in the event that their livelihood is undermined. Petitioners’ brief of January 10, 2007, pg. 16.

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13. They argue that Resolution 24/2006 of the National Commission on the Environment (hereinafter “CONAMA”) approving the project is illegal because it did not adequately assess the effects of the project on the indigenous population, while putting emergency measures into place to protect the population in general from possible harmful effects of the project. They add

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that mention is made of only a vague and future duty of the Nevada Ltd. Company to report on "the conditions in which interaction shall take place between the indigenous population of the sector, grazing by this population, and the mining project."[FN8]. They add that the resolution is also illegal as it violates provisions of Article 34 of the 1993 Indigenous Law N° 19.253,[FN9] which establishes the right to consultation of the Huasco-Altino Community.

[FN8] The petitioners point out that the last section of Article 16 of 1993 Law 19.300 on the General Rules of the Environment, provides that the environmental authority shall approve the Environmental Impact Study if it "fulfills the requirements of an environmental nature and, takes into account the effects, characteristics and circumstances set forth in Article 11, proposes appropriate mitigation, compensation or reparation measures. Otherwise, it shall be rejected.
[FN9] The petition notes that Article 34 of Law 19.253, known as the Indigenous Law, establishes: "Services of the administration of the State and organizations of a territorial nature, when dealing with subject matter involving or relating to indigenous issues, shall listen to and consider the opinion of the indigenous organizations recognized by this law."

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14. The petitioners allege that execution of the project in the middle of the ancestral territory would adversely affect practice of their traditional livelihood, disrupt their customs and way of life, bring harm to the environment in their habitat and would deprive them of the essential natural resources required to ensure their economic, social and cultural rights, by impairing their ability to provide food for themselves and make a living and, consequently, threatens their survival and territorial and cultural integrity, by jeopardizing the whole ecosystem sustaining this territory. Furthermore, the petitioners charge that the company has blocked access to paths leading to the mine, as well as to the Chollay River and the neighboring mountainsides by preventing free movement of vehicles, people and animals along the public road.

15. With respect to pursuing and exhausting domestic remedies, the petitioners explained in detail all of the procedural steps taken on behalf of the alleged victims with the courts and administrative authorities. On this topic, they state they filed a motion to overturn the administrative decision (recurso de reclamación) with National Commission on the Environment (CONAMA), against COREMA resolution Nº 24/2006 of February 15, 2006, which approved the "Modifications Pascua-Lama Project". Non Reviewable [or Exempt] Resolution N° 1397 of June 7, 2006, settled this motion and the moving party was served a copy of the ruling on June 14, 2006, thus terminating the environmental evaluation process of the project. Additionally, they note that action for Constitutional Protection Case Number 3308/2006 was brought in the courts against CONAMA Non Reviewable Resolution N° 1397, and was declared inadmissible on July 3, 2006 by the Appellate Court of Santiago. The petitioners challenged said ruling by filing a motion for reconsideration of judgment, which was denied on July 11, 2006. Additionally, the petitioners mention that an administrative action was brought with the General Directorate of Waters to challenge the Protocol of Agreement entered into between the Oversight Board of the Huasco River and its Tributaries and the Nevada Ltd. Mining Company SA (Subsidiary Barrick Gold Corporation).

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16. The petitioners claim that Chilean judicial authorities had denied justice in rejecting the appeal for constitutional protection pursued by the petitioners because it was found to be untimely, without ruling on the merits of the matter. In the judgment of the Appellate Court, the action should have been brought against COREMA Atacama Region Resolution N° 024/2006 of February 15, 2006 which approved the environmental impact study, and not against CONAMA Resolution N° 1397, denying the motion to overturn the administrative decision. The petitioners allege that the latter resolution terminated the administrative proceeding of the environmental impact evaluation of the plan "Modifications Pascua-Lama Project", dismissing the complaints of the Huasco-Altino Diaguita Community and prompting the filing of the action for protection of constitutional rights with the courts.

