REPORT No. 125/12
CASE 12.354
MERITS
KUNA INDIGENOUS PEOPLE OF MADUNGANDI AND EMBERA INDIGENOUS PEOPLE OF BAYANO AND THEIR MEMBERS
PANAMA
November 13, 2012

I. SUMMARY

1. On May 11, 2000, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a petition submitted by the International Human Rights Law Clinic of the Washington College of Law, the Centro de Asistencia Legal Popular (CEALP), the Asociación Napguana, and Emily Yozell (hereinafter "the petitioners")[1], on behalf of the indigenous peoples Kuna of the Madungandí[2] and the Emberá of Bayano and their members (hereinafter "the alleged victims") against the Republic of Panama (hereinafter the "Panamanian State," "Panama," or "the State").

2. The petitioners alleged that in the wake of the construction of the Bayano Hydroelectric Dam (Represa Hidroeléctrica del Bayano) from 1972 to 1976, the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano were forced to abandon their ancestral territory, which was flooded by the reservoir of the dam. They argued that as they lacked any other alternative, they were forced to relocate to the new lands offered by the State, which it said were of better quality and greater quantity, and to accept the economic compensation that was to be paid in exchange for the destruction and flooding of their ancestral territory. They indicated that nonetheless the commitments were not carried out, for the compensation was not paid in its entirety, and the lands granted did not have the characteristics offered. As regards the Kuna indigenous people of Madungandí, they argued that while the State formally recognized their right to collective property over the lands they inhabit in 1996, it has not provided effective protection vis-à-vis the constant invasion by non-indigenous persons. With respect to the Emberá indigenous people of Bayano, they argued that to date the State has failed to title, delimit, and demarcate the territory they occupy, but to the contrary has granted property title to third persons and has allowed its illegal appropriation by peasants.

3. The State, for its part, argued that it has not violated the alleged victims' human rights, since the construction of the hydroelectric dam was preceded by technical studies to reduce its negative impact, and that it entered into agreements with the Kuna and Emberá indigenous peoples concerning

[1] In a note received on October 30, 2008, the International Human Rights Law Clinic of the Washington College of Law reported that cacique Félix Mato Mato, legal representative of the Comarca of Madungandí, had designated the law firm of Rubio, Álvarez, Solís & Abrego as their new representatives. Subsequently, in a note received on May 1, 2009, the International Human Rights Law Clinic of the Washington College of Law reported that the services of that firm had been rescinded. In that same communication, the granting of power-of-attorney by the General Cacique of the Congress of Madungandí to "International Human Rights Law Clinic of the Washington College of Law, Centro de Asistencia Legal Popular, a law firm in Panama, and the Organización Kuna de Madungandí (ORKUM)." In a brief of October 17, 2011, received by the IACHR on October 27, 2011, the petitioners submitted a note, issued by the General Kuna Congress of Madungandí and the Regional Emberá Congress of Alto Bayano, by which they reiterate the power-of-attorney conferred upon the International Human Rights Law Clinic of the Washington College of Law and granted power-of-attorney to attorney Horacio Rivera, for his representation in the case. By note received on March 2, 2012, the Emberá General Congress of Bayano reported that as regards their communities, the petitioner is CEALP, particularly attorney Héctor Huertas. In a brief received by the IACHR on July 13, 2012, a note was presented by which the General Congress of the Kuna Comarca of Madungandí authorizes Horacio Rivera as its representative for the instant case.

[2] The IACHR takes note of the brief submitted on October 19th, 2012, by the CEALP, representative of the Emberá communities of Bayano in this case, in which it informed that "according to a decision of the Gunas indigenous authorities of Panama, the alphabet of the Guna language was approved, where the letter "K" was removed, therefore official documents should refer, from 2010 onwards, to name the Kuna with the correct name, that is GUNA". Likewise, it informed that on November 22, 2010, Law 88 was enacted, "which recognizes the languages and alphabets of the indigenous peoples of Panama and lays down rules for Bilingual Intercultural Education". According to Article 2 and the Annex of the Law, the alphabet of the Kuna language does not contain the letter "K".

their relocation, the granting of new lands, and the payment of compensation for the losses incurred. It states that for that reason, after the construction of the Bayano dam, the lands of these indigenous peoples were compensated for by other nearby lands that were declared not subject to adjudication and for their exclusive use by Decree No. 123 of May 8, 1969. It also alleged the Kuna District of Madungandí was created that by Law 24 of January 12, 1996, with which the collective property rights of the Kuna indigenous people of Bayano were legally recognized, and actions by non-indigenous persons or settlers were restricted. As regards the Emberá people of Bayano, the State argues that the approval of Law 72 of December 23, 2008, established a special procedure for recognizing the collective property rights of indigenous peoples, based on which the adjudication of their lands is in process. As regards the payment of compensation, it asserted that this matter was covered by Cabinet Decree 156 of 1971. It argued that pursuant thereto, payments were made to the alleged victims from 1974 to 1978 by the Corporación para el Desarrollo Integral del Bayano, a state agency in charge of compensation-related matters.

4. In Report No. 58/09, approved April 21, 2009, the Commission concluded that the petition was admissible in keeping with the provisions at Articles 46 and 47 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), with respect to Article 21 of the American Convention in conjunction with its Article 1(1). In addition, applying the principle of *iura novit curia*, the Commission concluded that the petition was admissible for the alleged violation of Articles 2, 8, 24, and 25 of the American Convention on Human Rights.[3]

5. In this report, after weighing the parties' arguments and analyzing the evidence presented, the Commission concludes, pursuant to Article 50 of the American Convention, that the State of Panama is responsible for violating the rights contained in Articles 8, 21, 24, and 25 of the Convention in relation to its Articles 1(1) and 2, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members.

II. PROCESSING BEFORE THE IACHR

6. On April 21, 2009, the Commission approved Report No. 58/09, in which it found admissible the petition regarding the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members. The decision was communicated to the parties by note of April 27, 2009, with which the term of two months began to run for the petitioners to submit observations on the merits. At the same time, the IACHR placed itself at the disposal of the petitioners to pursue a friendly settlement, in keeping with Article 48(1)(f) of the Convention.

7. By brief received May 1, 2009, the petitioners stated their interest in renouncing the friendly settlement process and pursuing the procedure before the IACHR. After being granted a one-month extension, requested June 25, 2009, on December 18, 2009, the petitioners presented their additional observations on the merits, whose pertinent parts were forwarded to the State on January 19, 2010. On that occasion, the IACHR gave the State three months to present its additional observations on the merits, in keeping with Article 37(1) of its Rules of Procedure. By brief received May 3, 2010, the State submitted its observations on the merits, which were forwarded to the petitioners by note of May 13, 2010.

8. During this stage, the IACHR received additional information from the petitioners on the following dates: November 16, 2010, January 14, 2011, May 31, 2011, March 13, 2012, May 16, 2012, June 20, 2012, July 13, 2012 and October 17, 2012. The State sent additional information to the IACHR on the following dates: March 25, 2011, September 27, 2011, October 4, 2011, May 14, 2012 and September 24, 2012. The notes sent by the parties were duly forwarded to the other party.

[3] In Report No. 58/09, the Commission found the petition inadmissible in relation to the alleged violations of the rights recognized in Articles 4, 7, 10, 12, 17, and 19 of the American Convention as well as in Articles I, III, V, VI, VII, XI, and XIII of the American Declaration. IACHR, Admissibility Report No. 58/09, April 21, 2009, Petition 12,354, Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members.

9. From December 14 to 19, 2010, the Rapporteur on the Rights of Indigenous Peoples, Dinah Shelton, made a working visit to Panama for the purpose of collecting information on the instant case. During the visit, the Rapporteur met with government officials and travelled to the territory of the Kuna indigenous people of Madungandí and the Emberá of Bayano.

10. During the processing of this case before the Commission, two public hearings were held. The first, while the admissibility of the petition was being considered, was held on November 12, 2001, during the 113th regular period of sessions of the IACHR.[4] A second public hearing was held in the merits phase, with both parties present, on March 23, 2012, during the 144th regular period of sessions of the IACHR.[5] On this occasion, the petitioners presented the testimony of Manuel Pérez, Cacique General of the General Congress of the Comarca Kuna de Madungandí; and Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. In addition, they presented the expert testimony of Alexis Oriel Alvarado Ávila and Ultiminio Cabrera Chanapi.

A. Precautionary measures

11. On March 14, 2007, the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano, through the International Human Rights Law Clinic of the Washington College of Law, filed a request for precautionary measures asking that the State adopt the measures needed to prevent the invasion of settlers in their territories. They indicated that in January 2007 nearly 50 non-indigenous persons entered the indigenous territories and destroyed the tropical forest, cutting the trees and preparing the land for crops.

12. The IACHR requested information from the State, which answered by noting that a series of actions had been taken such as inspections with the participation of different state institutions to collect evidence, providing advisory services to the First Cacique of the Comarca Kuna de Madungandí for filing a complaint, detaining persons for ecological harm, and the signing of a technical cooperation agreement between the Comarca Kuna de Madungandí and the National Environmental Authority (Autoridad Nacional del Ambiente) to ensure the protection of natural resources and rational natural resources management. The requesters filed additional information on May 7, 2007.

13. On March 15, 2011, the Kuna indigenous people of Madungandí and the Emberá of Bayano, through the Centro de Asistencia Legal Popular, reiterated the request for precautionary measures. On that occasion, they indicated that in February and March 2011 there had been massive invasions of the territories of the Comarca Kuna de Madungandí and that the lands of the Emberá communities were in the process of being titled to non-indigenous persons. They argued that "the settlers by violence took control of and destroyed virgin forests, crops, and lands of the Kuna and Emberá indigenous peoples of Bayano," without the State taking any actions to control the invasions. They also stated that the loss of their lands threatens the survival of the indigenous peoples, insofar as it places "at risk the food security of the indigenous children, women, and men."[6]

14. On April 5, 2011, the IACHR granted the precautionary measures requested, in keeping with Article 25(1) of its Rules of Procedure. In that decision, the Commission asked the State of Panama to adopt "the measures necessary to protect the ancestral territory of the communities of the Kuna people of Madungandí and the Emberá people of Bayano from invasions by third persons [and from the] destruction of their forests and crops, until such time as the IACHR reaches a final decision in Case 12,354."[7]

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[4] IACHR, Public hearing, November 12, 2001, on "Case 12,354 – Kuna of Madungandí and Emberá of Bayano, Panama," 113th regular period of sessions of the IACHR. See hearing at http://www.oas.org/es/cidh/.

[5] IACHR, Public hearing, March 23, 2012, on "Case 12,354 – Kuna of Madungandí and Emberá of Bayano, Panama," 144th regular period of sessions. See hearing at http://www.oas.org/es/cidh/.

[6] Brief requesting precautionary measures, March 14, 2011, received by the IACHR March 15, 2011.

[7] IACHR, Precautionary Measures MC 105/11, granted April 5, 2011, Kuna of Madungandí and Emberá de Bayano Indigenous Peoples.

15. The IACHR received information from both parties on implementation of the precautionary measures granted. The petitioners filed information on the following dates: April 20, 2011, June 14, 2010, and October 21, 2011. The State, for its part, presented information to the IACHR on the following dates: April 27, 2011, June 15, 2011, September 14, 2011, February 1, 2012, and February 6, 2012. As of the date of adoption of this report, the IACHR continues to monitor the situation.

III. THE PARTIES' POSITIONS

A. The petitioners

16. The petitioners alleged that the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano inhabited the Upper Bayano Indigenous Reserve (Reserva Indígena del Alto Bayano) until 1976, when they were moved to new localities due to the construction of the Bayano Hydroelectric Complex (Complejo Hidroeléctrico de Bayano). They stated that at present, the members of the Kuna indigenous people of the Bayano region live in the Kuna Comarca of Madungandí, located in the eastern part of the province of Panamá. They indicated that the Emberá inhabit the communities of Ipetí and Piriatí, which have attempted to obtain legal recognition of their lands through numerous political and administrative initiatives; they have yet to attain any results.

17. The petitioners pointed out in that 1963 the Panamanian State and the United States Agency for International Development (USAID) proposed a project entailing the construction of a hydroelectric complex in the Bayano Region by building a "concrete" dam at the intersection of the Cañita and Bayano rivers, creating a reservoir that would cover approximately 350 km^2.

18. They alleged that in early 1969 the government of Panama negotiated several agreements with the alleged victims with the aim of transferring them to new lands. They indicated that their relocation was forced given that "they never had an option to prevent the construction of the hydroelectric dam and the flooding of their lands." They argued that considering that there was no other alternative, they had to accept the State's terms, which consisted of granting them new lands and paying them both individual and collective economic compensation. They indicated that the hydroelectric dam was under construction from 1972 to 1976, and that the indigenous peoples who lived in the area were moved from 1973 to 1977.

19. According to the petitioners, the construction of the dam resulted in the flooding of 80% of the territory of the Kuna indigenous peoples, i.e. eight of the 10 villages that existed at that time, entailing the displacement of more than 2,000 persons. They argued, as regards the Emberá people of Bayano, that the village of Majecito was flooded, displacing its 500 inhabitants. They also noted that the project entailed the destruction of the ecosystem on which they depended for their physical and spiritual sustenance; the spread of diseases caused by plant decay, and the cultural deterioration of these indigenous peoples.

20. They alleged that the members of the Kuna people of Madungandí were relocated to less fertile and higher-altitude lands, and that the payment of collective monetary compensation for the loss of their lands ceased unilaterally in 1977, while the individual compensations for the crops and animals lost were not paid in their entirety. The petitioners argued that the State relocated the Emberá indigenous people of Bayano near the Membrillo river. Nonetheless, when it was shown that this place was inadequate, they were moved once again, this time to their current settlements of Ipetí and Piriatí. They reported that they were also promised monetary compensation for the loss of their crops, which was to be paid over three years, a commitment they state has not carried out.

21. They argued that in the years after their relocation the alleged victims took many initiatives to obtain legal recognition and protection for their territories and to pay adequate compensation. Nonetheless, they allege that the State has yet to fully carry out these commitments.

22. As for the recognition of their right to collective property, specifically, they indicated that the Kuna Comarca of Madungandí was established by Law 24, adopted January 12, 1996. With respect

to the Emberá people, they indicated that to date they have not received legal recognition of their lands. They argued that only recently, with the adoption of Law 72 of December 23, 2008, has a procedure been established for adjudicating collective property rights over indigenous lands that are not included within the *comarcas*. Under that law, they indicated that in 2009 they presented a request to obtain title from the National Bureau of Agrarian Reform (Dirección Nacional de Reforma Agraria), an institution that was later replaced by the National Lands Authority (Autoridad Nacional de Tierras). Nonetheless, they argued that the request was not approved as said law was not regulated. They said that while the respective Regulation was approved by Executive Decree 223 of July 29, 2010, the request presented by the petitioner indigenous communities has not led, to date, to the legal recognition, delimitation, or demarcation of their lands.

23. In addition, the petitioners argued that the alleged victims have been impeded from effectively exercising their collective property rights due to the constant appropriation of their territory by settlers and illegal logging. In this respect, they stated that in the wake of the construction of the Pan American Highway, as of the mid-1970s non-indigenous persons began an ongoing invasion of the territories of the Kuna and Emberá peoples of Bayano. They added that taking advantage of the State's passivity in carrying out the demarcation, the settlers took part of the indigenous lands, along with their natural resources, and converted them to pasture. They stated that these persons are engaged in logging in their territories, which has negative repercussions for the conservation of the fragile ecosystem in the area. They argued that the present invasion by the settlers and the deforestation they have caused are threatening the life and security of the indigenous communities, who depend on the land for their survival, and have made it difficult to preserve their culture and ancestral traditions.

24. They noted that they have pursued administrative remedies since 1992, and that since 2007 they have lodged criminal complaints to confront the invasion by settlers, all of which proved ineffective, for the settlers have returned to the territory of the indigenous peoples and have continued their illegal activities. According to the petitioners, the complaints presented by the Public Ministry are still in the investigative phase, without any individual being investigated or apprehended to date.

25. Based on these facts, the petitioners alleged the violation of Article 21 of the American Convention. In particular, they argued that the loss of the ancestral territories of the alleged victims due to the flooding provoked by the construction of the dam and the consequent displacement to new lands is *per se* a violation of Article 21 of the Convention. They also alleged that the lack of effective and timely payment of the compensation to the Kuna and Emberá peoples constitutes the violation of Article 21(2) of the Convention, insofar as their right to just compensation has not been guaranteed.

26. In addition, they argued that the State has breached its obligation to recognize, delimit, demarcate, and protect the territories currently inhabited by the Kuna and Emberá peoples. As regards the Kuna people of Madungandí in particular, they argued that the existence of Law 24, which creates the *comarcas*, is not sufficient to discharge the obligations of the State under the Convention, given that in practice there has been a lack of protection due to the constant invasion by the settlers, which constitutes a violation of Article 21 of the Convention.

27. With respect to the Emberá indigenous people, they argued that the lack of formal recognition of and effective protection for their collective lands violates the obligation contained in Article 21 of the Convention. They argue that while Law 72 provides the necessary legal framework, to date the request made for the titling of their lands has not been resolved, thus they do not yet have legal recognition of their collective property rights. They argued that Law 72 does not provide for a system for resolving land conflicts, which in their opinion means that "even if the request under Law 72 is approved, the Emberá [will continue] being vulnerable to violations of their property rights." They added that "the State has to ensure that the Emberá have an exclusive property right to their lands and should initiate the process of clarifying settlers' rights."

28. As regards Articles 8(1) and 25 of the Convention, the petitioners stated that the Panamanian legal order does not provide an effective mechanism, first, for obtaining the right to the recognition of collective property rights for indigenous peoples, and second, for protecting the territories of

indigenous peoples in the face of the illegal occupation by settlers. As for the first, they indicated that the procedure established by Law 72 has proved ineffective, insofar as it has not been resolved in a reasonable time, considering the request was filed in 2009 and to date there has been no conclusion.

29. As for protecting the territories of indigenous peoples in the face of illegal occupation, they argued that the Kuna Comarca of Madungandí did not have a *corregidor*, an authority with the rank of administrative police with jurisdiction to order the eviction of invaders, and that it was not until June 2008 that legislative measures were adopted to allow for the appointment of this authority, by Executive Decree 247. They argued that nonetheless this authority has not actually been appointed, therefore they do not have access to an adequate an effective remedy for the protection of their lands by which to impede the incursions of settlers, and to relocate those who are illegally occupying indigenous lands. They indicated that all the administrative and judicial remedies pursued before the appointment of the *corregidor* to expel the settlers from their lands have suffered an unjustified delay, and indeed some of them have not even been resolved.

30. As for the violation of Article 24 of the Convention, the petitioners alleged that the difficulties experienced by the Kuna of Madungandí and Emberá indigenous peoples in securing access to justice and protection of their collective lands are due to their ethnic origin, given that the State offers different and more favorable treatment to the property claims of non-indigenous individuals.

31. In relation to the violation of Article 2 of the Convention, they alleged that the State has breached its obligation to have effective provisions of domestic law that are effective for the protection of their right to official recognition of their property rights. They added that "it does not suffice to have only one process for the recognition of rights," but rather the State must ensure the effective protection of the indigenous territories, overseeing the application of the provisions that protect them, and punishing violations, all of which are obligations that were breached by the State of Panama.

B. The State

32. The State argued that the construction of the Bayano hydroelectric complex was one of several public projects promoted to provide electricity to the Panamanian State so as to avoid dependence on imported and costly energy resources. The State noted that on addressing this demand for energy the project was implemented without repudiating the specific rights of the communities that were living in that region. It alleged that this project was carried out 42 years ago, and that it met the requirements of the time.

33. In particular, it argued that the construction of the hydroelectric complex was preceded by technical studies to limit its negative impact, and it indicated that agreements were entered into with the Kuna and Emberá indigenous peoples on their relocation and the conditions in which it would take place. It asserted that accordingly Cabinet Decree 123 of May 8, 1969, was approved, by which the lands of the indigenous were compensated for by neighboring lands that were declared not subject to adjudication and for their exclusive use.

34. According to the State, the resettlement of the Kuna was carried out from 1973 to 1975, and answered to the signing of the "Agreement of Farallón," signed on October 29, 1976, by the Government of the Republic of Panama and the Caciques of the Kuna people of Bayano. It argued that this agreement guaranteed that the communities affected by the construction of the hydroelectric complex would be resettled in the region of the present-day Kuna Comarca of Madungandí. It stated that the relocation of the Emberá people was preceded by the signing of the "Agreement of Majecito" of February 5, 1975, under which they were moved to the localities of Ipetí and Piriatí.

35. As regards the legal recognition of the territory of the Kuna of Madungandí, the State indicated that the Kuna Comarca of Madungandí, established by Law 24 of January 12, 1996, elaborated upon by Decree No. 228 of December 3, 1998, was created "as a show of the public policy of territorial security for the indigenous peoples." It stated that with this, the boundaries of the Kuna territory were recognized, and actions by settlers were restricted.

36. With respect to the Emberá, the State indicated that while they do not currently have a legally recognized *comarca*, the approval of Law 72 of December 23, 2008, makes it possible to recognize their collective property rights to their lands through a special procedure. It also indicated that based on that statute the lands of the Emberá are in the process of being adjudicated by the National Land Management Authority (Autoridad Nacional de Administración de Tierras).

37. As regards compensation for the alleged victims, the State asserted that they were included in Cabinet Decree 156 of 1971. It argues that pursuant to that decree, payments were made to the indigenous from 1974 to 1978 by the Corporación para el Desarrollo Integral del Bayano, a state entity entrusted with compensation matters. Accordingly, the Government argued that the agreements with the indigenous peoples of the Bayano basin have been carried out.

38. As for the invasion of settlers in indigenous territory, the State indicated that it has paid close attention to the requests of the traditional authorities to evict them, and it has undertaken actions aimed at protecting indigenous territories by evicting settlers through the corresponding administrative authorities. In particular, it asserted that "this position of the State is put forth in a context in which those who have invaded this territory subsequent to the creation of the Comarca must leave the territory of the Kuna jurisdiction of Madungandí."

39. As the response to these demands shows, the State indicated that the Panamanian legal order did not authorize the mayor of Chepo, the district closest to the Kuna Comarca of Madungandí, to appoint a *corregidor* for that *comarca*. Nonetheless, given that the *corregidor* would be the competent authority for ordering the eviction of the settlers, the legal rules necessary for allowing the appointment of this authority were adopted, and this authority has been carrying out the eviction of illegal occupants of indigenous territories. The State also asserted that it has undertaken an investigation into the actions taken by the settlers against the environment, which led to the detention of persons in March 2007.

40. In summary, the State indicated that over the years, since it was agreed to build the Bayano hydroelectric complex, it has maintained steady and periodic conversations with the members of the Kuna and Emberá peoples, fully seeing to it that, after the various agreements and statutes adopted, full respect for their integrity should be sought, referring to both their culture and their inalienable rights, and the ecological system in which these various cultures unfold.