17. In conclusion, the petitioners argue that failure to settle the motion to nullify the acquisition of Chollay ranch, part of the community lands, by Nevada Mining Company, which has been pending in civil court since 2002, as well as the environmental approval of the Pascua Lama Mining project and the Modifications thereto, to be executed on the territory of the community without taking into consideration the impact of it on the community and its territory constitutes a violation of the rights enshrined in Articles 21, 8 and 25 of the Convention, in connection with the obligations set forth in Articles 1(1) and 2 of said Convention.

B. Position of the State

18. For its part, the State is requesting that the petition be declared inadmissible inasmuch as domestic remedies had not been exhausted and because it was filed after the six month time period had lapsed, as well as the facts at issue failing to constitute a violation and the doctrine of the forth instance being applicable in this case.

19. The State of Chile believes that grounds for inadmissibility of the petition based on failure to exhaust remedies under domestic law are supported in three different ways. Firstly, the remedies available in the Chilean legal system which the petitioners did not pursue; secondly, remedies currently pending decision; and, lastly, the untimely filing of the only legal remedy pursued by them: the action for protection of constitutional rights.

20. With regard to the remedies available in the Chilean legal system, which were not pursued by the petitioners, the State lists the following:

a. Action for annulment of public law, although not explicitly set forth in the Chilean body of law, it has been construed through Chilean legal doctrine, based on the right of action, set forth in the Chilean Constitution.
b. Writ of inapplicability based on unconstitutionality in a particular case, whereby they could have challenged the decision of the Court of Appeals of Santiago, which declared the Action for Constitutional Protection pursued by them inadmissible based on untimely filing.
c. Civil action for compensation from damages and losses. In response to the arguments of the petitioners regarding the material damages to the Community as a result of the execution of the Pascua Lama Project, for which they believe they should be compensated, the alleged harm brought to their traditional lands and natural resources, which they consider their primary means of subsistence and an integral part of their worldview and of their cultural identity, the State

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argues that it would be appropriate to bring a suit for a broad range of issues or file a claim for major damages, before the competent court, as a direct way in the civil arena to win the victims' claim for compensation.

21. With regard to the argument that cases are pending decision, the State claims that even though these have not been brought by the community, should a judgment be issued in favor of those who filed them, they would have repercussions on execution of said project, and these would be:

a. Civil action for absolute annulment of the purchase/sale contract brought in the Civil Court of Santiago, which is currently being processed. The Action deals with the dispute between Mr. Rodolfo Villar Garcia (Chilean national) and the multinational Mining Company Barrick Gold, arising from the sale/purchase that Mr. Villar made to this company, in 1997, over ownership of mining rights, the sales price of which is deemed derisory by the plaintiff.
b. Action for annulment of public law against the National Commission on the Environment (CONAMA), Case Number 1435-2006, brought in the 16th Court CMI of Santiago, filed by Mr. Jaime Perrelló Arias,[FN10] seeking to overturn Resolution N° 024 of February 15, 2006, for alleged harm, as a result of the approval of the Modifications to the Pascua Lama Project granted in said resolution, that would be caused to his property rights, right to utilization of waters and, in general, to live in a pollution-free environment.

[FN10] According to information provided by the petitioners, Mr. Jaime Perelló Arias is not entitled to the rights of the Huasco-Altino Diaguita Community, inasmuch as he is not a member of said community.

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22. With respect to the untimely lodging of the action for constitutional protection pursued by the community, the State holds that in keeping with domestic law, the action for constitutional protection should have been brought against COREMA Resolution 024/2006 of February 15, 2006, because this was the appropriate time in the procedure to appeal to the court. It is indicated that the community subsequently challenged CONAMA Resolution N° 1397 of June 7, 2006, after the 15 consecutive day time period had expired as provided under Article 1 of the En Banc Supreme Court Decision of 1992.