41. The State did not present specific arguments on the articles of the American Convention declared admissible by the IACHR in its Report No. 58/09.[8]

IV. PROVEN FACTS[9]

42. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the parties and the information obtained during the public hearings held in the 113th and 144th regular periods of sessions of the IACHR. In addition, it will take into consideration publicly known information.[10]

[8] IACHR, Admissibility Report No. 58/09, April 21, 2009, Petition 12,354, Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members.

[9] In this report, the IACHR uses as evidence documents submitted by the parties that make reference to "indians" or "tribes". Pursuant to the development of international law, the Inter-American Commission for decades has been referring to "indigenous peoples," and therefore does not endorse the terms used by the authors of the respective quotes.

[10] Article 43(1) of the IACHR's Rules of Procedure establishes: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

43. In addition, mindful that the Commission was processing the file on precautionary measures on behalf of the Kuna indigenous people of Madungandí and the Emberá of Bayano and their members, the Commission considers it necessary to recall that the Inter-American Court has noted: "The evidence submitted during all stages of the proceeding has been included in a single body of evidence, for it to be considered as a whole, which means that the documents supplied by the parties with regard to the preliminary objections and the provisional measures are also part of the body of evidence in the instant case."[11]

44. Accordingly, the Commission considers that the State of Panama, as a party in both proceedings, has had the opportunity to controvert and object to the evidence produced by the petitioners and, therefore, there is a procedural balance as between the parties. Accordingly, the Commission includes in the evidence under consideration the evidence produced by the parties in the precautionary measures procedure.

A. Indigenous peoples in Panama and the applicable legal framework

45. Panama is a country with a high degree of ethnic and cultural diversity. Seven indigenous peoples currently live in Panama: Ngäbe, Buglé, Naso or Teribe, Bri-Bri, Kuna, Emberá, and Wounaan.[12] The Ngäbe, Buglé, Naso or Teribe, and Bri-Bri are found mainly in the western part of the country, while the Kuna, Emberá, and Wounaan are located mainly in the east.[13] According to the last national census, the indigenous population in Panama numbers 417,559 persons, equal to 12.26% of the total population.[14]

46. Each of these peoples has its own culture and history, social and political organization, economic and productive structure, cosmovision, spirituality, and ways of interacting with the environment. The indigenous peoples of Panama are traditionally organized in the following congresses and councils: Consejo General Bri-Bri, Consejo General Naso Tjër-di, Congreso General Comarca Ngäbe-Buglé, Congreso Nacional Wounaan, Congreso General Emberá de Alto Bayano, Congreso General Emberá y Wounaan de Tierras Colectivas, Congreso General Emberá y Wounaan, Congreso General Kuna de la Comarca Wargandi, Congreso General Kuna de la Comarca Madungandí, Congreso General Kuna de Dagargunyala, Congreso General de Kuna Yala, and Consejo Regional Buglé.

47. The territorial rights of the Kuna people of the Caribbean coast were recognized in 1938, in the wake of the grievances that led to the Tule Revolution of 1925. Since then, and up to 2000, other indigenous peoples of Panama have had recognition of ancestrally occupied territories, whose total area comes to nearly 20% of the national territory.[15] Within the indigenous territories the traditional authorities

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[11] I/A Court H.R., *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, para. 68. See *inter alia* Case of *Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 48.

[12] The indigenous peoples in Panama come mainly from five linguistic groups: (i) the Guaymí, from whom are derived the Ngöbe; (ii) the Bokotá, from whom are derived the Buglé; (iii) the Talamanca, from whom are derived the Teribe and Bri-Bri; (iv) the Kuna or Tule; and (v) the Chocoes, from whom are derived the Emberá and Wounaan. The first three are situated in the eastern region, and the last two in the western region of Panama. Reina Torres de Araúz. In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. p. 58. Available at: http://bdigital.binal.ac.pa/bdp/tomos/XVI/.

[13] ALVARADO, Eligio. Perfil de los Pueblos de Panamá, Panama City, Regional Technical Assistance Unit (RUTA) and Ministry of Interior and Justice. 2001. p. 14. Available at: http://libertadciudadana.org/archivos/Biblioteca%20Virtual/Documentos%20Informes%20Indigenas/Nacionales/Juridico/Perfil%20Indigena%20de%20Panama.pdf.

[14] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, by province, indigenous *comarca*, indigenous group to which it belongs, and age groups. 2010.

[15] According to official figures, the total area of Panama is approximately 75,517 km^2, while the total area of the five *comarcas* comes to approximately 16,141 km^2. Source: National Institute of Statistics and Census. *Panamá en Cifras: años 2006-10.* 2010. Available at: http://www.contraloria.gob.pa/inec/cuadros.aspx?ID=170305. See also: International Labor Organization. Indigenous and Tribal Peoples: Panama. Available at: http://www.ilo.org/indigenous/Activitiesbyregion/LatinAmerica/Panama/lang--en/index.htm.

of each people take responsibility for different areas of government, administration of justice, education, and use of natural resources, among other matters. Nonetheless, at present there are still indigenous peoples in Panama who are on ancestral territories yet these territories have not been titled, demarcated, and/or delimited.[16]

48. Beginning with the 1904 Constitution, amended in 1925[17], the possibility of creating "*comarcas*" (special districts) was introduced in Panamanian domestic law; these are geographic areas that have a political-administrative regime governed by special laws. A similar provision is to be found in Article 5 of the 1972 Constitution, amended in 2004.[18] Based on this legal institution, the State has recognized the following "indigenous *comarcas*" through special laws: Comarca Kuna Yala[19], Comarca Emberá-Wounaan[20], Comarca Kuna de Madungandí[21], Comarca Ngöbe-Buglé[22], and Comarca Kuna de Wargandi.[23] [24] This recognition has been considered positive by the IACHR and other international human rights bodies.[25]

49. The domestic law of Panama also recognizes "indigenous reserves" ("*reservas indígenas*"), a category that allows the indigenous communities who live on them to possess the lands

[16] The State makes reference, for example to the communities of "Piriatí Emberá, Ipetí Emberá, Maje Emberá, and Unión Emberá, and other indigenous territories (Wounaan) that are located in the eastern sector of the province of Panamá." Brief by the State of September 26, 2011, received by the IACHR September 27, 2011. In addition, see thematic public hearing on "The right to collective property of the lands of the indigenous peoples in Panama," held during the 144th period of sessions, March 23, 2012. See hearing at http://www.oas.org/es/cidh/.

[17] Article 4 of the 1904 Constitution, amended by Legislative Act of March 20, 1925, and September 25, 1928. "The territory of the Republic is divided into Provinces and these are divided into Municipalities, in the number and with the boundaries established by the laws in force; but the National Assembly may increase or decrease the number of provinces or municipalities, or vary their boundaries. The National Assembly may create *comarcas* (special districts), governed by special laws, with territory separated from one or more provinces."

[18] Article 5 of the single text of the Constitution of Panama, published November 15, 2004. "The territory of the Panamanian State is divided politically into Provinces, which in turn are divided into Districts, and the Districts into Sub-districts (*Corregimientos*). The law may create other political divisions, either subject to special regimes or for reasons of administrative convenience or public service."

[19] Created by Law 2 of September 16, 1938 with the name of "Comarca de San Blas," by Law 16 of February 19, 1953 the Comarca de San Blas was organized; it came to be called "Comarca Kuna Yala" as provided in Law 99 of December 23, 1998, and it was declared an indigenous reserve by Law 20 of January 31, 1957.

[20] Created by Law No. 22 of November 8, 1983; the Organic Charter of the Comarca was adopted by Executive Decree 84 of April 9, 1999.

[21] Created by Law 24 of January 12, 1996; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 228 of December 3, 1998.

[22] Created by Law 10 of March 11, 1997; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 194 of August 25, 1999; its political-administrative boundaries were changed by Law 8 of February 14, 2006.

[23] Created by Law 34 of July 25, 2000; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 414 of October 22, 2008.

[24] According to official information, three indigenous *comarcas* (Kuna Yala, Emberá-Wounaan, and Ngöbe-Buglé) have the rank of a province, for they have a governor; while the two remaining *comarcas* (Kuna de Madungandí and Kuna de Wargandí) are at the level of a sub-district (*corregimiento*). National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Definiciones y explicaciones. 2010. Available at: http://www.contraloria.gob.pa/inec/Publicaciones/00-01-03/definiciones.pdf.

[25] In this respect, in the press release issued by the IACHR after the visit to Panama in June 2001, the IACHR stated that "it notes with satisfaction the legislative progress made in recent years, particularly those initiatives aimed at recognizing the territories of indigenous peoples and their cultural rights, in particular, the laws establishing the regions of Madungandí, Nöbe Buglé, and Kuna de Wargandi…." [IACHR, Press Release 10/01 - End of on site visit to Panama, June 8 2001. para. 35. Available at: http://www.cidh.org/Comunicados/Spanish/2001/10-01.htm]. In addition, the Committee on Economic, Social and Cultural Rights of the United Nations stated: "The Committee notes with appreciation the establishment by Act No. 10 of 1997, Act No. 69 of 1998 and Executive Decree 194 of 1999 of a territorial demarcation (*comarca*) for the Nöbe-Buglé indigenous community, which the Committee had recommended as a result of its 1995 technical assistance mission to Panama." Committee on Economic, Social and Cultural Rights. Consideration of Reports by State Parties under Articles 16 and 17 of the Covenant. Concluding observations. E/C.12/1/Add.64, September 24, 2001, para. 6.

and use the natural resources.[26] In contrast to a *comarca*, recognition as a *reserva* does not entail the State granting the community that inhabits it collective property rights to a geographically demarcated and delimited space, or official recognition of their traditional forms of political organization and decision-making.[27]

50. In addition, Article 127 of the Panamanian Constitution – a provision that exists in terms similar to those of the 1946 Constitution[28] -- recognizes the collective property rights of the indigenous communities and establishes that a determination will be made by law of the specific procedures for their recognition. That provision establishes as follows:

> The State shall guarantee the indigenous communities the reserve of the lands necessary and collective property rights to them for the attainment of their economic and social wellbeing. The Law shall regulate the procedures that should be followed for attaining this purpose, and the corresponding delimitations, within which the private appropriation of land is prohibited.

51. On December 23, 2008, Law 72 was adopted; it "establishes the special procedure for the adjudication of the collective property rights of the indigenous peoples who are not in the *comarcas*,"[29] and is regulated by Executive Decree 223 of July 7, 2010. According to Article 1, the purpose of that law is to establish the special procedure for the adjudication, free of charge, of the collective property rights to lands traditionally occupied by the indigenous peoples and communities, in furtherance of Article 127 of the Constitution.[30] The provision establishes the Ministry of Agricultural Development as the competent authority for carrying out that procedure.[31] Law 72 establishes among its provisions that collective title to the property rights over lands guarantees the economic, social, and cultural wellbeing of the persons who live in the indigenous community. It further provides that in case of usurpation or invasion of the lands recognized through the titling of collective property rights, the competent authorities should enforce the property rights over those areas. It also establishes that government and private agencies will coordinate with the traditional authorities regarding the plans, programs, and projects that will be developed in their areas so as to ensure the free, prior, and informed consent of the indigenous peoples and communities.[32]

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[26] In this respect, Article 98 of the General Law on the Environment establishes: "The right of the *comarcas* and indigenous peoples with respect to the use, management, and traditional tapping of the renewable natural resources located within the *comarcas* and indigenous reserves established by law is recognized. These resources should be used in keeping with the aims of environmental protection and conservation established in the Constitution, this statute, and all other national statutes."

[27] Among the statutes that recognize "indigenous reserves" is Law 59 of December 12, 1930, which declares as indigenous reserves "the barren lands in the Atlantic Coast region"; Law 18 of November 8, 1934, which declares indigenous reserves "the barren lands in the Provinces of Bocas del Toro and Panamá"; and Law 20 of January 31, 1957, which declares the Comarca of San Blas and some lands in the province of Darién to be indigenous reserves.

[28] See Article 94 of the 1946 Constitution; Article 116 of the 1972 Constitution; Article 123 of the 1972 Constitution as amended in 1978, 1983, and 1994; and Article 127 of the 1972 Constitution as amended in 2004.

[29] According to information known to the public, Law 72 was not consulted on with the indigenous peoples of Panama.

[30] For the purposes of this Law 72, the following terms shall be understand to have the following meanings:

> 1. Indigenous peoples (*Pueblos indígenas*). Human collectivities that descend from populations that inhabited the country or a geographic region to which the country belonged from the time of the conquest or colonization or establishment of the current boundaries of the state, and who, whatever their legal status, preserve their own social, economic, cultural, linguistic and political institutions.
>
> 2. Traditional occupation (*Ocupación tradicional*). Tenure, use, conservation, management, possession, and usufruct of the lands of the indigenous peoples defined in this article, transmitted from generation to generation.

[31] Law 72, Article 4.

[32] See Articles 3, 12, and 14 of Law 72.

52. Subsequently, with the adoption of Law 59, on October 8, 2010, the National Bureau of Agrarian Reform was replaced in its authority by the National Land Management Authority (hereinafter "ANATI": Autoridad Nacional de Administración de Tierras).[33]

53. As regards international instruments, on June 4,1971, the Panamanian State ratified Convention 107 of the International Labor Organization on indigenous and tribal populations (hereinafter "ILO Convention 107"), adopted on June 26, 1957. Panama has not ratified ILO Convention 169 on indigenous and tribal peoples in independent countries (hereinafter "ILO Convention 169") adopted June 27, 1989, and in force since September 5, 1991.

B. The indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, their ancestral territory and mode of subsistence

54. The Bayano Watershed, or Bayano river region occupies a large part of the area of the District of Chepo (Distrito de Chepo), which is located in the province of Panamá, Republic of Panama. This district is divided, in turn, into eight *corregimientos* or sub-districts: Chepo, Cañita, Chepillo, El Llano, Las Margaritas, Santa Cruz de Chinina, Madungandí, and Tortí.[34]

55. The Bayano area is a section of the tropical rainforest ecosystem that extends from the southeastern part of the District of Chepo to the province of Darién, and which reaches into the department of Chocó in Colombia.[35]

1. The Kuna indigenous people of Madungandí

56. The Kuna indigenous people of Madungandí are from the Kuna linguistic group, also called Tule. According to the most recent national census, the Kuna population of Panama numbers 80,526 persons, accounting for 19.28% of the entire indigenous population, making it the second most numerous indigenous group of Panama.[36]

57. Since the 16th century the Kuna have inhabited the Bayano region, in what is today Panama, extending into the territory of Colombia.[37] As a result of Spanish colonization, most of the Kuna displaced to the San Blas archipelago. The group that remained in the area of the Bayano river were called the Kuna of Madungandí.[38] The Kuna population that was displaced to San Blas was recognized

[33] Law 59, of October 8, 2010, "Law that creates the National Land Management Authority, unifies the competences of the General Bureau of Cadastre, the National Bureau of Agrarian Reform, the National Land Management Program, and the 'Tommy Guardia' National Geographic Institute."

[34] According to information provided by the parties, the district of Chepo covers 5,311.2 km^2, of which 3,777.5 km^2 correspond to the Bayano river basin. Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p. 27. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[35] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p. 27. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[36] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, province, indigenous *comarca*, indigenous group to which they belong, and age group. 2010.

[37] Annex 2. Informe Final de la Comisión Nacional de Límites Político-Administrativo sobre la Demarcación Física de la Comarca Kuna de Madungandí de 2000. Annex 3 to the petitioners' Brief of July 13, 2012, received by the IACHR that same day; Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. Annex 51 to the initial petition by the petitioners, May 11, 2000; Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p. 27. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[38] Initial petition of the petitioners of May 11, 2000. p. 2.

as a *comarca* by the Panamanian State by Law 2 of September 16, 1938.[39] The Kuna of Madungandí were not covered by this law.[40]

58. The land inhabited by the Kuna of Madungandí is currently bounded to the north by the Comarca Kuna Yala; to the south by the *corregimiento* de El Llano and the Tierra Colectiva Emberá Piriatí; to the east by the province of Darién; and to the west by the *corregimiento* of Cañitas and El Llano.[41]

59. The Kuna indigenous people of Madungandí are constituted by 12 communities: Akua Yala, Pintupo, Ikanti, Ipeti, Kapandi, Diwarsicua, Dian Wardumad, Kuinubdi, Nargandi, Piría, Arquidi, and Narasgandi.[42] The seat or main population center is situated in the community of Akua Yala. According to the census conducted by the National Institute of Statistics and Census in 2010, the Kuna of Madungandí number 4,271 persons.[43]

60. Traditionally, the Kuna practice slash-and-burn agriculture and a reforestation process that is highly compatible with environmental conservation.[44] Their mode of subsistence is closely linked to their habitat, for they depend on the natural resources they obtain from it.[45] This close relationship with the land is reflected in the Kuna's belief that "the forest is like a mother, and the Indians must live in harmony, like siblings, with all that is within. From the deep woods they get food, materials for housing and the leaves and roots with which their medicine men make potions."[46]

61. The traditional political organization of the Kuna of Madungandí has as its maximum authority a General Congress made up of "*sahilas*" or chiefs of each of the communities that make up the indigenous people. The representation of the General Congress to the central government and the autonomous entities vests in a Cacique[47], who is elected by the General Congress. In addition, the

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[39] Created by Law 2 of September 16, 1938 with the name of "Comarca de San Blas," by Law 16 of February 19, 1953 the Comarca de San Blas was organized; it came to be called "Comarca Kuna Yala" as provided in Law 99 of December 23, 1998, and was declared an indigenous reserve by Law 20 of January 31, 1957.

[40] Annex 4. Atencio López. "Alto Bayano: Cronología de la lucha del pueblo Kuna," Este País, No. 36, 1992. Annex 15 to the petitioners' initial petition of May 11, 2000.

[41] Annex 5. Article 1 of Law 24 of January 12, 1996. Annex 11 to the petitioners' initial petition of May 11, 2000.

[42] Annex 6. Informe Técnico Socio-Económico sobre la Indemnización e Inversión de la Comarca Kuna de Madungandí y de las Tierras Colectivas Emberá Piriati, Ipeti y Maje Cordillera del año 2002. Appendix E to the petitioners' brief of January 19, 2007, received by the IACHR that same day.

[43] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, province, indigenous *comarca*, indigenous group to which they belong, and age group. 2010.

[44] The petitioners, citing an academic research study in this regard, explain this process in the following terms: "[The Kuna] grew plantain and corn as basic products, and fruit as a cash crop. In general, they allowed for the land to lie fallow for five to 10 years, and did not clear portions of the land whose size varied from two to three hectares, and they planted an annual crop, such as corn. Once the corn was harvested the field was not cultivated for some time, to allow the fruit trees and plantains to grow. In this way, the Kuna practiced reforestation as part of the slash-and-burn cycle." **Annex X.** Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama", 26 Westview Press, Boulder, Colorado 1989. p. 33. Annex 51 to the petitioners' original petition of May 11, 2000.

[45] Petitioners' initial petition of May 11, 2000.

[46] Annex 7. Nathaniel Sheppard Jr., Panama Indians Criticize Project As A Road To Ruin. Chicago Tribune, April 16, 1992. Annex 38 to petitioners' initial petition of May 11, 2000. The petitioners describe this relationship in the following terms: "the Kuna … have a firm tradition and love for the earth, which has guided their whole cosmography." Annex 8. David Carrasco. "Panama: Indigenous Women demand rights & Political Space." Inter Press Service. July 9, 1993. Annex 43 to petitioners' initial petition of May 11, 2000.

[47] Annex 9. Doctoral thesis of Peter H. Herlihy entitled "Geografía cultural de los indígenas Emberá y Wounan (Choco) del Darién, Panamá, con énfasis en la formulación reciente de aldeas y la diversificación económica," of 1986. Annex 1 to petitioners' initial petition of May 11, 2000.

sahilas may form regional congresses for coordination at this level, and local congresses entrusted with the administration of each community.[48]

2. The Emberá Indigenous People of Bayano

62. The Emberá of Bayano are found in the *corregimiento* of El Llano, district of Chepo, province of Panama, in the Republic of Panama.

63. The Emberá constitute a linguistic subgroup of the Chocó indigenous group, which comes from what is today the Colombian State. The second subgroup that derives from the Chocó are the Wounaan, also called Nonamá.[49]

64. According to the census conducted by the National Institute of Statistics and Census in 2010, the total Emberá population in Panama is 31,284, which accounts for 7.5% of the country's indigenous population. At present they constitute the third largest indigenous group of Panama.[50]

65. In the late 17th and early 18th centuries the Emberá and Wounaan migrated from Colombia to what is today Panamanian territory and settled on the banks of the rivers in the present-day province of Darién, in Panama. In the early 19th century a part of the Emberá group moved to the region of Bayano[51], situating themselves along the river, with a principal village called Majecito.[52] The Emberá and Wounaan who remained in the region of Darién were recognized by the State as a *comarca* by Law 22 of November 8, 1983.[53] The Emberá who remained in the Bayano zone were not included in this law.

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[48] Law 24, Articles 4 to 7; and Executive Decree 228, Articles 6 to 29.

[49] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. pp. 59-60. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. See also, Reina Torres de Araúz. "Cunas (Tules)." In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. p. 192.

[50] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, province, indigenous *comarca*, indigenous group to which they belong, and age group. 2010.

[51] Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. Annex 51 to petitioners' initial petition of May 11, 2000. This migration is explained as follows: "Those who have studied the phenomenon agree that in these same years the migratory flow of black Colombians from the Chocó to the Darién was on the rise, and likewise of peasants from western Panama, displaced in turn by the plantation crops and ranchers. The pressure brought to bear by these two human groups on the lands occupied by the indigenous probably sparked another response: '…as they lacked title, the indigenous did not have any more resources than to yield and to go look for new lands elsewhere…,', but we consider equally valid to postulate that the Chocóes, in a defensive posture on the part of this ethnic group, opted to seek new areas where they could maintain their traditional lifestyle. And so Emberá-speaking families began to situate themselves in the basin of the Bayano river and Wounaan-speaking groups relocated in the district of Chimán in the province of Panamá (*sic*)". Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 89. Annex C to the petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009.

[52] According to a study by the Bureau of Settlement of the Bayano Integral Development Project, done in 1973, the Chocó living in the Bayano river basin numbered 623 persons, who constituted 115 families. Specifically, it notes that as of 1973, there were in all 152 persons in the village of Majecito, in the Bayano River. **Annex X**. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p.p. 91-92. Annex C to the petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009. In addition, in the public hearing before the IACHR, expert Ultiminio Cabrera Chanapi indicated: "Before the Bayano hydroelectric dam was built, the Emberá people of the Alto Bayano … were all around the river, from the source to the mouth, they occupied the fertile territories … there were [communities] in Río Diablito, there was one in Majecito, in Río Piragua, and along all the tributaries of the Bayano river." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi. See hearing at http://www.oas.org/es/cidh/.

[53] The Emberá-Wounaan Comarca was established by Law 22 of November 8, 1983**;** the Administrative Organic Charter of the Comarca was adopted by Executive Decree 84 of April 9, 1999.