23. Furthermore, the State also argues that the only remedy pursued by the petitioners was the action for constitutional protection established under Article 20 of the Political Constitution, which constitutes an action, the nature of which is to enforce constitutionally guaranteed rights, and is not strictly speaking a review mechanism of administrative decisions.[FN11]

[FN11] The State notes that the purpose of filing an action for constitutional protection is to "protect" the legitimate exercise of particular constitutional guarantees that are considered violated by act or omission by a particular person or authority and not to, by filing it, replace or substitute for other actions that may be brought with the competent administrative authority and even, with the courts themselves.

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24. With regard to the deadline for filing the petition, the State claims that the petition was forwarded to the Chilean State on May 11, 2007, based on the note sent by the Executive Secretariat for this purpose. The State indicates that the filing date stamp appearing on the petition submitted to the Commission is totally unintelligible. It adds that if the time period is counted as of the date of the final ruling wherein the Court of Appeals of Santiago rejected the action for constitutional protection brought by the petitioners, July 11, 2006 up until May 11, 2007, the petition has consequently been lodged too late, after the six month time period provided by the American Convention and the Rules of Procedure of the Commission has lapsed.

25. With respect to the facts not establishing a violation, the State argues that the petition is inadmissible because it does not set forth any facts that could constitute a violation of the rights established in the American Convention. The State affirms that as of the date of the filing of its response, the Pascua Lama Mining Project had not begun any work and that only certain roadways had been very sketchily laid out for future work. It adds that all of the mineral treatment operations and processing, which pose the highest risk of likely environmental pollution, particularly, the waste material that would be dumped into the so-called tailings settling tank, shall be housed and built entirely on Argentinean territory.

26. Additionally, the State highlights the petitioners' inactivity with regard to the first Environmental Impact Evaluation (EIE) approving the Pascua Lama Mining Project, granted in the respective resolutions of the Regional and National Commission on the Environment in 2001, against which no administrative or judicial action was taken. It notes that, during that period, administrative and judicial remedies under domestic law were not exhausted in a timely fashion. It argues that the Community did not become involved with this process until after 2001, through the citizen participation mechanisms set forth in Chilean environmental law and only when COREMA and CORAMA made Modifications to the previously authorized Project; an action for constitutional protection wasn't brought by the petitioners until 2004.

27. Lastly, the State alleges that the petition is inadmissible because the petitioners have appealed to the Commission "as if it were a sort of fourth instance, with jurisdiction to hear the facts and applicable law in the specific case, without there being any reasonable basis in the facts that constitutes a violation of any right guaranteed in the Constitution."

IV. ANALYSIS OF ADMISSIBILITY

A. Competence ratione personae, ratione materiae, ratione temporis, ratione loci

28. Pursuant to Article 44 of the American Convention and Article 23 of the Rules of Procedure of the IACHR, the petitioners are entitled to file petitions with the Commission relating to alleged violations of the rights established in said treaty. As for the State, Chile is a party to the American Convention and, therefore, is accountable under international law, for violations of said instrument. The petition names as alleged victims the Diaguita Agricultural Community of the Huasco-Altinos and the members thereof, for whom the State undertook to

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respect and ensure the rights enshrined in the American Convention. Based on the foregoing, the Inter-American Commission is competent ratione personae to examine the petition.

29. The IACHR is competent ratione materiae inasmuch as the petition pertains to complaints of violation of the human rights protected by the American Convention. Moreover, it has competence ratione temporis insofar as the obligation to respect and ensure the rights protected in said treaty were already in force for the State on the date when the facts alleged in the petition had occurred, given that Chile ratified the American Convention on August 21, 1990. Lastly, the Commission is competent ratione loci to entertain the petition, inasmuch as therein, violations of rights protected in the American Convention are alleged, which had taken place within the territory of a State party to said instrument.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

30. Article 46(1) of the Convention sets forth as a requirement for admission of a petition that remedies under domestic law have been pursued and exhausted, in accordance with generally recognized principles of international law. Article 46(2) provides that this shall not apply when: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law, or has been prevented from exhausting them; and c) there has been unwarranted delay in rendering the final judgment under the aforementioned remedies.