66. The Emberá of Alto Bayano are presently organized in four communities: Ipetí Emberá, Piriatí Emberá, Maje Emberá, and Unión Emberá.[54] The land the Emberá of Bayano currently occupy is bounded to the north by the Pan American Highway, to the south by settlers' lands, to the east it follows the course of the Ipetí river to its headwaters, and to the west it follows the course of the Curtí river and borders on the perimeter of the lands of the Kuna indigenous people of Madungandí.[55]

67. The Emberá are traditionally given to farming, especially growing plantain, corn, and rice. They also hunt and fish.[56] For this group the wood provided by their jungle surroundings is one of the most important elements, for: "Of wood are made the dwellings and much of the furniture, the artisanal sugar crushers and mortars called '*pilón*' and the '*mano de pilón*' are used to hull the rice and grinding the corn. Balsam wood is used for the ritual staffs of the healer and for the anthropomorphic and zoomorphic figures for the same purpose."[57]

68. As a subgroup of the Chocó, the Emberá were traditionally known as a group that lacked a well-defined political organization and with a habitat in dispersed dwellings. Beginning in 1968, when the first National Indigenous Congress was held in Alto de Jesús, in Veraguas, the Chocó decided to adopt the Kuna model of organization and selected the first Emberá caciques.[58]

69. The current political-administrative structure consists mainly of the Emberá General Congress of Alto Bayano, considered the maximum Emberá authority, which has the legislative function; the Caciques Generales, or Caciques General, considered the leading Emberá political and administrative authorities, whose functions are to coordinate all the economic, social, and political activities to the benefit of the communities and to represent the Emberá people before the government and private institutions; and the Nocoes or local leaders, who represent the cacique in each community, and lead the activities in their respective communities.[59]

3. The non-indigenous population or "settlers" ("*colonos*") in Bayano

70. At the time of the relocation or move of the Kuna indigenous people of Madungandí and the Emberá of the Bayano, due to the construction of the hydroelectric complex, there were a few settlers in the Bayano region who reached compensation agreements with the State because they also had to move. After the construction of the hydroelectric dam and with the construction of the Pan American Highway, the number of settlers in the zone increased considerably.[60] Given the difference between the hunter and fisher way of life of the indigenous communities and the extensive practice of the peasants,

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[54] Petitioners' brief of May 25, 2011, received by the IACHR on May 31, 2011; and the petitioners' brief of May 16, 2012, received by the IACHR that same day.

[55] Brief of additional observations on the merits by the petitioners, received by the IACHR on December 18, 2009. In addition, Annex 10. Technical report "Gira de campo para la revisión de la propuesta de Tierras Colectivas en la provincia de Darién, Distrito de Chepigana, corregimientos de Santa Fe y la Provincia de Panamá, Distrito de Chepo, corregimiento de Tortí; según ley 72 de 23 de diciembre de 2008." Annex, State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[56] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. pp. 66-67. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[57] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 68. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[58] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 81. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Also in: Reina Torres de Araúz. "Cunas (Tules)." In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. pp. 239-240.

[59] Reina Torres de Araúz. "Chocoes (Enberá y Wounaan)". In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. pp. 239-240. Citing a document by the Ministry of Justice and Interior. 1967. Unpublished. Also in: State's brief of October 3, 2011, received by the IACHR October 4, 2011; and State's brief of May 14, 2012, received by the IACHR that same day.

[60] Petitioners' initial petition of May 11, 2000.

who replace forest with pasture, expanding the agricultural frontier and degrading their natural habitat, conflicts and tensions have emerged over the use of the land and access to natural resources.[61] One of the main problems pointed out by the petitioners is the appropriation of lands by the settlers.[62] The settlers have formed the peasant communities of Wacuco, Curtí, and Loma Bonita, and are organized in the Federación de Trabajadores Agrícolas.[63]

C. Situation of the collective property rights of the Kuna Indigenous People of Madungandí and the Emberá of Bayano

1. Creation of the Indigenous Reserve of Upper Bayano, and the Comarca of Bayano and Darién (1930-1952)

71. In the early 1930s the Kuna situated in the Bayano basin carried out the first actions aimed at delimiting and recognizing their territory. According to the information presented by the parties, at the request of members of the indigenous people, in 1932 the government sent a surveyor to take the first measurements of the geographic space occupied by the Kuna.[64] The description of the expedition is in the record before the IACHR. It indicates that:

> For the purpose of measuring the lands that must be conserved as a reserve for the indigenous of the Bayano river and its tributaries, an arrangement was made with the chiefs (*ságuilas*) of the regions of Pintupo, Piriá, and Cañazas, by which the indigenous mentioned should contribute with the sum of One thousand five hundred balboas in cash (B/. 1,500.00) to the expenses incurred in the expedition by the topographic surveyors that the Government was going to send to those places. The obligations of the indigenous also included supplying food to all the members of the expedition and to clear the necessary dirt roads. The Government, for its part, had to contribute one thousand balboas (B/.1,000.00).
> On September 5, 1932, the Government communicated [illegible] Antonio Henríquez who had been designated chief of the commission that was to go to Bayano, district of Chepo, to take the measurements and [illegible] of the lands that are occupied by the indigenous tribes of that region, for whose work [illegible] the sum of B/. 290.90 monthly. [illegible] The measurement was to be 75 hectares for each head of family.
>
> On October 3 of the same year Mr. Henríquez was replaced by surveyor Blas Humberto D'Anello. In December I was asked by Mr. José E. [illegible] undersecretary of Agriculture and Public Works, that from that point I deal with Mr. D'Anello in relation to the work he was carrying out in the lands of Bayano and then, after I met with him, and with some chiefs and other indigenous persons, I drew up the following itinerary for him:
>
> Due to numerous difficulties and problems the Government was forced to increase by B/. [illegible] the sum of One thousand balboas that it had already spent for salaries and other expedition expenses. Mr. D'Anello and his helpers returned to Panama definitively in the middle of this year without having been able to close off the polygon on the piece of land; but the largest part of the perimeter was surveyed and today it is being drawn by the Technical Office of the Secretariat of Agriculture and Public Works by the same Mr. D'Anello[65].

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[61] Petitioners' initial petition of May 11, 2000. The members of the indigenous communities describe this practice as "devastation" ("*devastación*"), which in their words entails "clearing everything, felling the forest, the mountain, and then burning … and establishing themselves as owners, appropriating the land for themselves." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and the Emberá General Congress of Alto Bayano.

[62] Petitioners' initial petition of May 11, 2000; Brief of additional observations on the merits by the petitioners, received by the IACHR on December, 18, 2009.

[63] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to the petitioners' initial petition of May 11, 2000. p. 3.

[64] Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. p. 31. Annex 51 to petitioners' initial petition of May 11, 2000.

[65] Annex 12. Annex 7 to petitioners' initial petition of May 11, 2000. The petitioners also filed academic articles in which reference is made to the same facts: "By 1931 an engineer had been sent to survey the land and mark out the boundaries of the

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72. On November 18, 1934, Law 18 on Indigenous Reserves was adopted, by which the State of Panama declared the Upper Bayano region to be an indigenous reserve ("*reserva indígena*"). That law provided as follows:

> ARTICLE 1: The barren lands in the following places in the Provinces of Bocas del Toro and Panamá are hereby declared indigenous reserves: …
>
> Indigenous Region of Alto Bayano: The barren lands inhabited by the indigenous tribes of Maje, Pintupo, Piria, and Cañazas, in keeping with the official map drawn up in October 1932 by Official Surveyor Mr. Blas Humberto D'Anello, whose map bears the order number B 6-442, in the Archive of the Secretariat of the Public institution.
>
> ARTICLE 2: The lands addressed in the previous articles shall be possessed in common by the indigenous tribes who inhabit them and may not be sold or leased.
>
> ARTICLE 3: The Executive Branch is obligated to declare non-adjudicable an area in each of the Provinces of the Republic where there are Indian tribes and shall set them aside as indigenous reserves for them to work on them free of charge [*sic*][66].

73. The IACHR observes that as the text of the law indicates, the characterization of Upper Bayano as an "indigenous reserve" was based on the measurement work done in 1932 by surveyor Blas Humberto D'Anello, to whom the description of the expedition makes reference. According to information produced by the parties and other sources of public knowledge, the area of the Indigenous Reserve of the Upper Bayano was from 87,000 to 87,321 hectares.[67]

74. In addition, the IACHR finds that by Article 2 of that law, the Panamanian State granted the indigenous peoples who lived in the reserve the right to common possession of the lands, which could not be alienated or leased.

75. On February 14, 1952, the National Assembly of Panama passed Law 18, "by which Article 94 of the National Constitution is developed and other measures are issued."[68] By this law the State ordered the creation of four *comarcas*, including the "Comarca of Bayano and Darién." In addition, territories by which each *comarca* would be constituted were established. That law specifically provided as follows:

…continuation
reservation. The boundaries were marked out according to natural markers, such as rivers, tributaries of the Bayano, hills, or particular trees. A map was made out of the region based on the survey and finally, in 1935, a path was cleared to mark the reserve boundary. The collective Kuna community contributed labor, money and material to the delimitation of the work and they contributed labor to clear the trail. Additionally, according to a written history of the events preserved by the Kuna in their archives, the Kuna communities spent over $15,000 for the work." Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama", 26 Westview Press, Boulder, Colorado 1989. p. 31. Annex 51 to the petitioners' initial petition of May 11, 2000.

[66] Law 18, of November 18, 1934. Annex 7 of petitioners' initial petition of May 11, 2000; and Annex 1 to the communication from the State of June 29, 2001. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1930/1934/1934_092_0285.PDF.

[67] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. pp. 20-21; Annex 13. Report and Recommendation of the Inter-governmental Commission. Annex 21 of the communication from the State of June 29, 2001. In addition, academic documents make reference to an expansion of nearly 87,000 hectares. Reina Torres de Araúz. "Cunas (Tules)." In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. p. 174; Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 32. Annex C to the petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009; State's Brief of May 14, 2012, received by the IACHR on the same day; and Annex 2. Informe Final de la Comisión Nacional de Límites Político-Administrativo sobre la Demarcación Física de la Comarca Kuna de Madungandí de 2000. Annex 3 to the petitioner's brief of July 13, 2012, received by the IACHR the same day.

[68] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 21. p. 20; and Report and Recommendation of the Inter-governmental Commission. Annex 21 to the State's communication of June 29, 2001.

> Article 2: For administrative purposes, the regions occupied at present by the indigenous tribes shall be divided into four *Comarcas* thusly:
> Comarca of San Blas,
> Comarca of Bayano and the Darién,
> Comarca of Tabasará, and
> Comarca of Bocas del Toro
> Article 3: The Comarca of San Blas shall be made up of the indigenous reserves of San Blas.
> The Comarca of Bayano and the Darién shall include those regions currently occupied by the Nagandí and Chocó tribes and the indigenous reserve of Bayano.
> The Comarca of Tabasará shall be constituted by the regions occupied at present by the principal groups of the tribe of the Guaymíes in the Provinces of Veraguas and Chiriquí….
> The Comarca of Bocas del Toro shall be constituted by the indigenous reserves of the Province of Bocas del Toro.
> The physical boundaries of these Comarcas shall be set when the geodesic work currently under way is completed.

76. Accordingly, included in the Comarca of Bayano and Darién were the Kuna indigenous peoples who constituted the Indigenous Reserve of Bayano and the Chocó who inhabited the zone, a group to which the Emberá belong.[69] According to the information produced by the parties, the Reserve of Bayano and Darién occupied precisely the lands where the reservoir formed by the hydroelectric dam would sit.[70] Nonetheless, despite Law 18 the Comarca of Bayano and Darién was not constituted.

2. Construction of the Bayano Hydroelectric Complex and the Pan American Highway; Agreements of Farallón, Cimarrón, and Majecito (1963-1979)

77. In 1963 the Panamanian State proposed the construction of a hydroelectric dam in the region of the Bayano, also called Ascanio Villalaz Hydroelectric Complex or Bayano Hydroelectric Complex. The construction of the hydroelectric facility was to entail the creation of an artificial lake in the area of the Bayano[71], consisting of the construction of a concrete dam at the intersection of the Cañitas and Bayano rivers, which created a reservoir that would cover approximately 350 km^2 at the surface.[72]

78. To carry out the project, on May 8, 1969, the State adopted Cabinet Decree 123. The IACHR observes that the considering paragraphs of this decree indicates, in part: "That due to the construction of the Bayano River Project part of the present-day Indigenous Reserve, in the Upper Bayano, will be flooded by the reservoir" and "[t]hat it is a duty of the State to provide the necessary area for the relocation of the inhabitants of said reserve evicted due to the construction of the dam."[73] Specifically, Article 1 of Cabinet Decree 123 provided as follows:

> Article one: The area necessary for the hydroelectric reserve of the Bayano Hydroelectric Project is hereby established as the area included in the polygon that appears in Map No. PB-T-02-67 of non-adjudicable areas of Bayano and whose description is as follows [sic]: Starting from point No. 1, whose approximate coordinated referring to the Universal Transverse Mercator Grid (zone 17),

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[69] Annex 2. Informe Final de la Comisión Nacional de Límites Político-Administrativo sobre la Demarcación Física de la Comarca Kuna de Madungandí de 2000. p. 1. Annex 3 to the Petitioner's brief of July 13, 2012, received by the IACHR the same day.

[70] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 46. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[71] Annex 16. Alaka Wali, "The Transformation of a Frontier: State and Regional Relationships in Panama, 1972-1990." Human Organization, Vol. 52, No. 2 (1994). Annex 16 to petitioners' initial petition of May 11, 2000. Petitioners' initial petition of May 11, 2000. p. 3; and Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. p. 50. Annex 51 to petitioners' initial petition of May 11, 2000.

[72] Petitioners' initial petition of May 11, 2000. p. 10; and State's brief of March 24, 2011, received March 25, 2011.

[73] Annex 14. Cabinet Decree 123, May 8, 1969. Annex 8 to petitioners' initial petition of May 11, 2000; and Annex 2 to the communication from the State of June 29, 2001.

> Datum NA of 1927, are: North: 1,009.073 km and East: 731.286 km. One continues to the true North for a distance of 10.9 km until reaching point No. 2, whose coordinates are: North, 1,019.970 km and East 731.286 km.; from this point to true East and a distance of 5.4 km one reaches point No. 3, whose coordinates are: North 1,019.970 km, East 736.678 km, from this point to true North and a distance of 4.9 km until reaching point No. 4, whose coordinates are: North 1,024.868 km and East 736.678 km; from here and to the true East and a distance of 29.7 km one reaches point No. 5, whose coordinates are: North 1,024.868 km and East 766.343 km; to the true South and a distance of 8.0 km one reaches point No. 6, whose coordinates are: North 1,016.866 km and East 766.343 km; to the true East and a distance of 8.6 km one reaches point No. 7, whose coordinates are: North 1,016.866 km and East 774.983 km; to the South 45°00'00'' East and a distance of 19.9 km one reaches point No. 8, whose coordinates are: North 1,002.792 km and East 789.028 km; to the South 45°00'00'' West and a distance of 18.5 km, until reaching point No. 9, whose coordinates are: North 989.708 km and East 775.923 km; from here North 45°00'00'' West and a distance of 18.3 km until reaching point No. 10, whose coordinates are: North 1,002.641 km and East 762.960 km from here to the true West and a distance of 25.2 km until reaching point No. 11, whose coordinates are: North 1,002.641 km and East 737.731 km to North 45°00'00'' West and a distance of 9.1 km until reaching point No. 1, that is the starting point, whose coordinates were stated above. The area within the polygon has been described as 1,124.24 km^2.

79. The IACHR observes that by means of that article, the State alienated an area of 1,124.24 km^2, belonging to the "non-adjudicable areas of the Bayano," to set them aside for construction of the Hydroelectric Complex of the Bayano. In compensation for the dispossession of their ancestral territories, Articles 2 and 3 of Cabinet Decree 123 provided for granting new lands, which were declared non-adjudicable. Those provisions established as follows:

> Article two: The lands adjacent to the current Bayano Indigenous Reserve, between the boundaries of said Reserve and those of the Polygon described in Article One of this Decree, are hereby declared non-adjudicable. The area whose non-adjudicability is established in this Article is 457.11 km^2.
>
> Article three: Also declared non-adjudicable is the area situated to the East of the current Bayano Indigenous Reserve between the Bayano and Cañazas rivers, described next:
>
> Starting from point "A" in the town of Piriá, one follows along the Bayano river for a distance of approximately 45.33 km upriver to its source in the Serranía de San Blas, along the boundary between the Province of Panamá and the Comarca of San Blas, a point that is called "B"; from here one follows to the southeast along the continental divide of waters that constitutes that boundary, for a distance of approximately 14.48 km until reaching point "C," which is the interception of the boundaries of the Province of Panamá, the Comarca of San Blas, and the Province of Darién; from here one follows southward along the political boundary between Panamá and Darién, for a distance of approximately 21.33 km to the source of the Cañazas river, a point that is called "D"; from here one follows westward along the Cañazas river, downriver, for a distance of 19.91 km until reaching point "E" where this river intercepts the boundary of the current Bayano Indigenous Reserve and finally along the boundary of the Reserve, to the Northwest for a distance of approximately 23.28 until reaching the town of Piriá, point "A," which was the starting point. The area included in the zone that has been described is 426.33 km^2.
>
> Paragraph: The purpose of the non-adjudicability of these lands is to compensate for the area of the current Indigenous Reserve that will be flooded by the reservoir of the Bayano Hydroelectric Project.[74]

80. The IACHR calls attention to the last paragraph quoted, for it shows that the indigenous communities that were relocated due to the hydroelectric project of the Bayano were in effect within the

[74] Annex 14. Cabinet Decree 123, of May 8, 1969. Other relevant provisions of this decree include Article 5, which provides "The rights of the owners of lands duly registered in the Public Registry and who are in the areas declared non-adjudicable shall be recognized, with the limitations contained in the Law"; and Article 6, which establishes: "The implementation of soil conservation practices and the rational exploitation of forests is obligatory throughout the Bayano river basin."

Alto Bayano Indigenous Reserve.[75] Accordingly, the IACHR considers as proven that the Ascanio Villalaz Hydroelectric Project entailed the dispossession of the territories that were occupied by the Kuna indigenous people of Madungandí and the Emberá of Bayano, their transfer to new lands, and the subsequent flooding of their ancestral territories.[76]

81. According to the information before the IACHR, in 1969 representatives of the Panamanian State – in particular Head of Government General Omar Torrijos Herrera[77] -- held meetings with authorities of the Kuna of Madungandí and some members of the Emberá communities situated in the Bayano watershed[78], in which he told them that they had to abandon the territories they were occupying. In exchange, he offered to grant them and give them title to new lands, of better quality and larger in extent; and the payment of economic compensation for the loss of lands, crops, and animals.[79]According to the information produced by the parties, the alleged victims were not informed in a manner and language that they understood of the consequences of the construction of the hydroelectric project in the Bayano region.[80]

82. As a result of the foregoing, the State agreed to pay economic compensation to the indigenous communities who would have to "abandon the lands they occupy due to the works of the

[75] Similarly, the considering paragraphs of Cabinet Decree 156, of July 8, 1971, to which reference will be made subsequently, expressly recognize that "the indigenous groups who inhabit the current Bayano Indigenous Reserve shall have to abandon the lands they occupy due to the execution of the works of the Bayano Hydroelectric Project." In addition, it is noted that "these groups shall have to be situated in the areas established as non-adjudicable by Cabinet Decree 128 of May 8, 1969, in compensation for the area of the current indigenous reserve, which shall be flooded [sic]." Annex 15. Considering paragraphs of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[76] In addition to the text of Cabinet Decrees 123 and 156, in briefs filed in the proceeding before the IACHR the State made express reference to these facts. In this respect, it noted that "with the construction of the Ascanio Villalaz Hydroelectric Complex, 12 communities were resettled in the region of the Kuna Comarca of Madungandí" [State's brief of September 26, 2011, received by the IACHR September 27, 2011]. It also indicated that "The Emberá, with the construction of the Ascanio Villalaz Hydroelectric Complex, were resettled." [State's brief of September 26, 2011, received by the IACHR September 27, 2011]. Other sources make reference to the displacement of 2,000 Kuna individuals and 500 Emberá individuals. Annex 16. Alaka Wali, "The Transformation of a Frontier: State and Regional Relationships in Panama, 1972-1990." Human Organization, Vol. 52, No. 2 (1994). Annex 16 to petitioners' initial petition of May 11, 2000; and State's brief of March 24, 2011, received March 25, 2011.

[77] IACHR, Public hearing, March 23, 2012 sobre "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Manuel Pérez, General Cacique of the General Congress of the Kuna Comarca of Madungandí. See hearing at http://www.oas.org/es/cidh/.

[78] In his expert testimony, Ultiminio Cabrera Chanapi noted in this regard that: "… [There were] individual consultations only of those families that could have access to a conversation with General Torrijos Herrera and perhaps compensation for those who were consulted at that moment. Yet many families disappeared from the Bayano river basin.… As there was no consultation with the communities under any leadership of the communities, under several leaderships, because the river is extensive and the families were scattered throughout the Bayano river basin." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi.

[79] Petitioners' initial petition of May 11, 2000. p. 11; and State's brief of June 29, 2001. p. 2. In the hearing before the IACHR, expert Ultiminio Cabrera Chanapi noted that: "… the consultation was only, OK, you want to occupy another territory because we are going to give you other lands of better quality and greater extent. That was the question at that time, but they did not say for sure what the consequences of that relocation would be, if they were going to offer us quality lands for production or whether they were going to displace settlers in the vicinity, it was only indicating that they were going to guarantee lands for you. That they were going to pay you compensation, that they would build schools, dwellings." IACHR, Public hearing, March 23, 2012 sobre "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi. See hearing at http://www.oas.org/es/cidh/.

[80] Bolívar Jaripio Garabato, a member of the Emberá community of Piriatí, describes the process as follows: "… at that moment when our people, our family, were forcibly evicted, because prior to that there was no consultation for the indigenous peoples. Although there is talk of agreements, as our ancestors were not on top of, were not people with an education, at that moment they took it to clear it, to do as they wished, to displace from that place.… I would sit down with my grandfather who was a cacique, he was present at that moment and he would say that the people are making it look good, my grandfather did not know how to read or write, they told him you are going to have a right to your land and no one is going to bother you, no one will take your lands from you. For that reason, as my father did not know how to read or write, they would say the government is offering us this, so in a meeting they said we can move, but no, they have not followed through on this." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. See hearing at http://www.oas.org/es/cidh/.