31. With regard to the requirement under Article 46(1) of the Convention, as it pertains to the administrative act approving the environmental impact study of the modifications to the Pascua Lama project without taking into account the opinion of the community, the petitioners argue that remedies available under domestic law were exhausted. In this regard, the Commission notes that the petitioners pursued existing administrative and judicial remedies in order to protect the rights they claim to have been violated by the State. Firstly, as for the administrative remedy, based on the information provided by the parties, the petitioners filed a motion to overturn with the National Commission on the Environment, as provided in the Law on General Rules of the Environment,[FN12] against COREMA Resolution Nº 24/2006 whereby the modifications to the Pascua Lama Project were approved, which was denied in non reviewable Resolution N° 1397 of July 3, 2006. Said resolution exhausted the administrative proceeding.

[FN12] Law Nº19.300. Law on the General Rules of the Environment (Ley de Bases Generales del Medio Ambiente), published in the Official Gazette (Diario Oficial) on March 9, 1994. Article 29.- "[…] Citizen organizations and individuals whose observations have not been duly pondered in the basis for the respective resolution, shall be entitled to lodge a motion to overturn (recurso de reclamación) with the authority above the one who issued it [the resolution] within 5 days following notification, so that within a period of 30 days it [the authority] rules on the request …"

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32. Secondly, as for the judicial proceeding, the petitioners brought an action for constitutional protection against CONAMA Non reviewable Resolution N° 1397, which was declared inadmissible by the Court of Appeals of Santiago in a decision of July 3, 2006, because it was considered untimely.[FN13] The petitioners filed a motion for reconsideration of this ruling with the Court of Appeals of Santiago, which was denied on July 11, 2006.[FN14]

[FN13] Action 3308/2006 – Resolution 77.464 of July 3, 2006: "1st That the time period to appeal for constitutional protection is 15 consecutive days counted from the execution of the act that gave rise to the threat, interference or deprivation of the right that is believed to be violated. 2nd That based on the record of the proceedings on pg. 1, the act that gives rise to the constitutional protection action, from which the appellant is counting the time period to bring this action, is Non Reviewable Resolution Nº 1397 of June 7 of the same year, which settles the motion to overturn filed by the same appellant against resolution Nº 024 of February 15 of this same year, based on all of which it can be surmised that the appellant became aware of the appealed act well in advance of the maximum time period provided for lodging the appeal, and consequently this appeal cannot be granted because it has not been lodged in a timely fashion." http://www.poderjudicial.cl/

[FN14] Motion 3308/2006 – Resolution: 81245 dated July 11, 2006. Appearing on page 39: Regarding the main issue, in view of the fact that the arguments put forth fail to disprove the factual grounds taken into consideration in issuing the appealed resolution, which bases the untimeliness on understanding that the arbitrary and illegal act would be contained in resolution Nº 024 of February 15 of the same year, the motion to reconsider is denied. http://www.poderjudicial.cl/

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33. Furthermore, regarding the allegedly untimely lodging of remedies, the petitioners contend that they did not appeal against the initial approval of the project because they were not informed or consulted about it, but that they did appeal against approval of the modifications to the project once they heard about them.

34. For its part, the State alleges that the petition is inadmissible because, in the judgment of the judicial authorities, the action for protection against unconstitutionality was, on the one hand, pursued at the wrong time by the petitioners; and, on the other hand, it is not the appropriate remedy because it constitutes an action of constitutional guarantee, and not a mechanism per se of review of administrative decisions.[FN15]

[FN15] See State's brief submitted to the IACHR on October 12, 2007.