Hydroelectric Project of the Bayano."[81] To this end, Cabinet Decree 156 of July 8, 1971, was promulgated, by which the State established a Special Fund for Compensation to help the Indigenous of Bayano.[82] The IACHR notes, in relation to the reason why the payment of economic compensation was established, that the fourth considering paragraph of that decree established: "The move to new areas implies for the indigenous great efforts, accompanied by considerable economic outlays, all of which justifies, for reasons of humanity, the assistance that the State agrees upon to benefit them."[83]

83. According to Article 2 of Cabinet Decree 156, the Special Fund would be constituted by 30% of the total revenues of the State Forestry Fund (Fondo Forestal del Estado), as of January 1, 1971, and by those that come in as of the promulgation of said Decree and for the three subsequent years. These revenues would be obtained from the permits or concessions granted by the Forestry Service of the Ministry of Agriculture for the extraction of timber in the area of the Indigenous Reserve of Bayano.[84] As for the conditions in which the payment must be made, Article 3 established that the Forestry Service of the Ministry of Agriculture would deliver the corresponding amount to the officially recognized representatives of the indigenous every six months, beginning on June 30, 1971.[85]

84. In addition, the State made a commitment to the Kuna of Madungandí and the Emberá of Bayano to grant individual monetary compensation that would cover the crops lost and the burden of relocation. The payment was to be made monthly for three years.[86]

85. In 1972 the State initiated the construction of the Bayano Hydroelectric Complex, which culminated on March 16, 1976.[87] In March 1973, when the construction was already under way, the Institute of Hydraulic Resources and Electrification (hereinafter "IRHE") created an emergency project for the Bayano, temporary in nature, for the purpose of "keeping the residents of the basin from leaving in a disorderly and uncontrolled manner when the moment of the flooding arrives."[88]

86. Once construction of the hydroelectric dam began, the residents were opposed to leaving the zone.[89] To address this situation, the State created the Bayano Integral Development Project, by

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[81] Annex 15. Second considering paragraph of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[82] In particular, the first article provided as follows: "Hereby established within the Forestry Fund of the State shall be a Special Fund for Compensation and Assistance for the indigenous peoples who inhabit the area within the current Indigenous Reserve of Bayano and within the areas declared non-adjudicable by Cabinet Decree 123 of May, 1969" [sic]. Annex 15. Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[83] Annex 15. Considering paragraphs of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[84] Annex 15. Article 2 of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[85] Annex 15. Article 3 of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[86] Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama", 26 Westview Press, Boulder, Colorado 1989. Annex 51 to petitioners' initial petition of May 11, 2000. Annex 17. Sworn statement by the Kuna caciques. Annex 17 to petitioners' initial petition of May 11, 2000. Annex 6. Informe Técnico Socio-Económico sobre la Indemnización e Inversión de la Comarca Kuna de Madungandí y de las Tierras Colectivas Emberá Piriatí, Ipetí y Maje Cordillera de 2002. Annex E to petitioners' brief of January 19, 2007, received by the IACHR the same day.

[87] Petitioners' initial petition of May 11, 2000. pp. 11 and 16. Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 37. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009; State's brief of March 24, 2011, received March 25, 2011.

[88] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 40. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[89] Expert Ultiminio Cabrera Chanapi stated: "The indigenous communities had no recourse but to relocate since the water was already rising, and there was nothing they could do but relocate to another site." IACHR, Public hearing, March 23, 2012 on

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Decree No. 112 of November 15, 1973.[90] As regards the indigenous peoples who were living in the area, Article 5(b) of that decree provided: "Carry out the transfer and relocation of the communities situated in the areas of the reservoir in the critical areas of the basin and other special areas that require maintaining a protective plant cover [*sic*]."[91]

87. From 1973 to 1975 the Kuna and Emberá peoples of Bayano were moved.[92] The IACHR notes that the resettlement process occurred as of 1973, when execution of the project had already begun.

88. The Kuna people of Madungandí were relocated in the non-flooded parts of the indigenous reserve. According to the information in the record before the IACHR, the State entered into two agreements with the traditional authorities of the Kuna indigenous people of Madungandí: the Agreement of Farallón of 1976 and the Agreement of Fuerte Cimarrón of 1977. The first was signed on October 29, 1976 by the Head of Government Omar Torrijos and authorized representatives of the Kuna people. This agreement established, among other points, that:

> 1. The National Government undertakes to demarcate the reserve and relocate the settlers and the Chocó Indians found in the area, which is prejudicial to Kunas; this relocation shall be done after consultation with the groups affected.
> The sites, which shall be islets and which will constitute the waters of the dam shall not be used without the prior consent of the Kunas.[93]

89. With respect to this article, the State alleged in the procedure before the IACHR that "it constituted a binding legal instrument by which the Government of the Republic of Panama undertook vis-à-vis the Kuna of Bayano to demarcate the land and relocate the settlers, among other points."[94] The IACHR considers it proven that at least since 1976 the State undertook expressly and irrefutably to demarcate the lands of the Kuna of Madungandí and to remove all other occupants on these lands.

90. In order to carry out the terms of the Agreement of Farallón, on January 29, 1977, the Agreement of Fuerte Cimarrón was signed by representatives of the Corporación del Bayano, the National Guard, and representatives of the Kuna people of Madungandí.[95] Point 2 of that Agreement

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"Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi. See hearing at http://www.oas.org/es/cidh/.

[90] Article 1 of Decree No. 112. "The project for the Development of the Bayano is hereby created, subject to the oversight and inspection of the Executive branch through the Ministry of Agricultural Development and the Ministry of Planning and Economic Policy, based in the population of Chepo. The Office of the Comptroller of the Republic shall perform the functions of oversight and control that the Constitution and laws establish. Decree 112 of November 15, 1973, *Official Gazette* No. 17,621 of June 24, 1974. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_026_2085.PDF. With respect to the creation of the Bayano Integral Development Project, in documentary evidence introduced into the record it is noted that: "In the face of the human situation and the urgency of performing the ecological studies and delimiting the area of protection of the lake, etc., the Government, in mid-1973, created the Bayano Integral Development Project." Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una Comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 40. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[91] Decree 112 of November 15, 1973, *Official Gazette* No. 17,621 of June 24, 1974. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_026_2085.PDF. Annex 4. Atencio López. "Alto Bayano: cronología de la lucha del pueblo Kuna," Este País, No. 36, 1992. Annex 15 to petitioners' initial petition of May 11, 2000.

[92] Petitioners' initial petition of May 11, 2000; and State's brief of March 24, 2011, received March 25, 2011.

[93] The Agreement of Farallón sets forth more specific commitments regarding the re-evaluation of the logging permits left for the Kuna (point 2), the commitment to bring drinking water to the communities (point 3), cancellation of any hunting permits (point 4), creation of a forestry and hunting police appointed by mutual agreement between the Head of Government and the Kuna caciques (point 7), and the construction of a health center (point 8). Annex 18. Agreement of Farallón of October 29, 1976. Annex 13 to petitioners' initial petition of May 11, 2000; and Annex 6 to the State's communication of June 29, 2001.

[94] State's brief of September 26, 2011, received by the IACHR September 27, 2011.

[95] Annex 19. Agreement of Fuerte Cimarrón, January 29, 1977. Annex 12 to petitioners' initial petition of May 11, 2000.

established a new timetable for payment to bring up to date the commitments in arrears to pay compensation and build dwellings.[96] In addition, at point 5, the Corporación del Bayano undertook to recognize a sum of money to be paid to the indigenous communities for the extraction of timber.[97]

91. For their part, the Emberá communities who live in Bayano were transferred to near the Membrillo river, in the Darién region.[98] Nonetheless, this initial settlement proved inadequate, thus they were relocated to two villages, Ipetí and Piriatí, in the district of Chepo, province of Panamá. On February 5, 1975, the Agreement of Majecito was signed by which their relocation to these two new localities was recognized.[99]

92. Once construction of the hydroelectric facility was completed, the Panamanian State promulgated Law 93 of December 22, 1976, which created the "Corporación para el Desarrollo Integral del Bayano" (hereinafter "the Corporación del Bayano" or "the Corporation"), a wholly state-owned enterprise established to administer the hydroelectric complex.[100] Article 14 of that law provided that the Corporación del Bayano would subrogate the Bayano Integral Development Project in all its rights and obligations.[101] With regard to the assets of the Corporation, Article 16 of Law 93, of December 22, 1976, established as follows:

> Article 16. Decree No. 123 of May 8, 1969 is hereby derogated, and all the lands upriver from the dam site, lands which constitute the Bayano River Watershed, are set aside as a forest area, and become part of the assets of the Corporación para el Desarrollo Integral del Bayano, with the exception of the lands earmarked for Indigenous Reserves.[102]

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[96] Article 2 of the Agreement of Fuerte Cimarrón. "The Corporación Bayano undertakes and the Indigenous Representatives accept the following program of payment for updating the commitments in arrears in terms of compensation and construction of housing. February (pay the months of September and October), March (pay the months of November and December), April (pay the months of January and February 1977), May (pay the months of March and April)." **Annex X.** Agreement of Fuerte Cimarrón, January 29, 1977. Annex 12 to petitioners' initial petition of May 11, 2000.

[97] Article 5 of the Agreement of Fuerte Cimarrón. "The Corporación Bayano undertakes to recognize a sum of money for the indigenous communities for the extraction of timber. This percentage shall be established mindful of the interests and investments of the Corporación Bayano and the interests of the indigenous communities. The Kuna leaders of Alto Bayano shall designate a representative to coordinate with the Bureau of Planning and Finance of the Corporation the amount of this sum [sic]." Annex 19. Agreement of Fuerte Cimarrón, January 29, 1977. Annex 12 to petitioners' initial petition of May 11, 2000.

[98] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 20. Final Report of Conclusions and Action Plan from the Mesa de Concertación of the Bayano Zone of August 25, 1999. p. 5. Annex 32 to petitioners' initial petition of May 11, 2000 and Annex 20 to the State's communication of June 29, 2001; and Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000.

[99] According to information produced by the parties: "It was up to the IRHE [Institute of Hydraulic Resources and Electrification], together with the Corporación para el Desarrollo Integral de Bayano, to demarcate the lands for the Emberá, assigning to the community of Piriatí 2,650 hectares, and to the community of Ipetí, 2,490 hectares, lands that are situated alongside the Pan American Highway." Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 8; and Annex 20. Final Report of Conclusions and Action Plan of the Mesa de Concertación of the Bayano Zone of August 25, 1999. p. 5. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[100] Article 1 of Law 93 of December 22, 1976. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1976/1976_025_1251.PDF.

[101] Article 14 of Law 93 of December 22, 1976. "The Corporación para el Desarrollo Integral del Bayano subrogates to the Bayano Integral Development Project in all its rights and obligations. For these purposes, all the contracts entered into by the Bayano Integral Development Project shall be entered into with the Corporación para el Desarrollo Integral del Bayano.

[102] Subsequently, by Law 6 of February 3, 1997, all the assets of the Corporación Bayano were assigned to the Empresa de Generación Eléctrica Bayano S. A. Law 6 of February 3, 1997. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1997/1997_148_1785.PDF.

93. In the early 1970s the State decided to build a section of the Pan American Highway, the system of roads that was seeking to connect all the Americas. Specifically, it was proposed that the section between the bridge over the Cañitas river, in the district of Chepo, province of Panamá, to the border with Colombia be built. For this reason, Law 71 of September 20, 1973, was issued; it was amended by Law 53 of September 1, 1978. These provisions established the following:

> Article 1. The construction of the section of the Pan American Highway from the bridge over the Cañitas river in the District of Chepo, Province of Panamá and the border with the Republic of Colombia, is hereby declared to be of urgent social interest, as well as the use of the stable lands within a strip of eight (8 km) kilometers wide on each side of the central line of that highway….
> Article 4. The Executive Organ, consistent with the needs of public or social utility or based on the socioeconomic development projects, may regulate the adjudication of the lands within the zone described in Article 1 which are at present State property. Until such time as the Executive Organ issues the regulation referred to in this article, the adjudication shall be governed by the provisions.[103]

94. The IACHR observes that while the indigenous peoples were transferred to new lands, in subsequent years the State did not legally acknowledge their collective property rights nor did it physically delimit their territory. These factors plus the migration of peasants attracted by the construction of the Pan American Highway gave rise to the invasion of non-indigenous persons in the territories on which the alleged victims had been relocated.[104] In addition, according to the information presented by the parties, despite the promulgation of Cabinet Decree 156 the State did not effectively pay the total economic compensation agreed upon, but unilaterally halted those payments.[105]

3. Inter-institutional Commission, Decree 5-A, and Agreements of Mutual Accord (1980-1990)

95. Due to the breach of the initial commitments, the indigenous peoples had to enter into new agreements with the State. The IACHR observes that this renegotiation process was marked by the constant failure of the State to carry out the commitments entered into, followed by public demonstrations and acts of discontent, such as roadblocks on highways and embargos of timber, which led to the State entering into new agreements, which it would once again fail to respect.

96. As regards the payment of compensation, in 1980 the Kuna people reached an agreement on the suspended compensation payments, signed by the Vice President of the Republic, Ricardo De La Espriella. According to the terms agreed upon, the payment of the compensation shall continue for five more years, thus the payments were to be made for a total of eight years. Nonetheless, this new commitment was not carried out in full either.[106]

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[103] Law 71 of September 20, 1973, amended by Law 53 of September 1, 1978. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_027_2252.PDF. Annex 13. Report and Recommendation of the Intergovernmental Commission. Annex 21 to the State's communication of June 29, 2001. p. 1; and petitioners' initial petition of May 11, 2000. p. 15.

[104] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[105] Petitioners' initial petition of May 11, 2000. p. 15; Annex 22. Diagnóstico de la situación legal de las tierras de las comunidades indígenas de Alto Boyano, 2nd part, 1999, p. 22. Annex 23 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001. In addition, subsequent statements by the State verify the failure to make the payments. At the second meeting to reach a friendly settlement agreement, it is stated: "One must verify the payments made to the indigenous and peasants because of the construction of the Bayano Hydroelectric Project, and based on that information move towards viable solutions. A similar evaluation is needed for the Emberá of Ipetí and Piriatí." State's brief of February 18, 2002, received by the IACHR February 26, 2002.

[106] Petitioners' initial petition of May 11, 2000. p. 19; and State's brief of March 24, 2011, received March 25, 2011. p. 2. Other documentary evidence presented by the parties also makes reference to the prolongation for eight years of the compensation agreed upon: "Before the lake was flooded, the Government gave permits to exploit the timber in the area; with what is obtained from these resources compensation will be paid for eight years to the producers affected (indigenous and settlers)". Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of

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97. Beginning in 1981, a series of meetings were held between the authorities of the Kuna people of Madungandí and the Emberá, leaders of the different already-existing settlements of peasants, representatives of the Corporación del Bayano and state institutions related to land tenure.[107] As a result of these meetings, it was found that it was a complex situation, thus an inter-institutional commission was established that took charge "of the comprehensive Land Use Management of the Upper Bayano river basin."[108] That Commission was proposed with the objective of taking a census of the population in the Emberá communities of Ipetí and Piriatí; in addition to an initial study of the land tenure situation in some areas that were already considered conflictive, a study that sought to define the limits between the lands of the Kuna of Madungandí and the settlers. In addition, the Commission drew up a list of the settlers who had to leave the zone. Nonetheless, they opposed the eviction, which led to a series of conflictive situations between indigenous and settler communities.[109]

98. On April 23, 1982, the Government promulgated Decree 5-A, which regulated the adjudication to occupants and settlers of the lands that were declared to be state-owned by Law 71 of September 20, 1973, amended by Law 53 of September 1, 1978. Decree 5-A provided for the adjudication of lots, for sale, situated in the strip as wide as eight kilometers on either side of the central line of the Pan American Highway, from the Guayabo creek (quebrada Guayabo), parallel to the Wacuco river, in the *corregimiento* of El Llano, district of Chepo, and the border with Colombia.[110] That decree provided as follows in relation to the lands and natural resources of the indigenous peoples of the Bayano:

> Article 2. The adjudication under any guise of the state lands included and described is hereby prohibited: … (e) In the areas of the Kuna and Emberá indigenous *comarcas* whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of these communities. While that physical demarcation is being determined, the Kuna and Emberá communities may veto the requests for adjudication of plots that belong to the territories of those *comarcas* [*sic*].
> Article 5. In the territory of the *comarcas*, it shall be up to the National Bureau of Natural, Renewable Resources of the Ministry of Agricultural Development, together with the Kuna and Emberá indigenous communities, to see to the conservation and rational use of the natural, renewable resources such as the flora, or forest cover, the soils, fauna, and waters.
> In the event that a non-rational use is made of such renewable resources, the indigenous traditional authority shall so inform the competent authority of RENARE to beg that the corrective measures needed be taken….
> Article 9. The Officer of the Agrarian Reform shall reject the filing the requests for Adjudication when referring to plots included within the non-adjudicable areas, which are named in Articles 2, 3, and 4 of this Decree, and shall indicate to the petitioner verbally and in writing the absolute prohibition on initiating any clearing work in these areas under threat of ordering their removal, with the assistance of the official forces; and also with the loss of their improvements, in the event of a violation. In the case of persons who earn their living solely from farming or stock-raising, the

…continuation
May 11, 2000. p. 21. In addition, see Annex 6. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí the Emberá Collective Lands of Piriati, Ipeti and Maje Cordillera of 2002. Appendix E of the petitioners' brief of January 19, 2007, received by the IACHR on the same day; and Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí the Emberá Collective Lands of Piriati, Ipeti and Maje Cordillera of July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[107] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[108] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 23.

[109] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 23.

[110] Decree 5-A of April 23, 1982. "Which regulates the Adjudication of Rural State Lands, from Guayabo stream (Quebrada Guayabo) parallel to the Wacuco river, it is the Sub-district (Corregimiento) of El Llano, district of Chepo, to the border with Colombia." Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1980/1982/1982_019_1538.PDF.

> Officer of the Agrarian Reform is also obligated to indicate to said person the areas available for farming, stock raising, or agroforestry.

99. The IACHR observes that while Article 2 of Decree 5-A provided for the exclusion of the areas belonging to the Kuna and Emberá peoples, giving the National Bureau of Agrarian Reform the authority to adjudicate plots to occupants and settlers in the neighboring areas it aggravated the situation of risk to their territories, along with the failure to demarcate them, expressly recognized in the text of said Article 2.[111]

100. As the problematic situation lingered, in subsequent years the indigenous peoples continued their efforts to title, delimit, and demarcate their territories. On September 6, 1983, an agreement was signed among the Kuna people of Bayano, the Emberá community of Piriatí, and the Ministry of Interior and Justice, that the boundaries between the two indigenous peoples would be established.[112] Later, on August 3, 1984, the State and the Kuna people of Madungandí signed a commitment titled "Agreement of Mutual Accord" ("Convenio de Acuerdo Mutuo"). At the first point of that agreement the State, through the Corporación para el Desarrollo Integral del Bayano, reiterated its obligation to create a *comarca* for the Kuna people.[113]

101. On August 15, 1984, the authorities of the Emberá communities of Piriatí and Ipetí and the Corporación del Bayano signed an "Agreement of Mutual Accord" in which it was established that the Corporation undertakes to "take all steps necessary for attainment of the indigenous aspirations as regards the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriatí."[114]

102. Given that those commitments were not kept, the land continued to lack recognized and protected boundaries, which encouraged the continuing invasion of settlers on indigenous lands. Despite

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[111] Decree No. 5-A of April 23, 1982. Annex to the summary of the petitioners' intervention during the admissibility hearing, November 12, 2001. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1980/1982/1982_019_1538.PDF.

[112] That agreement literally provided as follows:

> 1. The boundary between the Kuna Comarca of Bayano and the Indigenous Community of Piriatí shall be the old dirt road of the Kuna Comarca;
>
> 2. To physically locate the dirt road that will serve as the boundary, it shall only be done by the participation of representatives of both indigenous groups jointly with the State representation;
>
> 3. The maintenance of the dirt road in question shall be done by the joint participation of both indigenous groups, as they deem advisable;
>
> 4. The Emberá indigenous of the Community of Piriatí shall have free access to the lake to develop their day-to-day activities such as transportation, hunting, fishing, etc.
>
> This land shall be assigned to the Indigenous Community by collective title and the boundaries agreed upon herein shall be considered for that purpose.

Annex 24. Agreement of September 6, 1983. Annex 14 to petitioners' initial petition of May 11, 2000; and Annex 7 to the State's communication of June 29, 2001.

[113] Specifically, the first article provided: "The Corporación para el Desarrollo Integral del Bayano undertakes with the Kuna Community of Madungandí to make every effort to proceed immediately to see the attainment of the aspirations of that community, so that the Comarca be established. By means of this Agreement, agreements are also established in relation to the conservation, protection, and rational use of the renewable natural resources such as the flora, fauna, and waters; which requires approval by the Corporación Bayano, the National Bureau of Renewable Resources (RENARE), and the authorities of the Kuna of Madungandí." Annex 25. Agreement of Mutual Accord of August 3, 1984. Annex 15 to petitioners' initial petition of May 11, 2000; and Annex 8 to the State's communication of June 29, 2001.

[114] That Agreement provided: "First. The Corporación Bayano undertakes to take all those steps necessary to see the attainment of the indigenous aspirations as regards the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriatí. Second. The works being carried out to attain the foregoing will be aimed at those lands being titled collectively, thus it will be the property of the indigenous population mentioned…." Annex 26. Agreement of Mutual Accord, August 15, 1984. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

this situation, the IACHR observes that the State took few if any actions aimed at removing the non-indigenous persons from the territories of the Kuna of Madungandí and the Emberá of Bayano.[115]

103. According to the information provided by the parties, in 1989 the Kuna of Madungandí drew up a Preliminary Bill for recognition of their territory under the legal concept of "*comarca indígena*," ("special indigenous district") which was submitted to the Ministry of Interior and Justice, and in 1990 to the Legislative Assembly.[116]

4. Aggravation of the invasion of non-indigenous persons, public protests, and creation of the Kuna Comarca of Madungandí (1990-1996)

104. The adjudication of plots to settlers in nearby lands, as well as the lack of any effective actions aimed at protecting the territory of the Kuna people of Madungandí and the Emberá from 1980 to 1990 led to an aggravation of the invasion by settlers on indigenous lands[117] and intensified the conflictive situation in the area.[118]

105. The State's response was to create an "Inter-Disciplinary Team" made up of the National Bureau of Local Governments, the Bureau of Indigenous Policy of the Ministry of Interior and Justice, and the Director of the Corporación del Bayano, among other state institutions. The team was in charge of drawing up an agreement, signed March 23, 1990, with two indigenous commissioners in addition to the authorities of the State, which states: "the possessory rights of the indigenous sector of the area of Bayano, as well as the ecological balance so necessary for the life of the Bayano Dam are today [suffering detriment due to] the incursion of settlers in the area."[119] Accordingly, Article 1 of the agreement prohibits burning in the protection zones, and in Article 2 it is resolved that: "The settlers who are within the limits of the Comarca, and in the upper part of the protection basin of the river, as well as those who arrived after December 20 of this year have to leave the area in dispute."[120]

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[115] The minutes of the meeting held with the authorities of the Kuna indigenous people and the Corporación del Bayano on August 7, 1984, appears in the record before the IACHR. There, reference was made to the payment of compensation to settlers for leaving the indigenous lands. [Annex 27. Annex 16 to petitioners' initial petition of May 11, 2000; and Annex 9 to the State's communication of June 29, 2001]. In addition, an official telegram sent by the Office of the Governor of the Province of Panamá to the Mayor of the District of Chepo, of July 18, 1995, appears in the record before the IACHR; that telegram gave notice that "in the case of Ipetí-Emberá and Kuna, national government made decision to remove the settlers indigenous areas as of April 1992. Messrs. Enock Ponte and Guadalupe de Pineda should carry out this decision immediately." [Annex 28. Official telegram of July 18, 1995. Annex 25 to petitioners' initial petition of May 11, 2000]. Also before the IACHR is Resolution No. 4, adopted by the Corporación del Bayano on March 16, 1989, by which it prohibited "hunting, indiscriminate logging, slash-and-burn in the area owned by the Corporación para el Desarrollo Integral del Bayano," with monetary sanctions imposed on violators. The IACHR notes that while the illegality of the activities carried out by the invaders in the zone is recognized, this measure was aimed at protecting the property of the Corporation, rather than that of the indigenous peoples. [Annex 29. Resolution No. 4 issued by the Director of the Corporation dated March 16, 1989. Annex 17 to petitioners' initial petition of May 11, 2000; and Annex 10 to the State's communication of June 29, 2001].