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35. Regarding the admissibility of the action for constitutional protection, said remedy in the Chilean Constitution is provided as an action to empower persons to resort to the administration of justice, in order to safeguard their fundamental rights, when as a result of arbitrary or illegal acts or omissions, they are subjected to deprivation, interference or threat to the legitimate

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exercise of the rights and guarantees established by the Constitution.[FN16] In accordance with doctrine, application of the action for constitutional protection is not limited to judicial decisions, but "covers the whole range of public decisions."[FN17] In fact, the Constitution not only gives the legal authority to the Court of Appeals to issue whatever rulings are necessary to restore the rule of law and ensure that due protection is afforded to the injured party, but also to assert other rights that it considers infringed before "the relevant authority or the courts."[FN18]

[FN16] Article 20 of the Chilean Political Constitution reads:
Any one who as a result of arbitrary or illegal acts or omissions is subjected to deprivation, interference or threat to the legitimate exercise of the rights and guarantees established in Article 19 […] shall be entitled to recourse on his own or by means of anyone else on his behalf, to the respective Court of Appeals, which shall immediately rule as it deems necessary to restore the rule of law and ensure due protection of the injured party, without prejudice to the other rights that he may assert with the relevant authority or courts. An action for protection against unconstitutionality shall also be admissible in the case of Article 19, 8th numeral, when the right to live in a pollution-free environment is infringed by illegal act or omission attributable to an authority or a particular person.
[FN17] See, , Nogueira Alcalá, Humberto. "Acciones Constitucionales de Amparo y Protección: Realidad y Prospectiva en Chile". ['Constitutional actions of amparo and Protection: Reality and Prospects in Chile'] Talca, Chile, Editorial Universidad de Talca, 2000, pg. 160.
[FN18] Supra 15.
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36. Among the rights safeguarded by actions of constitutional protection, Article 19 of the Constitution specifically includes, the right to life (Article 19 No. 1), equality under the law (Article 19 No. 2), equal protection of the law in the exercise of rights (Article 19 No. 3), freedom to engage in any economic activity (Article 19 No. 21), equal treatment to be afforded by the State and its agencies in economic matters (Article 19 No. 22), the right to property (Article 19 No. 24); and lastly, the right to live in a pollution-free environment (Article 19 No. 8).

37. Pursuant to the Chilean Supreme Court En Banc Decision of June 24, 1992, "the action for constitutional protection has established itself as an actual effective legal action for the necessary, adequate judicial protection of the rights and individual guarantees subject to the safeguard of said means of constitutional protection," including the fundamental rights for which the Community was appealing to be protected.[FN19]

[FN19] Constitutional protection actions specifically protect the right to life (Article 19 No. 1), equality under the law (Article 19 No. 2), equal protection of the law in the exercise of rights (Article 19 No. 3), freedom to engage in any economic activity (Article 19 No. 21), equal treatment to be afforded by the State and its agencies in economic matters (Article 19 No. 22), the right to property (Article 19 No. 24); and lastly, the right to live in a pollution-free environment (Article 19 No. 8).
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38. In accordance with the foregoing, the Commission finds that, by lodging an action for protection of constitutional guarantees against acts through which the administration might have placed their territorial, cultural and physical integrity at risk, the Community pursued the appropriate remedy provided for under domestic legislation to safeguard the fundamental rights of persons, which was exhausted by the Court of Appeals of Santiago in issuing the July 11, 2006 decision.

39. Furthermore, the State alleges that the petition is inadmissible because the action for constitutional protection was pursued outside of the requisite time period. Therefore, the Commission must make sure that the remedy has been pursued and exhausted in keeping with generally recognized principles of international law.[FN20]

[FN20] IACHR, Report No. No. 77/08 (admissibility), petition No.109403, José Agapito Ruano, El Salvador, October 17, 2008, paragraph 34.

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40. On this issue, the Commission notes that the En Banc Decision of the Chilean Supreme Court regulating the processing of and ruling on actions for constitutional protection, prescribes as the absolute deadline for bringing this action "15 consecutive days counted from the date of execution of the act or occurrence of the omission."[FN21]

[FN21] Chilean Supreme Court of Justice. En Banc Judgment of June 24, 1992. Number 1.

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41. At the same time, Article 54 of Law 19.880, which sets forth the rules of administrative procedure governing the acts of the bodies of the Administration of the State, reads as follows:

After a motion is lodged by an interested party with the Administration, the same party may not make the same claim to the Courts of Law, while it [the motion] has not been resolved or until the time period to consider it denied has lapsed.

After the motion has been lodged, the time period shall be interrupted for the court to take action. This [time period] shall begin to run again as of the date that notice is served of the act resolving or, as the case may be, from the time the motion is considered denied because the time period has lapsed.

If a judicial action is brought regarding an administrative act by the interested party, the Administration shall refrain from hearing any claim that it [the party] may file regarding the same case. (Underlined text not part of original)

42. The Commission understands that the Law of Administrative Procedure establishes the order in which actions or claims with regard to administrative acts must be lodged, according to which, an administrative action must first be pursued, and only after it has been resolved or

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tacitly understood as disallowed, may the appropriate judicial action be brought. Furthermore, the above-cited law provides for the interruption of the time period in order for the courts to act on the administrative claim that was lodged.

43. Therefore, in light of the aforementioned circumstances and for the purposes of this analysis of admissibility, the Commission considers that by initially filing a motion to overturn the administrative decision with the National Commission on the Environment against COREMA resolution Nº 24/2006 and by subsequently bringing an action for constitutional protection before the Chilean judicial authorities, the alleged victims exhausted available remedies in accordance with the principles of international law.

44. Additionally, the Chilean State argues that the petition is inadmissible because the petitioners did not exhaust particular remedies under domestic law. Specifically, the State contends that the petitioners should have availed themselves of the following remedies: action for annulment of public law (acción de nulidad de derecho público); motion for writ of inapplicability based on unconstitutionality against the decision of the Court of Appeals of Santiago; and a civil action for compensation of damages and losses. Furthermore, the State cautions that there are cases pending decision, none of which have been brought by the petitioners.

45. Based on the foregoing, it can be gathered that while the State objected on the basis of petitioners' non exhaustion of remedies under domestic law, it also argues improper exhaustion, so therefore we must clarify what domestic remedies should be exhausted and how adequate they are in the instant case. The IACHR recalls that with regard to indigenous peoples, the case law of the Inter-American system has held that "it is essential for States to grant effective protection that takes into account their own particular characteristics, their economic and social characteristics, as well as their special situation of vulnerability, their customary law, values, uses and customs." [FN22]

[FN22] I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. para. 63; Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparation and Court Costs. Judgment March 29, 2006. Series C No. 146, para. 83; and Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparation and Court Costs. Judgment November 28, 2007. Series C No. 172, para. 178; Case of Tiu Tojin v.Guatemala. Judgment November 28, 2008. Series C No. 190, par. 96.

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46. On this topic, the IACHR notes that even though the State has listed other judicial remedies that should have been exhausted by the petitioners, no argument has been made regarding the function of these remedies, within the national legal system, or as to how adequate they are to protect the legal interests that the petitioners allege would be infringed in the case inter alia. It is fitting to recall that in all national bodies of law, several remedies are available, but not all of them are applicable in every circumstance. The case law of the inter-American system is clear in indicating that only remedies that are adequate and effective in providing relief, when appropriate, for the issue in question, must be exhausted. Moreover, the State has

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not reported on domestic remedies and mechanisms that take into consideration the particular characteristics of the indigenous peoples as such, which ensure effective protection of the collective rights of the community vis-à-vis acts that threaten their fundamental rights.

47. Specifically, with regard to the action for annulment of public law, the Commission finds that it is not enforceable being that, as the State itself has explained, it is not expressly enshrined in Chile's body of law. A writ of inapplicability based on unconstitutionality issued by the judiciary cannot be considered enforceable either, because it is a mechanism of control to render a defective precept of the law inapplicable. Based on the arguments of the parties, the matter being challenged by the petitioners is limited to the actual administrative act and not the legal provisions regulating it.