[116] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. pp. 23 and 25.

[117] According to information presented to the IACHR, in those years "[the settlers] arrived in the zone indiscriminately and without control due to the lack of authority in the area and in this way settlements began form along the Pan American Highway." Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 4.

[118] The situation is described by information produced by the parties as follows: "This moment is considered critical in the recent history of the events in the Bayano basin: the indigenous groups once again denounced to the Government the incursion in their lands, the settlers alleged that those lands 'are property of the State and specifically of the Corporación Bayano' and the Government responded by creating a new Commission made up of the pertinent institutions and the representatives of the indigenous and peasant sectors, the commission was to take charge of studying the problem of the invasions reported." Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 24.

[119] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001.

[120] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001.

106. To carry out the agreement signed March 23, 1990, on July 16, 1991, the indigenous peoples signed the "Working Agreement for the New Land Use Management of the Upper Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí, and other Communities," in which the state agencies involved undertake to "make efforts to relocate the invader settlers from the protected lands for the conservation of the flora and fauna of the Bayano watershed." To that end, September 15, 1991 was set as the deadline for carrying out what was provided for.[121] Nonetheless, the relocation did not take place on the date indicated. As a result of this new failure to perform, the Kuna people blocked the highway that goes around Lake Bayano.

107. The result of this action was the issuance of Resolution 002 and Resolution 63. The first of these was adopted on January 24, 1992, by the Director General of the Corporación del Bayano, ordering the relocation of the "Ipetí Emberá settlers to undisputed areas" and the "recovery of all the lands that are property of the Corporación Bayano and that have been compensated or reoccupied."[122] In addition, Resolution 63, of March 17, 1992, adopted by the Ministry of Interior and Justice, it was resolved to confer to the office of the governor of the province of Panamá and to the office of the mayor of Chepo the powers, and the economic and logical support necessary for ordering the relocation of the settlers in the disputed areas to which Resolution 002 makes reference. In addition, instruction was offered to the police to facilitate the mobilization and protection of the settlers and to maintain order in the area.[123]

108. Despite such resolutions, once again the settlers were not removed. In the face of this situation, in May 1993 the Kuna and the Emberá staged public demonstrations demanding implementation of the agreements reached with the State, which led to a national strike organized by indigenous leaders from different parts of the country.[124]

109. Due to the pressure generated by these public demonstrations, President Guillermo Endara created a Mixed Commission entrusted to a presidential delegate, Miguel Batista, and made up of state and indigenous representatives. This Commission prepared a study on the reforms should have been implemented by January 1994. These included "the creation of a *reserva de comarca* for the Kuna of Madungandí and of the Bayano region" and the "demarcation of the collective lands of the 42 Emberá communities that were outside of the Comarca de Emberá-Drua, which was created by Law 22 of 1983."[125] The State did not carry out the actions needed to effectively implement these commitments.

110. On December 5, 1994, the Corporación del Bayano issued a resolution prohibiting the establishment of new human settlements, logging, burning, and the expansion of the agricultural frontiers on the existing farms.[126] On December 13, 1994, the Minister of Interior and Justice, through the National Bureau of Local Governments, instructed the mayor of the district of Chepo to carry out that resolution.[127] The IACHR was not informed of effective actions taken to carry out the resolution.

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[121] Annex 31. Working Agreement for Renewed Land Use Management of Alto Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí, and Other Communities, July 16, 1991. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[122] Annex 32. Resolution 002 of January 24, 1992. Annex 19 to petitioners' initial petition of May 11, 2000; and Annex 14 to the State's communication of June 29, 2001.

[123] Annex 33. Resolution 63 of March 17, 1992. Annex 20 to petitioners' initial petition of May 11, 2000; and Annex 13 to the State's communication of June 29, 2001.

[124] Petitioners' initial petition of May 11, 2000. p. 23. Annex 34. Articles titled "Panama: Indians say blood will flow unless they get land rights," Inter Press Service, May 18, 1993; "Antimotines enfrentan a los indígenas que se toman Puerto Obaldía," El Siglo, May 29, 1993; and "Panama: Tensions Between Government and Amerindians Subsides," Inter Press Service, June 3, 1993. Annexes 40, 41, and 42 to petitioners' initial petition of May 11, 2000.

[125] Petitioners' initial petition of May 11, 2000. pp. 24-25.

[126] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 25.

[127] Annex 35. Communication from the Minister of Interior and Justice, December 13, 1994. Annex 14 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

111. On March 31, 1995, an agreement was signed by the indigenous authorities and the settlers who were living at that time on lands of the Kuna of Madungandí, approved by the authorities of the national government. That agreement established that:

> Taking into consideration the antecedents of other proposed Comarcas, the settlers remain where they are under certain special conditions:
> - They may not expand their agricultural frontiers beyond where they are currently found.
> - The lands that at this moment they usufruct may not be assigned or exchanged or sold to third persons.
> - If a settler does what is indicated above or leaves the area, these lands revert to the *comarca*.
> - All this shall be done under the conditions agreed upon and by documents signed with the authorities and the parties affected.[128]

112. On December 29, 1995, the law was passed that created the Kuna Comarca of Madungandí (Comarca Kuna de Madungandí), which was adopted as Law 24 of January 12, 1996. Articles 1 and 2 of this law provide:

> Article 1. The Kuna Comarca of Madungandí is hereby created, constituted by a geographic area in the province of Panamá, district of Chepo, sub-districts of El Llano and Cañitas, situated within the following boundaries […] The polygon described has an area of approximately one thousand eight hundred (1,800) square kilometers or one hundred eighty thousand (180,000) hectares.[129]

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[128] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 5.

[129] Article 1 of Law No. 24 described the following boundaries of the *Comarca*: starting from point No. 1, situated 400 meters beyond the intersection of the Pan American Highway and the road that leads to the Viejo Pedro dam, situated 34.4 km from the Garita de Chepo, one follows along the Pan American Highway towards Darién until reaching the monument C.R. 107C line 3 of the "Tommy Guardia" Geographic Institute. From this monument C.R. 107C line 3, one continues along the Pan American Highway towards Darién 200 meters, until encountering point No. 2. From this point one follows, along the dirt road to the Southwest until reaching the bed of the stream of Sardian or Caracolito; one continues along this stream, downriver, until its mouth at Lake Bayano, distinguished as point No. 3. From this point one follows an imaginary straight line to the Southwest, crossing Lake Bayano, to Point Majecito (Maje Island), distinguished as point No. 4. From this point, more to the East, one follows to Point Read, distinguished as point No. 5. From this point one continues along an Imaginary straight line, crossing Lake Bayano, to the Southeast, until reaching Point Pueblo Nuevo, distinguished as point No. 6. From here one follows along the curve at 63 meters altitude (maximum level of Lake Bayano, to the East until Point Ugandi or Point Nilo, distinguished as point No. 7. From this point one follows along a dirt road to the Southeast until reaching point No. 8, located in the population center of Quebrada Cali, at a distance of approximately 2,125 meters from the bridge over the Aibir River. From here one follows 883 meters along the Pan American Highway towards Darién, until encountering the intersection with the dirt road that is to the left, distinguished as point No. 9. From here one follows the dirt road to the Southeast, a distance of 9.1 km, until encountering the mouth of the Catrigandi River in Lake Bayano, distinguished as point No. 10; from point No. 9 to point No. 10 it shares a boundary with the Emberá-Piriati collective lands. One then follows the Catrigandi river upriver a distance of 3.1 km until encountering P. I. No. 117, where point No. 11 is located. From here one continues along the dirt road to the Curti River, identified as point No. 12. From this point one follows upriver, to the bridge over the Curti River on the Pan American Highway, identified as point No. 13. One then follows the Pan American Highway towards Darién to the bridge over the Wacuco River or Dianwardumad, identified as point No. 14. From this point one follows the river or Dianwardumad, downriver, and at a distance of 70 meters one reaches the dirt road, identified as point No. 15. From here one follows that dirt road in the Southern direction 71° East and at a distance of 11.1 km one reaches point No. 16, situated in the Playa Chuso or Dibirdirrale river. From this point to the South 79° East at a distance of 9 km one reaches point No. 17. From here one follows that dirt road to the South 39° East and at a distance of 3.1 km, one reaches point No. 18. From this point straight South, at a distance of 600 meters, one reaches point No. 19, situated in the Higueronal or Dirudi stream. From this point at a distance of approximately 5.1 km, one reaches point No. 20, situated at the intersection with the road that leads from the population center of La Ocho to Pingadicito. From this point Northward 66° East, at a distance of 5.5 km, one reaches point No. 21, situated in the Pingadicito river. From this point, following the dirt road to the Northeast, passing the Pingandi river, one reaches point No. 22. From this point to the North 36° East, one reaches point No. 23, situated at a distance of 400 meters from the road that connects the towns of Sábalo and Wala. From this point, to the North 85° East, one reaches point No. 24, situated along the road from Sábalo to Wala. From this point to the South 60° East, one covers a distance of approximately 2.6 km to point No. 25, situated along the road from Sábalo to Wala. Following the road we encounter point No. 26, situated at the border between the provinces of Darién and Panamá. From there one continues along that border to the North to point No. 27, situated in the Serranía de San Blas. From here one follows to the Northwest along the entire boundary of San Blas and the province of Panamá, to point No. 28, situated to the North of the Espavé or Bunorgandi river. From here one continues straight South to the headwaters of the Espavé or Bunorgandi river, then along that river, downriver, covering a distance, from the Serranía, of 9.9 km, to reach point No. 29. Then to the South 47° West, at a distance of approximately 5 km, one reaches point No. 30 in the Playita or Dinalugandi river. From this point, to the South 82° West, at a distance of approximately 4.1 km, one reaches point No. 31, situated in the Chuluganti river. From here one follows that river,

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> Article 2. The lands described in the previous article are the collective property of the Kuna Comarca of Madungandí, whose tenure, conservation, and use shall be regulated in keeping with the Constitution, the national laws in force, and the provisions of this law.
> The subsoil, which belongs to the State as per Article 254 of the Constitution, may be exploited as determined by section 5 of that article, the laws that govern the matter, and by agreement of the authorities and communities of the Kuna Comarca of Madungandí (General Congress).[130]

113. Article 21 of that law established as follows: "The Agreement of March 31, 1995, signed by indigenous and peasants who live in the Kuna Comarca of Madungandí and approved by the authorities of the national government, shall be respected."[131]

5. Coordinating the Mesas de Concertación of the Darién Sustainable Development Program and the new Inter-Governmental Commission (1996-2001)

114. Despite the adoption of Law No. 24 the invasion in territories of the Comarca continued.[132] This led in August 1996 to members of the Kuna people of Madungandí blocking the Pan American Highway, which eventually led to a confrontation with the National Police, the result being that several persons were wounded.[133]

115. In view of this situation, on August 8 and 29, 1996, indigenous and peasants were called to meetings at the offices of the IRHE in which it was agreed to create an Inter-Institutional Commission to verify the changes that occurred with the arrival of new settlers.[134] Once the results were obtained, on December 16, 1996, a meeting was held between the Minister and Vice-Minister of Interior and Justice, the governor of the province of Panamá, the mayor of Chepo, and the representatives of the Kuna Comarca of Madungandí. On that occasion, the following conclusion was reached:

> Maintain the commitment to respect Law 24 of 1996, as well as examining the application of the agreement to which that law refers in Article 21 to implement it.
> The Government undertook to take the steps and make the legal efforts so that the persons identified as settlers who were in the *comarca* illegally would be evicted on January 30, 1997.[135]

116. Following up on this agreement a new meeting was held in December 1997 at the Municipal Council of Chepo. In the presence of various state offices – such as Agrarian Reform, INRENARE, and IRHE – indigenous leaders reported on the continuation of the situation.[136]

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downriver, to point No. 32, situated at the mouth of Emilio or Acuasibudian stream in Lake Bayano. From this point one follows the contour of the lake in the direction of the Viejo Pedro dam, at a distance of approximately 3.7 km, until reaching point No. 33, situated at the mouth of Emilio or Acuasibudian stream in Lake Bayano. From this point in a straight line to point 1, which was the starting point of this description.

[130] Annex 5. Law 24 of January 12, 1996. Annex 11 to petitioners' initial petition of May 11, 2000; Annex to brief submitted by the petitioners, January 19, 2001; and Annex 15 to the State's communication of June 29, 2001.

[131] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 6.

[132] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 5.

[133] Annex 36. Article "Choque armado entre Indios y Policías," Periódico Crítica, August 7, 1996; "Defenderemos a muerte la Comarca," La Prensa, August 8, 1996; "Indígenas denuncian maltrato de policías y firman tregua," El Universal de Panamá, August 10, 1996. Annexes 47, 48, and y 49 to petitioners' initial petition of May 11, 2000, respectively.

[134] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. p. 28. Annex 31 to petitioners' initial petition of May 11, 2000.

[135] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. p. 28. Annex 31 to petitioners' initial petition of May 11, 2000.

[136] In particular, the then-Cacique General of the Comarca, José Oller, stated: "the problems have worsened because the settlers are building houses of concrete on the lands of the Comarca, in addition to having a negative impact on indigenous production, burning coffee groves, cutting the plantains and plantings of fruit trees, and other violations of the agreements signed

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117. Given the permanence of the invasion of settlers and the systematic failure of the State to respect the agreements reached, on June 13, 1999, the Special Kuna General Congress of Madungandí issued Resolution No. 1, which provides:

> To demand of the Panamanian authorities the enforcement of Law 24 of 1996, subject to the following actions: …
> 2. With respect to the settlers
> a. Total eviction of the settlers found in the Kuna Comarca of Madungandí for failure to carry out the agreements entered into between the authorities of Madungandí and the settlers, and above all Law 24 of January 12, 1996.
> b. To determine the authority of the sub-district, mayor's office, governor's office who will be in charge of seeing to the implementation of the agreements entered into.[137]

118. After that resolution, a meeting was held on July 21, 1999, at the National Bureau of Indigenous Policy with the presence of the National Environmental Authority, the mayor of Chepo, the Bureau of Agrarian Reform, the office of the governor of Panamá province, among other agencies and offices. The purpose was "to seek a definitive solution to the land conflict between the Kuna indigenous ethnicity of Madungandí and the peasants who have emigrated from the central provinces, settling in the communities of Wacuco, Loma Bonita, and Curtí."[138]

119. Subsequently, the Ministry of Economy and Finance, through the "Darién Sustainable Development Program," financed by the Inter-American Development Bank, carried out the project of "Mesas de Concertación of the Bayano Zone."[139] In the context of this program meetings were held for dialogue with the authorities of the Kuna people and of the Emberá communities of Ipetí and Piriatí.[140] According to the information produced by the parties, on August 18, 1999, a meeting was held that included the participation of the indigenous authorities; leaders of the peasants who had settled in Loma Bonita, Curti, and Wacuco; and governmental authorities. As a result of that meeting, on August 19, 1999, an "Agreement of Commitments" ("Acuerdo de Compromisos") was signed. It established as follows:

> 1. That a rapid study of land tenure and appraisal of the disputed lands be carried out.
> 2. This study should be presented to the Secretariat for Inter-Institutional Coordination of the Sustainable Development Program through a Multidisciplinary team with the participation of Agrarian Reform, technical personnel, and commissioners of the Kuna Comarca of Madungandí and from the peasant sector.
> 3. Request of the Technical Coordinating body and the Inter-American Development Bank (IDB) that the necessary for carrying out the land tenure study be secured.
> 4. The study will take as a basis the other studies performed previously and should be done on a priority basis. In addition one should take into consideration the censuses previously agreed upon by both parties.[141]

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such as the use of mechanized equipment on their crops, …. Destroying the barbed wire fences by Wacuco." Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. p. 29. Annex 31 to petitioners' initial petition of May 11, 2000.

[137] Annex 37. Resolution No. 1 of the Extraordinary Kuna General Congress of Madungandí, June 13, 1999. Annex E to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[138] Annex 38. Minutes of the meeting held July 21, 1999, at the National Bureau of Indigenous Policy. Annex to the State's brief of July 9, 2001, received by the IACHR July 13, 2001.

[139] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 3.

[140] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000.

[141] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

120. In addition, on August 25, 1999, the Ministry of Economy and Finance, through the Darién Sustainable Development Program, issued a "Final Report of Conclusions and Plan of Action."[142] Among the recommendations, it was concluded that:

> Based on the results obtained by the consultancy on the process of assessment and ranking of the land tenure conflicts in the upper basin of the Bayano river, it is deemed fundamental that the Government assume the corresponding responsibility and establish clear rules and criteria for the use of the territory in this fragile area….
> It is deemed necessary to begin implementation of a Land Use Management Plan in the zone from a holistic, democratic, and participatory perspective….
> In addition, it is deemed fundamental to establish a normative framework that covers the concept of 'Collective Lands' for the indigenous communities, in which one regulates the actions that had to be taken with these lands that are the property of the indigenous communities situated outside of the already established Comarcas, as is the case of the commitments acquired since 1975 with the Emberá of Ipetí and Piriatí.[143]

121. That program of the Ministry of Economy and Finance recommended the following as a plan of action: (i) the demarcation, delimitation, and marking of the lands of each indigenous community (Ipetí, Piriatí, and Comarca of Madungandí), and the fulfillment of the commitments acquired in the Agreements of Majecito and Farallón; (ii) in relation to the clearing up of land titles in the community of Ipetí, promote the purchase of the settlers' improvements; (iii) in relation to the clearing up of land titles in the community of Piriatí, undertake a study by the Agrarian Reform, by Manuel Poveda and José María García Quintero, an on-the-ground inspection, and the consultation on receiving compensation; (iv) the issuance by the Bureau of Agrarian Reform of a resolution to recognize the collective usufruct rights of the Emberá of Ipetí and Piriatí, while promoting the law that recognizes the rights to Collective Lands; and (v) a land tenure study of the land occupied by the communities of Loma Bonita, Curti, and Wacuco within the Kuna Comarca of Madungandí to get a clear picture of the physical situation of the lands.[144]

122. After the assessment by the Sustainable Development Program a new Inter-Governmental Commission was created to resolve the land dispute. In its "Report and Recommendation," submitted to the proceeding before the IACHR, possible solutions were put forth that were put to the consideration of the National Government.[145]

123. The IACHR observes that as a result of the *mesas de concertación* with the indigenous peoples, a plan of action was drawn up that recommended specific measures that would resolve the land dispute, and the Inter-Governmental Commission recommended actions to be taken to solve the indigenous land question. The measure that has come to the attention of the IACHR is the physical demarcation of the Kuna Comarca of Madungandí by the National Commission on Political-Administrative Boundaries[146], done from April to June 2000. In this respect, the Commission observes that this action

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[142] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[143] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. pp. 20-21. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[144] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. p. 21. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[145] As the State indicated, such alternatives can be summarized as follows: "Compensate the settlers and return the lands to the indigenous communities; exchange the lands occupied by the settlers; [or that] the settlers remain as per the terms of the agreement of January 31, 1995, i.e. that they were there prior to said date, and that all those who entered afterwards must leave." State's brief of June 29, 2001, received by the IACHR July 2, 2001. p. 5. Annex 13. Report and Recommendation of the Inter-governmental Commission. Annex 21 to the State's communication of June 29, 2001.

[146] The National Commission on Political-Administrative Boundaries was created by Law 58 of July 29, 1998. According to Articles 101 and 102 of that law, the Commission is permanent and is authorized to "advise and recommend the advisable and definitive solution to the conflicts and discrepancies that may exist between boundaries of sub-districts, districts, and provinces of the Republic. As for the demarcation of indigenous *comarcas*, it shall coordinate with the Bureau of Indigenous Policy of the Ministry of Interior and Justice."

was carried out as it was considered a condition for mitigating the impact of the paving of the highway from Puente Bayano to Yaviza, which was part of the Darién Sustainable Development Program. The information available to the IACHR also indicates that the demarcation process was done in coordination with the traditional authorities and members of the Comarca.[147]

124. In summary, as of the date the petition was presented, on May 11, 2000, none of the commitments acquired by the State of Panama regarding the titling, demarcation, and delimitation of the territories of the Emberá communities of Bayano had been carried out; the Kuna Comarca of Madungandí, recognized as such in 1996, was in the process of being demarcated; and the occupation by settlers on the indigenous territories persisted in both cases. As of that date, the State had not carried out the commitment assumed in relation to the payment of the compensation stemming from the hydroelectric facility, acquired through the Decrees and the many agreements mentioned.[148]

6. Pursuit of a friendly settlement agreement before the IACHR: The Indigenous-Government Commission (2001-2006)

125. In May 2000, the petition was filed with the IACHR. In their brief of December 12, 2001, the petitioners expressed their willingness to reach a friendly settlement agreement. From that moment, until early 2007, a friendly settlement agreement was pursued, with several interruptions in the negotiations as a result of differences between the parties. At the outset of this stage, the alleged victims presented Resolution No. 0028-01 of November 24, 2001, adopted by the General Congress of the Comarca, in which they made known the more important aspects of their claims.[149]

126. In order to pursue a friendly settlement, an Indigenous-Government Commission was established with the participation of the traditional authorities of the Kuna and Emberá of Bayano, and of

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[147] Annex 2. Final Report of the National Commission on Political-Administrative Boundaries on the Physical Demarcation of the Kuna Comarca of Madungandí of 2000. Annex 3 to the petitioners' brief of July 13, 2012, received by the IACHR that same day.

[148] That is why on that date the petitioners stated: "For 25 years, the Kuna and Emberá indigenous peoples have attempted to maintain their cultural integrity on peacefully negotiating and re-negotiating with the government of Panama, for the purpose of preventing new harms and the growing risk of annihilation of their culture, caused by the construction of the Bayano Hydroelectric Dam. For 25 years, the Panamanian government has ignored the protests of the Kuna and the Emberá, has renounced its obligation with them, and has deliberately treated their interests and rights as inconsequential. The Kuna and the Emberá now seek to present this injustice to the Commission." Petitioners' initial petition of May 11, 2000. p. 4.

[149] That resolution provided as follows:

That the Government of Panama publicly recognizes the harm to the human rights of the Kuna of Madungandí and Emberá indigenous peoples caused by the construction of the Bayano Hydroelectric Complex.

That the Government of Panama undertakes to carry out the Agreement of Farallón and subsequent agreements, such as:

1. Clearing the title to the lands of the Kuna Comarca of Madungandí and of the collective lands of the communities of Ipetí, Piriatí, and Alto Bayano.

2. The approval as a matter of immediate legal obligation of a law on collective lands for the Emberá communities, especially Ipetí, Piriatí, and Alto Bayano.

3. The payment of the compensations to which we have a right due to losses of lands, forests, fauna, and alteration of the ecosystem related to our lifestyles; which should be individual, community-based, and *comarca*-based.

4. The payment of the expenses of the Kuna and Emberá indigenous communities towards carrying out the agreements, including the legal action.

5. The payment of expenses, costs, and fees to our representatives or legal representatives.

6. The commitment of annual investments to benefit the communities of the Emberá *comarca* of Piriatí, Ipetí and Alto Bayano.

In addition to others as the representatives deem pertinent.

State's brief of December 14, 2001, received by the IACHR December 19, 2001.

authorities from the national, provincial, and local governments. In the framework of this Commission, it was determined that three sub-commissions would be formed: (i) Sub-commission on Lands and Territories, "in charge of coordinating the clearing of title to the lands of the Kuna Comarca of Madungandí and of the collective lands of the communities of Ipetí, Piriatí, and Alto Bayano"; (ii) Sub-commission on Compensation and Expenses, with "the purpose of reviewing the compensation for the Kuna Comarca of Madungandí and to quantify the new compensation payments to be made to the Kuna and Emberá on an individual, *comarca*, and community basis"; and (iii) Sub-commission on Social Investments, "in charge of determining the amount of social investments for the Kuna Comarca of Madungandí and the indigenous communities as collective compensation."[150]

127. In this stage the State took some actions such as circulating signs with the notice for invaders signed by the Minister of Interior and Justice[151]; the training by the National Environmental Authority of 30 indigenous persons as forest rangers[152]; and coordination between the National Environmental Authority and indigenous authorities for granting permits for community exploitation of the forests for the benefit of the Comarca of Madungandí.[153]

128. Among the actions taken to reach a friendly settlement, the petitioners had the "Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera" prepared; it was presented to the Ministry of Interior and Justice on May 12, 2003.[154] This report details the amount of compensation pending payment, which came to US$7,824,714.19 (seven million eight hundred twenty-four thousand seven hundred fourteen and 19/100 U.S. dollars). That report also presented an assessment of the different needs of the Kuna Comarca of Madungandí and the Emberá communities of Bayano.[155]

129. Also, during this stage Executive Decree 267 of October 2, 2002 was adopted, extending the scope of application of the aforementioned Decree 5-A of April 23, 1982, Article 2 of which provided[156]:

> An exception is made, as regards the application of this Decree, of the following lands:
> 1. The Comarca of Madungandí.
> 2. The collective lands of the Emberá population of Ipetí and Piriatí, in the district of Chepo, province of Panamá.
> 3. The lands declared non-adjudicable by Cabinet Decree 123 of May 8, 1969.

130. The process of negotiation culminated definitively on August 19, 2006, the date on which the authorities of the Kuna and Emberá peoples of Bayano issued a communiqué stating their willingness

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[150] Petitioners' brief of January 16, 2002, received by the IACHR January 18, 2002.

[151] Annex 39. Note titled "Advertencia" ("Notice"), signed by the Minister of Interior and Justice. State's brief of June 18, 2002, received by the IACHR July 1, 2002. p. 14.

[152] Annex 40. Certification of the National Environmental Authority ARAPE-01-631-02 of November 8, 2002. Annex to State's brief of November 25, 2002, received by the IACHR December 2, 2002.

[153] State's brief of November 25, 2002, received by the IACHR November 29, 2002; and petitioners' brief of July 8, 2003, received by the IACHR on August 4, 2003.

[154] Annex 41. Letter from authorities of the Kuna Comarca of Madungandí to the Vice Minister of Interior and Justice by which they formally submit the Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera. Petitioner's brief of July 8, 2003, received by the IACHR August 4, 2003.

[155] Annex 6. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera of 2002. Annex E to petitioners' brief of January 19, 2007, received by the IACHR the same day.

[156] Annex 42. Executive Decree 267 of October 2, 2002, "which extends the scope of application of Decree 5-A of April de, 1982, to the Adjudication, with Consideration, of the State Plots situated in the part of the National Territory that goes from the Quebrada Cali, to the Quebrada Guayabo, in the Sub-district of Tortí, district of Chepo, province of Panamá," (G.O. 24,652 of October 3, 2002). State's brief of October 3, 2011, received by the IACHR on October 4, 2011.

to continue the processing of the petition before the IACHR, considering: "The national government has no intention of resolving our just demands."[157] This decision was communicated to the IACHR in a writing received on January 19, 2007.[158]

7. Creation of the High-Level Presidential Commission and establishment of a procedure for the adjudication of collective property rights in indigenous lands (2007-2012)

131. The IACHR observes that in the following years the agreements adopted by the State continued to go unimplemented. Given the lack of government attention to their claims, in October 2007, members of the Kuna indigenous people staged a public protest, which was repressed by police agents, resulting in several indigenous persons being wounded and detained.[159]

132. Executive Decree No. 287, of July 11, 2008, "creates the High-Level Commission to attend to the problems of the Indigenous Peoples of Panama."[160] According to the information available to the IACHR, in May 2008 this Commission made a visit to the areas of the Kuna Comarca of Madungandí invaded by settlers.[161] That Commission also proposed a framework law for the collective titling of the property of indigenous peoples, which was taken up by the Cabinet Council and presented to the Legislative Assembly, contained in Draft Law 411. On December 23, 2008, the government proposal was approved by Law No. 72 "which establishes the special procedure for the adjudication of the collective property rights to lands of the indigenous peoples who are not in the *comarcas*,"[162] which was regulated by Executive Decree No. 223 of July 7, 2010.

133. On January 26, 2009, the government promulgated Executive Decree No. 1, by which Article 2 of Decree No. 5-A of April 23, 1982 was amended, regarding the adjudication of rural state lands in the district of Chepo. As regards the indigenous peoples of the Bayano, Executive Decree No. 1 established:

> Article 2: The adjudication under any guise of the state lands included and described: …
> (c) In the areas of the Kuna and Emberá indigenous Comarcas, whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of those communities. While said physical demarcation is completed, the communities of Kuna and Emberá may veto the requests for adjudication of plots that go deep into the territories of those comarcas.[163]

134. With respect to the compensation due, in July 2009, at the request of the authorities of the Kuna Comarca of Madungandí and of the Emberá of Bayano, a report was prepared entitled "Socio-Economic Technical Report on Compensation and Investment: the Kuna Comarca of Madungandí and

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[157] Annex 43. Communiqué from the indigenous communities of Bayano regarding the construction of the Bayano hydroelectric complex, August 19, 2006. Annex to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[158] Petitioner's brief of January 19, 2007, received by the IACHR the same day.

[159] Annex 44. News articles in Annex 2 to the brief of November 13, 2007, received by the IACHR the same day.

[160] According to information that is a matter of public knowledge, this decision was preceded by the adoption, on April 28, 2007, of a Declaration of the Indigenous Peoples of Panama.

[161] Additional observations on the merits submitted by the State by brief of April 27, 2010, received by the IACHR on May 3, 2010; and thematic hearing on the right to private property of the indigenous peoples of Panama, held in the 133rd period of sessions, October 28, 2008.

[162] Law 72, "which establishes the special procedure for the adjudication of the collective property of indigenous peoples who are not within the *comarcas*," published in Official Gazette No. 26193, December 30, 2008.

[163] Executive Decree 1 of January 26, 2009, "By which Article 2 of Decree No. 5-A of April 23, 1982 is amended." Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2009/26238_2009.PDF.

the Emberá Collective Lands of Piriati, Ipeti, and Maje Cordillera."[164] According to the information collected for the preparation of this report, the total amount of compensation for the losses caused by the construction of the hydroelectric facility still pending payment came to B/. 9,512,804.30 (nine million five hundred twelve thousand eight hundred four and 30/100 balboas).[165]

135. Subsequently, based on the above-mentioned Law 72, the Emberá communities of Piriatí and Ipetí filed a request for adjudication of lands on October 27, 2009, which was reiterated on January 26, 2011, without this request having been resolved.[166]

136. In view of the delay in recognition of their collective property rights, the Emberá and Wounaan indigenous peoples, including the Emberá communities of the Upper Bayano, engaged in acts of protest.[167] As a result, on November 18, 2011, the respective authorities of these peoples signed an "Agreement on Action and Decision" with representatives of ANATI and of the Ministry of Interior and Justice. The IACHR observes that by that agreement the state authorities undertook to title the collective lands of the communities of the Emberá and Wounaan peoples, which included the Emberá communities of Piriatí and Ipetí.[168]

137. On January 30, 2012, there was an invasion of settlers numbering 150 to 185 persons in the Emberá community of Piriatí.[169] Accordingly, members of the Emberá people of the Bayano engaged in acts of protest and their traditional authorities publicly denounced the continuing invasion by settlers in their territories, and the lack of attention to their requests by the competent authorities.[170]

138. As a result, on February 8, 2012, the State signed a new agreement called the "Agreement on Piriatí Emberá," which established the creation of "a commission for monitoring the processes of collective titling until their complete adjudication" and reiterated "to the ANATI the commitment acquired by agreement signed on November 18, 2011 to expeditiously process all the requests for collective titling and deliver the first title no later than March 2012."[171] According to the information available to the IACHR, to date the State has not granted collective title to the lands claimed by the communities of Piriatí and Ipetí of the Emberá people of Bayano.

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[164] Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera. July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[165] Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera, July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[166] Annex 45. Application for the Adjudication of Collective Lands of the communities of Piriatí and Ipetí, submitted by the Emberá General Congress of Alto Bayano on January 26, 2011. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

[167] Petitioners' brief of July 13, 2012, received by the IACHR the same day.

[168] Annex 46. Agreement of Action and Decision – ANATI/MINGOB/Pueblo de Tierras Colectivas Emberá y Wounaan, November 18, 2011. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012 and Annex 6 to the petitioners' brief of July 13, 2012, received by the IACHR the same day.

[169] Bolívar Jaripio Garabato, member of that community, describes the events as follows: "2012 this year, on January 30 more than 150 persons came into our community, it had a major impact for our community, we even had to get a lawyer which, we don't have, to do this, because if we did not do so we cannot remove these people…." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. See hearing at http://www.oas.org/es/cidh/. See also, petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012 and petitioners' brief of July 13, 2012, received by the IACHR the same day.

[170] Communiqué from the Emberá and Wounaan People of Panama, brought together in the General Congress of the Emberá and Wounaan Comarca, the General Congress of the Emberá and Wounaan Collective Land, National Congress of the Wounaan People, the Emberá General Congress of Alto Bayano, the Bribri General Council, and the Bugle General Congress. January 31, 2012. Available at: http://www.prensaindigena.org.mx/?q=content/panam%C3%A1-comunicado-del-pueblo-Emberá. In addition, petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

[171] Annex 47. Agreement of Piriatí Emberá of February 8, 2012. Petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

139. During the processing before the IACHR, the petitioners repeatedly asserted that the State was granting property titles to non-indigenous persons on the lands claimed by those Emberá communities of Bayano. The State, for its part, did not reject that statement nor did it present information that would allow one to controvert it. To the contrary, there is information in the record before the IACHR that indicates that on January 26, 2009, a private person asked the National Bureau of Agrarian Reform to individually adjudicate, with consideration, a part of the land claimed by the Emberá community of Piriatí, situated in the locality of Quebrada Cali; that institution that did not reject the request.[172] In response, on September 8, 2009, authorities of that community filed an opposition brief with the National Bureau of Agrarian Reform, which was forwarded to the 15th Circuit Court for Civil Matters of the First Judicial Circuit. In the process, a motion of appeal was filed, which is pending before the First Superior Court.[173]

140. The IACHR observes that through various acts the State undertook to suspend the recognition and adjudication of possessory rights requested by third persons. In this respect, it notes that in said Agreement of Action and Decision of November 18, 2011, the indigenous authorities request "that recognition of the Possessory Rights that are being requested by indigenous and non-indigenous persons from elsewhere be suspended." Along these lines, at point 3 the General Administrator of ANATI stated "that as of this moment it will suspend the recognition and adjudication of possessory rights within the polygons that take in the collective lands requested by the people through their traditional authorities."[174] The IACHR also notes that at the third point of the "Agreement of Piriatí Emberá," of February 8, 2012, signed by state authorities, it is noted: "That despite the requests for adjudication of collective titles by the Emberá and Wounaan communities, the lands considered for titling are invaded by settlers or persons not authorized to do so, adducing possessory rights recognized by the municipal authorities of the provinces of Darién and Panamá."[175] In view of the foregoing situation, the ANATI issued resolutions to suspend the processing of requests for adjudication of private titles in the areas claimed by the Emberá communities of Bayano.[176] In view of the information available to it, the IACHR considers as proven that property title has been granted to persons on lands claimed by the Emberá communities of Ipetí and Piriatí.

D. Administrative and judicial actions taken by the Kuna and Emberá indigenous peoples to protect their lands and to secure payment of the compensation due for the loss of their ancestral territories

141. Throughout the process of claims described above, the Kuna indigenous people of Madungandí and the Emberá of Bayano directed, through their traditional authorities and/or legal representatives, many communications to authorities at the national, provincial, and local levels; and they filed numerous administrative and criminal actions with the objective of obtaining legal recognition of their territories, securing the payment of the compensation owed, and achieving the effective protection of their territories in the face of the invasion of non-indigenous persons and the harm caused by them to their natural resources.

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[172] Annex 48. Application submitted to the National Bureau of Agrarian Reform. Petitioners' brief of May 16, 2012, received by the IACHR the same day.

[173] Annex 49. Official Note No. 824 of March 23, 2012, by which the 15th Circuit Court for Civil Matters of the First Judicial Circuit referred Case file 2010-5622. Petitioners' brief of May 16, 2012, received by the IACHR the same day.

[174] Annex 46. Agreement of Action and Decision – ANATI/MINGOB/Pueblo de Tierras Colectivas Emberá y Wounaan, November 18, 2011. Petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

[175] Annex 47. Agreement of Piriatí Emberá of February 8, 2012. Petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

[176] Annex 50. ANATI Resolution No. ADMG-058-2011 of December 1, 2011, first article; Annex 51. Resolution of ANATI No. ADMG-001-2012 of February 8, 2012, first article; and Annex 52. Certification issued by the ANATI, March 12, 2012. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

1. Communications and initiatives with authorities at the national, provincial, and local levels

142. According to the information provided by the parties, at least since 1990 the alleged victims sent a large number of communications, letters, and requests to different government authorities seeking actual implementation of the promises to formalize the collective property rights over their territories, and to remove the illegal occupants who are living within their boundaries.

143. As appears in the record before the IACHR, with the objective of calling for the creation of a *comarca* for the Kuna people of Madungandí, their traditional authorities, in addition to many efforts to sign the above-mentioned agreements with the State, sent numerous communications to the highest level state authorities such as the President of the Republic [177] and the Minister of Interior and Justice.[178]

144. In addition, the authorities of the Kuna Comarca of Madungandí sent numerous letters and communications demanding protection for their lands vis-à-vis the illegal occupation by peasants. In the record before the IACHR one finds letters sent to the *Procuradora General de la Administración*[179], to the office of the governor of the province of Panamá[180], to the mayor of the district of Chepo[181], among other state authorities.[182]

145. By the same token, the IACHR observes that the traditional authorities of the Kuna Comarca of Madungandí on numerous occasions sent letters to the Presidency of the Republic asking that actions be taken in relation to the invasion of settlers[183] and calling for payment of the compensation

[177] Annex 53. Letter from the Kuna Regional Congress to President Guillermo Endara, June 11, 1990, in which it asks that Decree 156 be implemented, and that the Kuna Comarca of Madungandí be established. Annex E to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[178] Annex 54. Letter from the Cacique General, Second Cacique, and Kuna Secretary General to the Minister of Interior and Justice of June 21, 1991, requesting the establishment of the Kuna Comarca of Madungandí. Annex 11 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 55. Letter from the Cacique General, Second Cacique, and Kuna Secretary General to the Minister of Interior and Justice, January 20, 1992, requesting his good offices to resolve the problem of the Bayano basin. Annex 12 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 56. Letter from the Kuna General Congress to the Minister of Interior and Justice, March 12, 1992, requesting that the actions aimed at protecting the Comarca be expedited. Annex 13 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[179] Anexo 57. Letter from CEALP, on behalf of the *Comarca* of Madungandí, to the *Procuradora General de la Administración*, requiring the observamce of the Law 24 of 1996 and of the agreement of December 16, 1996 signed between the Minister of Interior and Justice, and the authorities of the Kuna *Comarca*, undated. Annex 17 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[180] Annex 58. Letter from the Kuna General Congress of Madungandí to the Governor of the Province of Panamá, April 27, 1997, denouncing the illegal occupation of lands in the zone of Wacuco. Annex 18 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001. Annex 59. Letter to the Governor of the Province of Panamá from the Kuna Comarca of Madungandí, February 13, 2003, by which they report that settlers who live within the community in Viejo Pedro are threatening indigenous persons with firearms, accordingly it is requested that she act in her capacity as Governor. Annex D to the petitioners' brief of additional observations on the merits received by the IACHR December 18, 2009; Annex 60. Letter from the Kuna General Congress of Madungandí to the Governor of the province of Panamá, July 8, 2003, requesting a solution to the problem of the invasion by settlers. File 212, folio 39. Annex to the petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[181] Annex 64. Letter from the authorities of the community of Ipetí to the mayor of the district of Chepo, October 5, 1997 in which they inform him of the invasion of settlers in the region of Curti. Annex 20 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[182] Annex 60. Communication to the IRHE, Office of the Mayor of Chepo, Agrarian Reform, and Office of the Governor of the Province of Panamá, July 19, 1998. File 212, folios 42-43. Annex to the petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[183] Annex 63. Communication from the General Congress of the Kuna Comarca of Madungandí to the President of the Republic, February 21, 2000. Annex D to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Communication to the presidential adviser of September 28, 2002, asking that a census be conducted to determine the number of settlers on lands within the Comarca. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Communication to the President of the Republic, December 2, 2002. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18,

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for damages caused by the construction of the hydroelectric complex.[184] The record also includes evidence of the numerous actions brought before the Ministry of Interior and Justice to win protection for their lands.[185]

146. In addition to the foregoing are the many efforts made to sign the agreements, resolutions, and decrees mentioned in the preceding section. Nonetheless, these agreements or commitments were repeatedly ignored by the State.[186]

147. In summary, the IACHR finds that by means of their representative institutions, for more than four decades the alleged victims have taken initiatives of different sorts vis-à-vis the authorities of the national, provincial, and local government requesting compensation for their resettlement, legal recognition of their lands, and protection for their lands in the face of the invasions by non-indigenous persons.

2. Administrative procedures followed by the alleged victims

a) Administrative procedures for eviction of illegal occupants

148. The documents produced by the petitioners that are part of the record before the IACHR include numerous administrative steps for the purpose of countering the settlers' actions.

149. In effect, on April 5, 2002, the traditional authorities of the Kuna Comarca of Madungandí initiated an administrative proceeding of eviction of illegal occupants before the mayor of the district of Chepo, based on Article 1409 of the Judicial Code of Panama.[187] Given the lack of response after nearly a year had transpired since the filing of the request, on February 17, 2003, the authorities of the Kuna Comarca of Madungandí began an administrative proceeding of eviction before the governor of the province of Panamá.[188] In the context of that proceeding, on March 7, 2003, the representatives of the

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2009. Annex 63. Letter to the President of the Republic, November 18, 2004. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 65. Communication from the community of Wacuco to the President of the Republic, March 17, 2005. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[184] Annex 63. Communication to the President of the Republic, December 2, 2002. Annex D to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Letter to the President of the Republic, November 18, 2004. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[185] Annex 59. Letter from the authorities of the Kuna Comarca of Madungandí to the Minister of Interior and Justice, February 13, 2003, accusing several individuals of helping the settlers with illegal transactions to buy and sell lands of the Comarca. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 60. Letter from the Kuna General Congress of Madungandí to the Minister of Interior and Justice, August 14, 2003, requesting that he seek a solution to the invasion of settlers. File 212, folio 39. Annex to the petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 61. Communication to the Vice Minister of Interior and Justice of January 10, 2006. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[186] This is expressed in the Resolution, "By which the Extraordinary General Congress of Madungandí, in the use of its legal authorities, approves the filing of the legal action against the Panamanian State before the Commission on Human Rights, an organ of the Organization of American States," September 1999, whose seventh and eighth considering paragraphs indicate: "That in these 23 years the traditional authorities of the Comarca of Madungandí have held hundreds of meetings, and entered into agreements with various national, provincial, and local governmental authorities for the solution and responses to the problems of the Comarca of Madungandí," "That it has been a systematic mockery and a denial of justice on the part of the governmental agencies on not carrying out the agreements signed to resolve the problems of land invasion. In addition the Ascanio Villalaz Hydroelectric Complex has not represented any benefit whatsoever to our communities, but only problems." Annex 62. Resolution of the Extraordinary Kuna General Congress of Madungandí, September 1999. Annex E to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[187] Annex 63. Annex to the petitioners' brief of July 8, 2003, received by the IACHR August 4, 2003; and Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[188] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

Kuna Comarca of Madungandí presented a brief reiterating the beginning of the procedure[189] and on March 12, 2003, they produced the certification issued by the National Bureau of Indigenous Policy that accredited the representativity of the authorities of the Kuna Comarca of Madungandí who initiated the eviction process.[190]

150. According to the information in the record before the IACHR, the first act by the governor of the province of Panamá was to issue the resolution of June 6, 2003, ordering the correction of the eviction action so as to include the information on the Caciques General of the Kuna Comarca of Madungandí.[191] That order was answered by the requesters a few days later, by brief of June 26, 2003.[192]

151. Subsequently, the authorities of the Comarca reported on new invasions in the areas of Wacuco and Tortí Abajo[193], and presented a request expedite the procedure, asking that the corresponding authorities be ordered to protect the property of the Kuna Comarca of Madungandí. In addition, in that brief they request referral to the criminal courts of the Secretary General of the Federación de Trabajadores Agrícolas, who was said to be promoting the invasion of new lands and distributing flyers instigating persons to invade the Comarca.[194]

152. On March 10, 2004, one year after the request for eviction was filed, the office of the governor sent consultative note No. 033-04 to the *Procuraduría de la Administración* requesting its legal opinion on the authority of the governor's office to entertain the request submitted.[195] By note C-No. 73 of March 31, 2004, the *Procuraduría de la Administración* answered the consultation, concluding that the authority vests in the Presidency of the Republic, as the president is the maximum chief of police of the nation.[196]

153. In view of that, by resolution of August 2004, the office of the governor of the province of Panamá declared itself to lack the authority and ordered the record archived, considering that it should have been forwarded to the Presidency of the Republic. Nonetheless, five months after this decision was made, the record had not been forwarded to the Presidency.[197] For that reason, on January 24, 2005, the traditional authorities of the Kuna Comarca of Madungandí filed the request for eviction of illegal occupants with the Presidency of the Republic.[198]

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[189] Annex 63. Annex to petitioners' brief of July 8, 2003, received by the IACHR August 4, 2003; and Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[190] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[191] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[192] Annex 63. Annex to petitioner's brief of July 8, 2003, received by the IACHR August 4, 2003; and Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[193] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[194] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[195] Annex 63. Brief for pursuing an administrative proceeding submitted to the President of the Republic of Panama, January 24, 2005. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[196] Annex 60. File 212, folios 44 to 54. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[197] Annex 63. Brief for pursuing an administrative proceeding submitted to the President of the Republic of Panama, January 24, 2005. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[198] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

154. According to the information produced by the parties, the President referred the matter to the Ministry of Interior and Justice, which led the authorities of the Kuna Comarca to present a letter rejecting this decision on February 16, 2005, given that the matter had been brought the attention of this authority previously, without it coming up with a solution to the problem. Subsequently, by note presented to the Presidency on October 31, 2006, the authorities of the Comarca requested information on the status of the procedure and the actions taken, a communication for which there was no response according to the information available to the IACHR.[199]

155. Subsequently, in order to appoint an administrative authority for the Comarca, on June 4, 2008, Executive Decree 247, added Articles 66a and 66b to Article 66 of Executive Decree No. 228 of 1998, the Organic Charter of the Comarca of Madungandí.[200] Executive Decree No. 247 provided as follows:

> Article 1. Article 66a is added to Executive Decree 228 of December 3, 1998, as follows:
> Article 66a. The administration of administrative police justice, within the special political division of the Kuna Comarca of Madungandí, shall be entrusted to a *Corregidor de Policía*, who shall meet the requirements established by Law for the exercise of that position, and shall have the functions and powers established by the Law for those who occupy the post of *Corregidor de Policía*, and shall enjoy the support of the National Police when required. The decisions of the *Corregidor de Policía* shall be appealable to the Ministry of Interior and Justice.
>
> Article 2. Article 66b is added to Executive Decree 228 of December 3, 1998, as follows:
> Article 66b. The Corregidor de Policía of the Kuna Comarca of Madungandí shall be appointed by the President of the Republic, jointly with the Minister of Interior and Justice. The *Corregiduría* shall have its office in the seat of the Comarca and the operating costs shall be charged to the budget of the Ministry of Interior and Justice.