48. Regarding cases or motions pending decision in the Chilean courts, as asserted by the State as well, the Commission notes that said motions have not been lodged by the petitioners, and therefore it would not be right to require that they be exhausted.

49. Lastly, with regard to the property rights to the Chollay ranch, part of the community lands, the petitioners indicate that as of 2002 a civil claim is pending in the First Court of Vallenar, Case Number 50728-2002, wherein the Huasco-Altino Agricultural Community is seeking to have the acquisition of Chollay ranch by Nevada Mining Company, subsidiary of Barrick Company in Chile, be rendered null and void. On this issue, the State has submitted no argument whatsoever.

50. Based on the information provided by the petitioners, which went unquestioned by the State, it can be inferred that more than 7 years have elapsed without any decision being rendered on the motion for nullification of [purchase/sale] lodged by the Community. Consequently, the Commission finds that unwarranted delay has marred the proceeding in rendering a decision on the remedy pursued by the petitioners for a determination of their rights.

51. By virtue of the foregoing, the IACHR finds that with respect to the approval of the modifications to Pascua Lama Project, the petitioners exhausted remedies under domestic law as a result of lodging a request for and receiving a ruling on the action for constitutional protection, and therefore the requirement set forth in Article 46(1) of the American Convention has been met. In relation to the civil suit for nullification of the acquisition of Chollay ranch, the exception based on unwarranted delay in ruling on the motion set forth under Article 46(2)(c) of the American Convention is applicable.

2. Timing of Lodging of Petition

52. Pursuant to Article 46(1)(b) of the American Convention, one requirement for admissibility is lodging the petition within a period of six months as of the date of service of notice on the alleged injured party of the judgment exhausting domestic remedies. Article 32 of the Rules of Procedure of the Commission provides 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

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purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

53. With regard to this admissibility requirement, the State argues that the petition was presented outside the time period of six months that is set forth by the Convention and the Rules of Procedure of the Commission. In this regard, it notes that the petition was transmitted to the Chilean State on May 11, 2007, arguing that a totally unintelligible filing stamp appears on the petition. The State contends that by counting the time periods from the date of the ruling of the Court of Appeals of Santiago denying the motion for constitutional protection lodged by the petitioners, July 11, 2006 up to May 11, 2007, the period would exceed the six month requirement under the American Convention and the Rules of Procedure of the Commission, and therefore the petitioners' claim would be inadmissible.[FN23]

[FN23] See State's brief submitted on October 12, 2007.

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54. In the instant case, the Commission notes that the petition was received on January 10, 2007 and that the last ruling of the courts, regarding the action for constitutional protection brought against the approval of the modifications to the Pascua Lama project, is dated July 11, 2006. Consequently, with regard to this aspect of the petition, the Commission finds that it was presented in a timely fashion and considers the admissibility requirement pertaining to the deadline for filing as met. As regards the civil suit for nullification of the acquisition of Chollay ranch brought by the alleged victims, it is noted that a judicial decision has been pending since 2002, and therefore it is the view of the Commission that the exception based on unwarranted delay in rendering final judgment provided under Article 46(2)(c) of the American Convention is applicable.

3. Duplication of proceedings and res judicata

55. There is no evidence in the case file indicating that the subject matter of the petition is pending in any other international proceeding for settlement, nor is it substantially the same as any other petition previously examined by this or any other international organization. Therefore, it is appropriate to consider the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention as being fulfilled.

4. Characterization of the alleged facts

56. For purposes of admissibility, the Commission must decide whether the alleged facts tend to establish a violation of the rights, as provided under Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or is "obviously out of order", pursuant to section c) of said Article. The standard used to evaluate these requirements is different from the one used to rule on the merits of a petition; the Commission must conduct a prima facie evaluation to determine whether the petition establishes a possible or potential basis for the violation of a right guaranteed by the Convention, but not to establish the actual existence

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of a violation of rights. This determination amounts to a preliminary analysis, which does not involve any pre-judgment on the merits of the case.

57. With respect to the arguments on approval of the environmental study for modifications to the Pascua Lama project, which envisions locating said project on the ancestral territory of the Huasco-Altino Diaguita Community, without any environmental and cultural impact study on the community and the members thereof, as well as failing to consult them prior to approval being granted for the Pascua Lama project, and the unresolved civil suit to render the acquisition by the Nevada Mining Company of the Chollay ranch null and void, the Commission notes that these arguments tend to establish a potential violation of Article 21 of the American Convention.

58. With regard to the arguments that neither the administrative nor the judicial proceedings had been effective to ensure the territorial rights of the Huasco-Altino Diaguita Community as a result of the execution of the Pascua Lama mining project and the modifications thereto on their ancestral territory, the IACHR finds that these arguments tend to establish a potential violation of Articles 8 and 25 of the American Convention.

59. Furthermore, applying the iura novit curia principle, the Commission points out: First, as regards the allegations that approval of the environmental impact study's findings in favor of the Pascua Lama project and the modifications to that Project was granted without consideration of environmental and cultural impacts and without weighing their effects on the Diaguita Community as opposed to the other inhabitants in the area, the Commission considers that that Could constitute a possible violation of Article 24 of the American Convention.

60. As regards the allegation that the Community was not consulted in connection with the environmental impact evaluation of the Pascua Lama Project and modifications thereof, the Commission considers that right of access to information is one of the components of the prior consultation process. On that, the Commission has stated:

[O]ne of the central elements to the protection of indigenous property rights is the requirement that States undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories… [and that member States are obliged] to ensure that any determination…. is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[FN24]

[FN24] IACHR, Report No. 40/04, Maya indigenous community of the Toledo District (Belize), Case 12.053, October 12, 2004, p.142.

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61. In the instant case, the petitioners contend that the State failed to provide timely and sufficient information for the indigenous people to be able to conduct an informed debate on the

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intervention in its territory. Therefore, the Commission considers that there could be a violation of the right to access to information established in Article 13 of the Convention.

62. Finally, the Commission observes that the failure to consult the community also points to the lack of a collective participation mechanism as required by law, using an indigenous people's traditional forms of organization and participation in the process whereby citizens take part in the approval of environmental studies. In this particular petition, that process of political participation is especially important for the community given the alleged potential impact of the Project on the Community's traditional economic activities, customs and ways of life. Therefore, the Commission considers that the aforementioned omission could amount to a possible violation of Article 23 of the American Convention.

63. Consequently, the Commission finds that the requirements set forth in Article 47c of the American Convention have been fulfilled.

V. CONCLUSION

64. The Commission concludes that it is competent to entertain the complaint and that the petition is admissible in accordance with Articles 46 and 47 of the Convention based on alleged violation of Articles 21, 8 and 25 of the American Convention in connection with Articles 1(1) and 2 of the same instrument. Additionally, in application of the principle of iura novit curia, the Commission shall analyze during the merits stage possible application of Articles 13, 23 and 24 of the Convention.

65. By virtue of the foregoing arguments on the facts and law, and with no pre-judgment on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

HAS DECIDED:

66. To declare the instant petition admissible with regard to Articles 21, 8 and 25 of the American Convention in connection with Article 1.1 and 2 of said Convention. Additionally, in application of the principle of iura novit curia, the Commission shall analyze during the merits stage possible application of Articles 13, 23 and 24 of the Convention.

1. To transmit this report to the petitioners and the State.
2. To proceed to analyze the merits of the case.
3. To publish this report and include it in the Annual Report of the Commission to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights on the 30th day of the month of December, 2009. (Signed): Luz Patrica Mejía, President; Víctor E. Abramovich, First Vice-President; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo G. Carozza, members of the Commission.