156. After the issuance of this provision, a Corregidor was appointed for the Kuna Comarca of Madungandí; he held this office in 2008 and 2009.[201] According to the information produced by the parties, in 2008 two eviction actions were filed with this authority, and on March 23, 2009, the Corporación de Abogados Indígenas, acting on behalf of the Kuna Comarca of Madungandí, filed an administrative action for "protection of lands" against the persons who were invading areas of the Comarca.[202] The petitioners and the State agreed that this authority took some eviction actions in relation to the invasion of settlers.[203] This Corregidor was removed in 2009 and in October 2011 a new person was appointed to the position.[204]

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[199] Annex 66. Communication to the President of the Republic, February 15, 2005. Annex E to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 67. Communication to the President of the Republic, October 26, 2006, presented on October 31, 2006. Petitioners' brief of May 16, 2012, received by the IACHR the same day. In addition, petitioners' brief of July 13, 2012, received by the IACHR the same day.

[200] Annex 68. Annex B to the petitioners' brief of May 25, 2011, received by the IACHR May 31, 2011; and State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[201] It appears in the record before the IACHR that on July 29, 2008, the National Director of Indigenous Policy sent the Minister of Interior and Justice a communication requesting "that the slate of candidates to occupy the position of Corregidor of the Kuna Comarca of Madungandí … be presented." Annex 69. Annex to the brief by the requesters in the precautionary measures proceeding of June 14, 2010, received by the IACHR June 14, 2011.

[202] Annex 70. Administrative action for protection of lands, filed March 23, 2009. Annex to the brief by the requesters in the precautionary measures proceeding of June 14, 2010, received by the IACHR June 14, 2011.

[203] The petitioners asserted that "during his administration some evictions were carried out" [petitioners' brief of May 16, 2012, received by the IACHR the same day], and that "two eviction actions were presented, one in the area of Tortí Abajo and another in Wacuco, both in 2008. With these actions, some persons were evicted – not the majority – and that was able to control the entry of more settlers (illegal occupants). When the term of the first Corregidor concluded, the invasions resumed" [petitioners' brief of July 13, 2012, received by the IACHR the same day]. The State indicated that the Corregidor "has impeded the massive invasion by peasants from Torti, Margarita de Chepo, Chiman, and central provinces, among others." [State's brief of May 14, 2012, received by the IACHR the same day.]

[204] In a brief filed June 14, 2011, the petitioners note that after his removal, no *corregidor* has been appointed for the Comarca, even though the authorities asked the indigenous for names as of October 2009 [brief of requesters in precautionary measures proceedings of June 14, 2010, received by the IACHR June 14, 2011]. Subsequently, in a brief of October 12, 2011, the

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157. According to the information produced by the parties, the petitioners submitted at least two requests for eviction to the new Corregidor.[205] The information available to the IACHR indicates that as a result, working visits were made in January 2012 in different sectors of the Comarca, investigative measures in which the presence of settlers was confirmed; and two administrative hearings were held, in December 2011 and January 2012.[206] The information contained in the case file indicates that an agreement was reached with the settlers to evacuate the invaded lands, by March 31, 2012 at the latest. Given the failure to comply by the agreed date, through Resolution No. 5 of April 2, 2012, the *Corregidor* ordered "the eviction, as intruders, of the persons who are illegally occupying *comarca* lands in the Lago, Río Piragua, Río Seco, Río Bote, Wacuco, Tortí, and other sectors of the Kuna of Mandungandí *Comarca*," against which the settlers presented an appeal, which was admitted on May 31, 2012, and submitted to the Ministry of Government, in accordance with article 1 of Executive Decree No. 247. Through Resolution No. 197-R-63 of August 22, 2012, that Ministry decided to "[a]ffirm, in its entirety, Resolution No. 5 of April 2, 2012 […]."[207] According to the statements of the State in its last submission to the IACHR, the eviction based on this decision is currently being carried out.

b) Administrative proceedings for ecological harm pursued before the National Environmental Authority

158. According to the information produced by the parties, the alleged victims pursued procedures before the National Environmental Authority (hereinafter "ANAM": Autoridad Nacional del Ambiente) in view of the ecological harm caused by the settlers' activities in different zones located within their territories.

159. Specifically, in early January 2007, members of the Kuna Comarca of Madungandí denounced the Regional Administration of Eastern Panama (Administración Regional de Panamá Este) of the ANAM of engaging in clear-cutting in their territory.[208] The ANAM made an inspection visit on January 30, 2007, in which it verified the facts alleged, as appears in Inspection Report No. 006-2007.[209] Based on that visit, it concluded that there was a violation of Law No. 1, of February 3, 1994, "which establishes the forestry legislation in the Republic of Panama, and other provisions are issued" (hereinafter "Forestry Law"). By Interlocutory Order No. ARAPE-ALR-008-2007 of February 8, 2007, the Regional Administration of Eastern Panama of the ANAM admitted the complaint filed by the members of the Kuna Comarca of Madungandí and began an administrative investigation. By Resolution ARAPE–AGICH-030-2007, of May 21, 2007, the persons found in the inspection visit were considered responsible for unauthorized clearing of forest, accordingly they were ordered to pay the sum of B/. 500.00 (five

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petitioners reiterated that the appointment of the Corregidor had not yet been made [petitioners' brief of May 25, 2011, received by the IACHR May 31, 2011. p. 4]. Those facts were not denied by the State but rather, to the contrary, in a brief submitted September 27, 2011, it noted that a *corregidor* was appointed for the 2008-2009 period, and that as of that date, for various reasons, a new Corregidor had not been appointed for the Kuna Comarca of Madungandí [State's brief of September 26, 2011, received by the IACHR September 27, 2011; and State's brief of October 3, 2011, received by the IACHR October 4, 2011]. According to the State's subsequent statements, on October 20, 2011 a person was appointed to the position of Corregidor or councilman. [Submission of the State of September 17, 2012, received on September 24, 2012.]

[205] Petitioners' brief of May 16, 2012, received by the IACHR the same day; and petitioners' brief of July 13, 2012, received by the IACHR the same day.

[206] Annex 71. Annex 13 to petitioners' brief of July 13, 2012, received by the IACHR the same day; and Annex 4 of the State's submission of September 17, 2012, received by the IACHR on September 24, 2012.

[207] Annex 72. Resolution No. 5 of April 2, 2012 issued by the Special *Corregidor* of the Kuna of Mnadungandí comarca. Annex 4 to the submission of the State of September 17, 2012, received by the IACHR of September 24, 2012; and Annex 73. Resolution No. 197-R-63 of August 22, 2012, issued by the same Ministry of Government. Annex 1 to the submission of the State of September 17, 2012, received by the IACHR on September 24, 2012.

[208] Annex 74. Communication from the mayor of Chepo to the Minister of Interior and Justice, January 8, 2007. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[209] Annex 75. Inspection Report No. 006-2007 issued by the National Environmental Authority, January 30, 2007. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

hundred balboas), to be paid severally to four persons.[210] Nonetheless, the IACHR was not informed that this sanction was enforced. To the contrary, according to the petitioners, and based on information not controverted by the State, it has not been enforced.[211]

160. Subsequently, the Corporación de Abogados Indígenas filed a complaint with the ANAM for illegal logging in the area of La Playita, Playa Chuzo, in the Kuna Comarca of Madungandí. The ANAM made a visit on March 14 and 15, 2007, in which it observed three areas of secondary forest that had been logged, with an area of approximately three hectares, thus it concluded in Technical Report No. 18 that there had been a violation of Article 80 of the Forestry Law, and it was recommended to reinforce oversight by the ANAM and the Police.[212] The record does not include any evidence of the application of a sanction vis-à-vis the mentioned violation of the Forestry Law. To the contrary, in response to the request for information in this respect by the IACHR, the petitioners stated: "We have persistently requested information from the ANAM yet they have not responded as to whether they sanctioned Messrs. Irineo, Iván, and Arnulfo Batista and Pascual Abrego (*sic*)" and "as for the technical report, it does not provide us any information on it."[213]

c) Administrative proceedings for the adjudication of collective property rights

161. The Emberá of Bayano took several initiatives over the years, particularly before the President of the Republic, to obtain recognition of their collective property rights over their lands. Certainly in the documents produced by the parties that are part of the record before the IACHR it appears that on June 13, 1995, the Emberá communities of Ipetí and Piriatí filed a request for demarcation and titling of collective lands before the Cabinet Council of the President of the Republic of Panama, for the purpose of obtaining legal recognition of their lands. That request was filed under Article 12 of the Agrarian Code, which provides that: "For adjudications or transfers that exceed 500 hectares, the approval of the Cabinet Council shall be necessary."[214]

162. In response to this petition, the chief counsel to the Presidency issued Note No. 159-95-LEG of August 2, 1995, by which, making reference to Article 123 of the Constitution – Article 127 of the current Constitution – he demanded that certain requirements, not expressly contained in this provision, be met.[215] Accordingly, Aresio Valiente, member of the Indigenous Program of CEALP, requested an appointment to address that matter, but did not obtain a response, according to the information available to the IACHR.[216]

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[210] That sanction was based on Law 1, of February 3, 1994, "by which the forestry legislation is established in the Republic of Panama, and other provisions are issued" and Board of Directors Resolution No. 05-98 of January 22, 1998. In particular, Article 106(2) of this Resolution provides: "When logging or the destruction of forest resources impedes evaluating the volume of timber and/or the number of trees affected, a minimum sanction shall be applied of …. For young secondary forest (stubble) … (B/.1,000.00). When the infraction consists of the destruction of the undergrowth the fines shall correspond to 50% of the foregoing figures…." Annex 76. Resolution ARAPE – AGICH-030-2007 issued by the ANAM May 21, 2007. State's brief of July 17, 2007, received by the IACHR August 14, 2007.

[211] Petitioners' brief of July 13, 2012, received by the IACHR the same day.

[212] Annex 77. Technical Report No. 18 issued by the National Environmental Authority. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[213] Petitioners' brief of May 16, 2012, received by the IACHR the same day.

[214] Annex 78. Request for demarcation and titling of collective lands, June 13, 1995. Annex 26 to petitioners' initial petition of May 11, 2000.

[215] In particular, it is indicated that the request should meet the following requirements: (i) steps to measure the area in order to obtain the cartographic expression; (ii) bureaucratic transactions, formalities, and other requirements of the property titles that are granted administratively by the Bureau of Agrarian Reform, which should issue the Resolution on Adjudication if it considers it appropriate; (iii) number of members relocated from the Ipeti-Emberá Community especially its productive population and (iv) certification of Mr. Bonarge Pacheco as cacique of the Ipeti-Emberá community. Annex 96. Note No. 159-95-LEG of August 2, 1995 issued by the Director of Legal Counsel to the Presidency. Annex 27 to the petitioners' initial petition of May 11, 2000.

[216] Annex 79. Letter of September 8, 1995. Annex 28 to petitioners' initial petition of May 11, 2000.

163. According to the information produced by the parties, on January 27, 1999, a new request for recognition of lands was presented to the Presidency of the Republic from the Emberá community of Ipetí on behalf of the "Organización de Unidad y Desarrollo de Ipetí-Emberá," an association that has legal status granted by the Ministry of Interior and Justice by Resolution No. 118-PJ-35.[217] On the same date, a request for recognition of lands from the Emberá community of Piriatí was presented to the Cabinet Council of the Presidency of the Republic. By means of this request, it was asked that titling be done in the name of the "Asociación para el Desarrollo de la Comunidad de Piriatí – Emberá Alto del Bayano," a representative organization of the community of Piriatí with legal status granted by the Ministry of Interior and Justice by Resolution No. 583-PJ-256.[218] No response to these two requests appears in the record before the IACHR.

164. As mentioned, on December 23, 2008, Law No. 72 was adopted. It "establishes the special procedure for the adjudication of collective property rights to their lands for the indigenous peoples who are not in the *comarcas*."[219] According to its Article 4, the competent authority for carrying out that procedure was the National Bureau of Agrarian Reform of the Ministry of Agricultural Development.[220]

165. Based on that law, on October 27, 2009, the representatives of the Emberá indigenous communities of Ipetí and Piriatí filed a request for adjudication of lands with the National Bureau of Agrarian Reform by which they requested the collective titling of 3,191 hectares in the name of the community of Ipetí and 3,754 in the name of the community of Piriatí.[221] On that occasion, it was also requested that "in keeping with Article 111 of the Agrarian Code, and as a matter that must be ruled on before the underlying claim can be decided, the suspension should be ordered at any stage of any request for or processing of property titles or certification of alleged possessory rights over the lands or any administrative application that is aimed at obtaining property title over those lands."[222]

166. On October 8, 2010, Law 59 was adopted by which it is ordered that the National Bureau of Agrarian Reform be replaced in its authority by the ANATI.[223] On January 26, 2011, the General Cacique of the Emberá General Congress of Alto Bayano reiterated to the ANATI the request for adjudication of land in favor of the Emberá communities of Piriatí and Ipetí.[224]

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[217] According to that communication, the following were attached to justify the request: (i) proof of the juridical personality of the Organización de Unidad y Desarrollo de la Comunidad de Ipeti-Emberá, (ii) a population census, and (iii) a map produced by persons authorized to perform this type of technical work. Annex 80. Letter of January 27, 1999, sent by Marcelino Jaén on behalf of the Ipeti-Emberá community. Annex 29 to petitioners' initial petition of May 11, 2000.

[218] According to that communication, the following were attached to justify the request: (i) proof of the juridical personality of the Organización de Unidad y Desarrollo de la Comunidad de Ipeti-Emberá, (ii) a population census, and (iii) a map produced by persons authorized to perform this type of technical work. Annex 80. Letter of January 27, 1999, sent by Marcelino Jaén on behalf of the Ipeti-Emberá community. Annex 29 to petitioners' initial petition of May 11, 2000.

[219] Law 72, "which establishes the special procedure for the adjudication of the collective property rights over the land of the indigenous peoples who are not within the *comarcas*," regulated by Executive Decree No. 223 of July 7, 2010.

[220] Law 72, Article 4.

[221] Annex 81. Process of requesting free adjudication of the collective property rights to lands granted in compensation to the communities of Ipetí and Piriatí for their displacement for construction of the Bayano Dam. Annex to petitioners' brief of May 16, 2012, received by the IACHR the same day.

[222] Annex 81. Process of requesting free adjudication of the collective property rights to lands granted in compensation to the communities of Ipetí and Piriatí for their displacement for construction of the Bayano Dam. Annex to petitioners' brief of May 16, 2012, received by the IACHR the same day.

[223] Law 59, of October 8, 2010, "Law that creates the National Land Management Authority, unifies the authority of the General Bureau of Cadastre, the National Bureau of Agrarian Reform, the National Land Management Program, and the 'Tommy Guardia' National Geographic Institute."

[224] Annex 45. Application for Adjudication of Collective Lands of the communities of Piriatí and Ipetí, submitted by the Emberá General Congress of Alto Bayano, January 26, 2011. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012 and Annex 4 to the petitioners' brief of July 13, 2012, received by the IACHR the same day.

167. The titling process included, in August 2011, a field visit by the Ministry of Interior, the National Bureau of Local Governments, the National Commission on Political-Administrative Boundaries, the National Bureau of Indigenous Policy, and the traditional authorities of the Emberá communities of Piriatí and Ipetí.[225] According to the information available to the IACHR, to date this titling procedure has not concluded; rather, it has been necessary, as referenced earlier, to sign two new agreements.[226]

3. Criminal proceedings concerning the invasion by peasants and crimes against the environment

168. In addition, the alleged victims initiated criminal actions against settlers for ecological crimes and invasion of their territories. In the documents produced by the parties that are part of the record before the IACHR one finds five criminal complaints against settlers for different crimes, some of which were joined.

a) Complaint for the crime of illicit association to engage in criminal conduct, usurpation, harm to property, illicit enrichment, ecological crime, and others before the Fifth Prosecutorial Circuit

169. On December 20, 2006, the Corporación de Abogados Indígenas de Panamá presented, on behalf of the General Caciques of the Kuna Comarca of Madungandí, a criminal complaint before the Attorney General of the Nation against 127 persons for the crime of illicit association to engage in criminal conduct, usurpation, harm to property, illicit enrichment, ecological harm, and all others that result from the illegal occupation of the lands of the Comarca. By means of that complaint the corregidors of El Llano and Tortí, the mayor of Chepo, the governor of the province of Panamá, and the President of the Republic were all alleged to be liable for the delict of abuse of authority and infraction of the duties of public servants.[227]

170. By resolution of January 29, 2007, the Office of the Attorney General of the Nation ordered that the investigation be removed to the Prosecutorial Circuit of the First Circuit of Panama.[228] By resolution of February 13, 2007, the Office of the 15th Prosecutor of the First Circuit of Panama undertook to study the complaint and declared that the investigation was open.[229] On February 28, 2007, the 15th Prosecutor's Office forwarded the investigation to the Office of the Specialized Prosecutor on the Environment, as it was considered a specialized matter.[230] On March 14, 2007, the Office of the Fifth

[225] Annex 10. Technical report "Gira de campo para la revisión de la propuesta de Tierras Colectivas en la provincia de Darién, Distrito de Chepigana, corregimientos de Santa Fe y la Provincia de Panamá, Distrito de Chepo, corregimiento de Tortí; según ley 72 de 23 de diciembre de 2008," and technical report "Gira de campo para la revisión del ante proyecto y aprobación de tierras colectivas a nivel nacional según ley 72." Annex to State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[226] In the last brief filed by the State, received by the IACHR May 14, 2012, it states: "… the delivery date of the Collective Property Titles of the Territories of Ipetí Emberá, Piriati Emberá, and Maje Emberá Drua [was agreed upon] as May 17, 2012…. In addition, the National Land Authority shall issue a certification of the indigenous territories of Piriati, Ipeti, and Maje-Emberá that are in the process of adjudication…." State's brief of May 14, 2012, received by the IACHR the same date. In its last submission to the IACHR, the State affirmed that a request presented by the authorities of the Emberá people of Bayano to the ANATI on August 13, 2012, is currently in "process of adjudication" "in accordance with an agreement between the State and the Traditional Authority in this region." State's brief of September 17, 2012, received on September 24, 2012. In addition, according to what was reported by the petitioners in their last brief, received by the IACHR June 20, 2012, the adjudications applied for have not been carried out. In particular, they noted that "to date no collective title has been granted, the settlers have not been evicted, nor has protection been given to the indigenous territories of Darién not to mention the Emberá of Alto Bayano [*sic*]." Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

[227] As background to this allegation, mention is made of the lack of a response in the administrative sphere, given that as of December 20, 2006; the legal action presented to the President of the Republic on January 24, 2005, had not been admitted or dismissed. Annex 60. File 212, folios 1 to 10. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[228] Annex 60. Resolution of the Office of the Attorney General of the Nation, January 29, 2007. File 212, folios 74 and 75. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[229] Annex 60. File 212, folio 77. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[230] Annex 60. File 212, folios 78 and 79. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

Prosecutorial Circuit, specialized in environment, initiated its consideration of the preliminary inquiry.[231] In response to the request by the Commission regarding this investigation, the State informed the Commission that "the Attorney General of the Nation has state that it has not been possible to locate this criminal complaint […]."[232]

b) Criminal proceeding for crimes against the environment before the Office of the 11th Prosecutor of the First Judicial Circuit

171. On January 16, 2007, the Caciques General of the Kuna Comarca of Madungandí filed a complaint for crime against the environment before the Specialized Unit on Crime against the Environment of the Technical Judicial Police, which received number 002-07. It was based on Article 394 of Law 5 of January 28, 2005, which punishes with imprisonment of two to four years and with a fine of 50 to 150 days "one who, breaching the established norms on environmental protection, destroys, extracts, contaminates, or degrades the natural resources, causing irreversible adverse effects, direct or indirect." Specifically, they denounced that unknown persons were devastating forest areas of the Kuna Comarca of Madungandí, especially the areas of Loma Bonita, Curtí, Wacuco, and Tortí Abajo. The complaint identified two persons who were said to be leading the movement of peasants to the territory of the Comarca.[233]

172. On January 23, 2007, the Chief of the Unit on Crimes against the Environment took steps to determine the identity of the persons allegedly responsible, requests for information that were answered on January 25, 2007.[234] In addition, on January 23, 2007, it sent a request for information to the ANAM in order to determine whether the Comarca was part of the Bayano watershed, which was answered in the affirmative.[235] By resolution of January 25, 2007, the Chief of the Unit on Crimes against the Environment opened the corresponding preliminary investigation.[236]

173. After taking supplemental statements from the first and second caciques of the Kuna Comarca of Madungandí, by resolution of January 30, 2007, it was ordered to forward the proceedings up until that moment to the Office of the Special Prosecutor for Environmental Crimes, considering that the complaint should have been filed with the Circuit Judges, according to Article 159 of the Judicial Code. The complaint was forwarded the same day.[237]

174. In tandem with the foregoing process, on February 1, 2007, the Corporación de Abogados Indígenas de Panamá, in representation of the Kuna Congress of Madungandí, filed a criminal complaint for crimes against the environment with the 11th Prosecutor of Panama against three individuals.[238] On February 2, 2007, it was decided to assign to the Office of the 11th Prosecutor of the First Judicial Circuit of Panama the investigation in the context of the above-mentioned complaint 002-

[231] The last action of which the IACHR has knowledge is that on April 9, 2007, the 11th Prosecutor of the Circuit communicated with the Office of the Fifth Prosecutor of the First Judicial Circuit to report that a complaint was lodged with his office by the Caciques General of the Kuna Comarca of Madungandí for various offenses. In his last communication Héctor Huertas stated that it was joined to the criminal proceeding described next.] Annex X. File 212, folio 81. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[232] Submission of the State of September 17, 2012, received on September 24, 2012.

[233] Annex 82. File 0118, folios 1 and 2. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[234] Annex 82. File 0118, folios 12-14 and 17-25. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[235] Annex 82. File 0118, folio 15. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[236] Annex 82. File 0118, folio 30. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[237] Annex 82. File 0118, folios 44 and 46. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[238] Annex 82. File 0118, folios 49 and 50. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

07.[239] Accordingly, on February 28, 2007, the Office of the 11th Prosecutor admitted as private accuser the Cacique General of the Comarca, and on April 24, 2007, incorporated three persons as defendants.[240] According to the information produced by the parties, on August 22, 2007, and September 7, 2007, that prosecutorial office conducted field inspections.[241] According to the evidence before the IACHR, on May 29, 2008, the 11th Prosecutor's Office issued Prosecutorial Review no. 151, in which it concluded that:

> […] despite the various technical evaluations carried out by the experts of the National Envrionmental Authority, the [accused] cannot be considered responsible of this fact, given that the experts have concluded that these devastations have taken place approximately 10 to 15 years, so no one can be held responsible even through they have been found in the lower Curtí sector[.] [S]imilarly, it was concluded that in this site there was not environmental affectation, and in the area where some degree of environmental affectation was found, Playa Yuso beach and Viejo Pedro, there is no evidence to establish the responsibility of the accused.[242]

175. According to the foregoing, the Prosecutor's Office requested the Second Circuit Court of the First Judicial Circuit of the Panama Province to order the temporary stay of the investigation.

c) Criminal proceeding before the Office of the Fifth Specialized Prosecutor of the First Circuit of Panama

176. On January 30, 2007 Héctor Huertas, attorney for the alleged victims, filed a complaint with the Technical Judicial Police of the district of Chepo, that on that same day he was going through the Comarca with personnel from ANAM when, in the zone of Tortí Abajo, they surprised four persons indiscriminately felling trees. The complaint was identified as CHE-029-2007.[243] On that same day, January 30, 2007, these persons were detained preventively by members of the Police of Tortí, and the next day they were handed over to the Technical Judicial Police.[244]

177. After taking a series of investigative measures[245], on January 31, 2007, the Technical Judicial Police of Chepo forwarded the file to the *Personería Municipal* of Chepo, the investigative agency of the Public Ministry, indicating that the accused continued in custody.[246] That officer known as the Personera Municipal took statements from the persons detained and by resolution of February 1, 2007, she ordered the application of measures to appear before the authorities instead of preventive

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[239] Annex 82. File 0118, folio 47. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[240] Annex 82. File 0118, folios 67-68 and 86. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[241] The first was in the sector of Viejo Pedro, Sub-district of El Llano; in the community of Loma Bonita, district of Chepo; and in the sub-district of Tortí, district of Chepo. [Annex 83. Transcript of the Field Inspection made by the 11th Prosecutor of the First Judicial Circuit of Panama, September 28, 2007, folios 464-466. Petitioners' brief of November 13, 2007, received by the IACHR the same day]. The second was in the sectors of Playa Chuzo, Tortí Abajo, Curtí, and Wacuco. [Annex 84. Transcription of the Field Inspection made by the 11th Prosecutor of the First Judicial Circuit of Panama, September 17, 2007, folios 461-462. Petitioners' brief of November 13, 2007, received by the IACHR the same day].

[242] Annex 85. Fiscal Review no. 151 of May 29, 2008 issued by the Eleventh Prosecutor's Office of the First Judicial Circuit of Panama. Annex 3 to the submission of the State of September 17, 2012, received on September 24, 2012.

[243] Annex 86. File 258, folios 1 to 5. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[244] Annex 86. File 258, folios 14 to 32. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[245] Annex 86. Statement by Ernesto Castillo Castillo, regional administrator of the ANAM. File 258, folios 8 to 12. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Statement of Miguel Bonilla, sergeant of the Police Zone of Chepo who arrested the four persons. File 258, folios 33 to 34. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Request to the Regional Bureau of the ANAM for the complete report and photographic views of the place where the clear-cutting was found in the sector of Tortí Abajo. File 258, folios 14 and 36. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Request for identification of persons allegedly responsible to the Department of Judicial Identification. File 258, folio 35. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Investigative measure in the sector of Tortí Abajo, along with officials of the ANAM. File 258, folios 64-66. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[246] Annex 86. File 258, folios 68-69. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

detention.[247] On February 12, 2007, the Personera Municipal of Chepo ordered that due to her own lack of jurisdiction, the preliminary investigation should be forwarded to the corresponding Agency of the Public Ministry[248], assigning it to the Office of the Fifth Specialized Prosecutor of the First Judicial Circuit of Panama by resolution of February 23, 2007.[249] According to information provided by the parties, the Office of the Fifth Prosecutor took investigative measures in March and April 2007.[250]

178. The information available to the IACHR indicates that by Prosecutorial Proceeding No. 140 of July 29, 2007, that investigative agent recommended to the judge, the Tenth Circuit Criminal Court Judge of the First Judicial Circuit of the Province of Panama that he issue a provisional order to dismiss. According to the information produced by the parties, on December 27, 2007, the principal judge of that court ordered provisional dismissal No. 436-07, based on Article 2208(1) of the Judicial Code.[251] [252]

d) Criminal proceeding before the Office of the Deputy Director for Judicial investigation of the Agency of Chepo

179. On August 16, 2011, Tito Jiménez, administrative *sahila* of the community of Tabardi, filed a complaint for crime against property before the Office of the Deputy Director for Judicial Investigation, Agency of Chepo. The complaint, identified by the number AID-FAR-CHE-298-11, refers to the invasion of and logging in the Kuna communities of Tabardi, Ikandi, and Pintupu, in an estimated area of 400 hectares.[253] According to the information available to the IACHR, Tito Jiménez subsequently made a statement and filed an amendment to the complaint in the face of new invasions in the sector of Tabardi.[254] The authority in charge of the process made two inspections to the areas in question, in August and September 2011.[255]

180. On September 26, 2011, the file was forwarded to the Office of the Municipal Ombudsperson of Chepo[256], in response to which Tito Jiménez filed a new amended complaint on

[247] Annex 86. File 258, folios 76-87 and 88-91. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[248] Annex 86. File 258, folio 124. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[249] Annex 86. File 258, folio 128. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[250] The record includes a request for information from the National Bureau of Indigenous Policy of the Ministry of Interior and Justice, folio 139; requests for information to the General Administrator of the National Environmental Authority, folios 161-163; witness statements, folios 164-169; social work visits to the home of the persons prosecuted, folios 174 to 219. Annex 86. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[251] Article 2208(1) of the Judicial Code - "The dismissal shall be without prejudice: 1. When the means that justify it, collected in the proceeding, are not sufficient to prove the punishable act…."

[252] Annex 87. Tenth Circuit Court for Criminal Matters of the First Judicial Circuit of the Province of Panamá. Dismissal without prejudice No. 436-07 of December 27, 2007. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

[253] In particular, denounced was "a group of persons who entered the Kuna Comarca of Madungandí and in which they established themselves, invaded and harmed approximately 400 hectares and that they have felled a large number of trees for timber, specifically ESPAVE, in addition they have burned and felled a large quantity of natural resources, and are residing in the place." Annex 88. Annex to the brief by requesters in the proceeding for precautionary measures, October 12, 2011, received the same day.

[254] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folios 8-9 and 22-24. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[255] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folios 11-12 and 29-31. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[256] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folio 37. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

October 17, 2011.[257] According to the information available to the IACHR, this process is continuing, without any clarification of the facts alleged or any punishment for those responsible.[258]

E. Impact of the Bayano Hydroelectric Complex and the Pan American Highway on the the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members

181. As the IACHR has considered proven in preceding paragraphs, the construction of the dam meant the flooding and consequent destruction of the territory inhabited ancestrally by the Kuna and Emberá peoples of Bayano, and on whose ecosystem they depended for their physical and spiritual survival, which itself represented a grave impact on the alleged victims' traditional way of life.[259] This impact is described by a member of the Emberá community as follows:

> ... I suffered a brusque change as a child also at that time and I know that my whole family suffered the same at that moment when the water was rising behind the dam, flooding their houses, I saw it with my own eyes; we were the last family to abandon that place. Since then I was waiting on the other side of the river for us to move to the place where we were first relocated, when we reached that place, our community was ill, that I will never forget, and my community became ill and went crazy, my family ran fleeing into the street, to the mountains, those are things that stay with us … even the children, like they went mad, perhaps due to the very impact that we suffered. Perhaps we didn't have any way to live with our nature….(*sic*)[260]

182. The construction of the hydroelectric complex led to an increase of diseases in the indigenous communities, caused mainly by the decomposition of the plant cover due to the creation of the reservoir.[261] According to the information produced, "the lake is also responsible for the proliferation of malaria by means of mosquitoes that transmit it and other flies that bite in the area, a major health problem for the indigenous peoples.""[262] In this respect, the record before the IACHR includes an epidemiological report produced May 12, 2009, in communities of the Kuna Comarca of Madungandí, which verifies that presence of "parasitic diseases of water origin" such as "malaria…, yellow fewer [and] leishmaniasis plasmodium vivax."[263] In addition, in a medical report produced based on a visit to three

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[257] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folios 46-48. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[258] In that regard, the State affirmed in its last submission to the IACHR that "[a]t this time, according to information of the Municipal Government, the reopening of the investigation will be requested, since there is new evidence that supports doing so." Submission of the State of September 17, 2012, received on September 24, 2012.

[259] In this respect, the petitioners note: "The flooding of their ancestral lands no longer allows any tribe to continue its traditional way of life, and keeps them from passing on their cultural knowledge to future generations. For these indigenous groups, religious and cultural sites and bound up with the lands already flooded under Lake Bayano that cannot be replaced." Brief of additional observations on the merits by the petitioners, received by the IACHR on December 18, 2009. p. 23.

[260] IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. Along similar lines, the Cacique General of the Kuna Comarca of Madungandí noted on this incident that: "... I felt the sensation of the invasion of Bayano and also … I feel very sad because lately, and in addition that I … experienced, I felt the pain with this reservoir on the Bayano river ... has lost sacred sites, burial grounds, among others, and lack of cultural values." IACHR, Public hearing, March 23, 2012 sobre "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Manuel Pérez, Cacique General of the General Congress of the Kuna Comarca of Madungandí. See hearing at http://www.oas.org/es/cidh/

[261] Petitioners' initial petition of May 11, 2000. pp. 3-4. Annex 17. Sworn statement by the Kuna caciques. Annex 17 to petitioners' initial petition of May 11, 2000. p. 26; and petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. pp. 7-8.

[262] Annex 17. Sworn statement of the Kuna caciques. Annex 17 to petitioners' initial petition of May 11, 2000. p. 26; and petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. pp. 7-8.

[263] Annex 90. Epidemiological report produced May 12, 2009. Annex F-3 to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

communities of the Kuna Comarca on May 10, 2009, it was found that the most common pathologies include respiratory, gastrointestinal, and dermatological infections.[264]

183. The IACHR also observes that the construction of the hydroelectric complex had a harmful impact on the traditional forms of subsistence of the indigenous peoples of Bayano. With the flooding of their ancestral lands the ecosystem on which they depended for hunting, fishing, and farming, and for obtaining traditional medicines was destroyed.[265] According to information produced by the parties, "most of the lands of the region [of the Bayano], with the exception made of the alluvial entisols [soils formed by the rising waters of the rivers] are of little or limited agricultural value…. A large part of the best soils, the alluvial ones, have been lost under the waters of the reservoir."[266] On that point, said epidemiological report of May 12, 2009, indicates that:

> The hunting lands, which are now the main channel of Lake Bayano, source of protein for the population's diet, changed drastically to the consumption of vegetables, with scant meat consumption. To this situation has been added that the lands that have been available for agriculture have few nutrients or minerals (rocky and calcareous without organic matter at the surface), which makes it impossible for farming to replace the nutritional demand, resulting in severe malnutrition among children and adults over 50 years of age [*sic*].[267]

184. Consistent with this information, according to a report from the Ministry of Health on the Kuna Comarca of Madungandí produced by the State, as of December 2011 there was malnutrition in 80% of children under 5 years of age.[268] Along the same lines, the petitioners stated: "The poor quality of the land impacts on the food security of the indigenous communities, which affects the health of the population; diseases such as malaria, diarrhea, malnutrition, and tuberculosis are common."[269]

185. In addition, according to the information presented by the parties, the alleged victims do not have basic services such as water[270] and electricity.[271] The IACHR observes that paradoxically, the

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[264] Annex 90. Medical report produced May 10, 2009. Annex F-3 of petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. In addition, according to information produced by the alleged victims: "At present after more than 30 years skin diseases, rashes, malaria, fever, cough, among others, have followed and only one health post has been constructed in two communities, medical visits are sporadic, and they only go for a couple of hours … [*sic*]". Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera, July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[265] Petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. pp. 7-8; and petitioners' brief of January 19, 2007, received by the IACHR the same day.

[266] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 29. Citing Salamín Aguila, Edith Argelia. La Represa del Bayano y las Transformaciones Geoeconómicas de la Región (Panamá). Thesis for degree. UNAM. Mexico City. 1979. p. 23. Annex C to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. In addition, Bolívar Jaripio Garabato, in his testimony before the IACHR, noted: … when our land was flooded, the best lands that were fertile and through that loss, at that moment, we did not perhaps have the best quality of life, our population cannot produce from the land as it did before. There are many pests, the plantains, for example, do not produce as they did before, one must be planting every year, whereas before in that territory we would plant just once and we would have crops from generation to generation." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano.

[267] Annex 90. Epidemiological report done May 12, 2009. Annex F-3 to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[268] Annex 91. Report by the Ministry of Health on the activities carried out in the Kuna Comarca of Madungandí in 2000-2001. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[269] Petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. p. 7.

[270] Annex 92. Informe ejecutivo preliminar de las actividades realizadas por el Gobierno de Panamá en la Comarca Kuna de Madungandí y las Comunidades Piriati Empera e Ipeti Emberá hasta el año 2001 [Preliminary executive report of the activities carried out by the Government of Panama in the Kuna Comarca of Madungandí and the Emberá communities of Piriati and Ipeti up to 2001]. Annex to State's brief of November 25, 2002, received by the IACHR December 2, 2002.

Bayano Hydroelectric Project does not benefit the indigenous peoples who were evicted from their lands and moved to make this construction possible who must purchase electrical generators at their own cost to have electricity.[272]

186. In addition, as has been noted, the construction of the hydroelectric project and the Pan American Highway led to the arrival in the Bayano region of groups of non-indigenous persons who began to establish themselves at the ends of the basin.[273] Once the highway running through indigenous lands was completed, this new road facilitated the internal migration of settlers who appropriated the indigenous lands, producing drastic changes in the social composition of the area.[274] The possession of lands and the use of natural resources by non-indigenous persons generated a climate of permanent tension that persists to this day. The IACHR observes that confrontations have even occurred on several occasions between indigenous persons and settlers, which impede the normal development of the alleged victims.[275] Accordingly, the presence of non-indigenous persons represents a constant threat to the traditional way of life and cultural identity of the Kuna and Emberá peoples.[276]

187. When they arrived the settlers began deforesting wooded areas to grow crops, engaging in extensive agriculture by which, through slash-and-burn practices, they have converted forests to pastureland, expanding the agricultural frontier and removing their natural resources from indigenous lands to convert them to pasture.[277] Indeed, according to the information produced by the parties, many settlers do not live in the lands of the comarca, but carry on economic activities in their territory or rent them to other persons to obtain better earnings.[278] The practice of eliminating the natural plant cover to grow crops is "diametrically opposed to the modes of conservation and protection of the petitioners' natural resources."[279]

…continuation

[271] Petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. p. 7; and petitioners' brief of January 19, 2007, received by the IACHR the same day.

[272] In this respect, the Cacique General of the Kuna Comarca of Madungandí noted: "with this problem of the reservoir that appeared, new diseases also appeared affecting the population, and of late I wish to tell you the lack of electricity in the indigenous area, because the benefit is for the Panamanian people…." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Manuel Pérez, Cacique General of the General Congress of the Kuna Comarca of Madungandí. See hearing at http://www.oas.org/es/cidh/. See also petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. p. 7.

[273] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[274] The petitioners state: "At the time the dam was built, nearly 2,000 settlers had already settled in the Bayano region. Drawn to the zone by the extension of the Pan American Highway in the 1950s, these settlers had come to the Bayano region from western Panama in search of lands to cultivate.... The additional construction of the highway in the 1970s accelerated the invasion." Petitioners' initial petition of May 11, 2000. p. 15 and pp. 25-26.

[275] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 21, pp. 29-30.

[276] Petitioners' initial petition of May 11, 2000.

[277] Petitioners' initial petition of May 11, 2000. IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano; and Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[278] Annex 93. Survey done in the community of Curtí, November 21, 1998. Annex 17 to the State's communication of June 29, 2001, received by the IACHR July 2, 2001; and IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi.

[279] Petitioners' brief of September 23, 2002, received by the IACHR September 25, 2002. According to information produced by the parties: "As there is an intimate relationship between the natural life processes, flora and fauna coexist and reproduce. With exuberant and rich vegetation, animal life is equally varied and abundant. If the flora is destroyed, the animal species also succumb. The jungle provides refuge and food to the fauna in its environment. This symbiotic and functional union is only altered by man…. Flora and fauna were for centuries a source of sustenance for the life of the indigenous groups that inhabited the basin, nonetheless their presence did not cause a rupture of the ecosystem given their low technological level, which enabled them to conserve the jungle." Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. pp. 30-31. Annex C to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

V. LEGAL ANALYSIS

A. Preliminary matters

1. Delimitation of the legal dispute with respect to the territories of the alleged victims

188. The ancestral or traditional presence of the Kuna indigenous people of Madungandí and the Emberá in the Bayano zone has not been controverted by the State, nor has it presented evidence that contradicts or challenges the evidence that shows their long-standing ties to the land. To the contrary, the State has expressly recognized that the indigenous peoples who are the alleged victims have property rights over the lands they occupy. Accordingly, the State has repeatedly expressed – albeit with interruptions – its express will to formally adjudicate that property in the case pending, and to provide "territorial security" ("*seguridad territorial*") to the indigenous peoples, in keeping with the provisions of the Constitution, the domestic legislation, and the commitments that were explicitly made to the alleged victims. In this regard, the IACHR understands that what is at issue in the instant matter is not the property rights of these indigenous peoples over the territories they occupy, but the delivery of a legal title – in the case of the communities of the Emberá people – as well as their delimitation, demarcation, and effective protection.

189. In addition, the IACHR observes that one aspect around which the parties' arguments have revolved refers to the rights that non-indigenous third persons who occupy territories claimed by the alleged victims could have, based on the agreement of March 31, 1995, signed with traditional authorities of the Kuna people of Madungandí and approved by the national government, and on Article 21 of Law 24 of January 12, 1996, which creates the Kuna Comarca of Madungandí. It is not up to the IACHR to determine the rights of the non-indigenous inhabitants of the area, who are not a party in the instant case, nor to rule on the specific way in which the process of eviction and relocation of the non-indigenous persons who remain in the zone should be carried out. What the IACHR considers it appropriate to indicate is that the State of Panama must guarantee, for the alleged victims in the instant case, an exclusively indigenous territory that is formally recognized, demarcated, delimited, and effectively protected, in keeping with its international obligations.

2. Considerations on the competence of the IACHR *ratione temporis*

190. Throughout the years relevant to the present case, as will be noted in the following paragraphs, the State of Panama had obligations relating to indigenous property rights both internationally, under the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, ILO Convention 107 on indigenous and tribal populations; as well as internally, under its own legal and constitutional regime.

191. Based on the evidence in the record, the IACHR has considered as proven a number of facts that occurred prior to May 8, 1978, the date on which Panama ratified the American Convention, which refer mainly to the eviction of the population and the flooding of the ancestral territories of the alleged victims. The IACHR considers that while those facts occurred prior to the State's ratification of the American Convention, the obligations which emerged from these acts, which consist of the payment of economic compensation and the recognition of rights to the lands granted, persist even after that date, and have been complemented by subsequent state acts to which reference has been made, as well as by international commitments assumed by the State. Accordingly, this case is centered on the failure to comply with such obligations, as well as the lack of a response by the State in light of the impact on indigenous territories subsequent to the agreements and initial recognitions.

B. Indigenous property rights – Articles 8, 21, and 25 of the Convention, in relation to its Articles 1(1) and 2

1. The territorial rights of indigenous peoples in the inter-American human rights system

192. The case-law of the inter-American human rights system has repeatedly recognized indigenous peoples' property rights over their ancestral territories, and the duty of protection that emanates from Article 21 of the American Convention and Article XXIII of the American Declaration, interpreted in light of the provisions of the International Labour Organization (ILO) Convention No. 169, the United Nations Declaration of the Rights of Indigenous Peoples, the Draft American Declaration of the Rights of Indigenous Peoples and other relevant sources, all of which compose a coherent corpus iuris that defines the obligations of OAS Member States with regard to the protection of indigenous property rights.[280] In this respect, the IACHR has stated that indigenous and tribal peoples have a communal property right over the lands they have used and occupied traditionally, "and that the character of these rights is a function of … customary land use patterns and tenure."[281] Along these same lines, the Inter-American Court has indicated: "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[282]

193. In addition to their collective conception of property rights, the indigenous peoples have a special, unique, and internationally protected relationship with their ancestral territories, which is absent in the case of non-indigenous communities. This special and unique relationship between indigenous peoples and their traditional territories enjoys international legal protection. As the IACHR and the Inter-American Court have argued, preserving the particular connection between the indigenous communities and their lands and resources is bound up with the very existence of these peoples, and therefore "warrants special measures of protection."[283] The right to property of indigenous and tribal peoples protects this close tie they maintain with their territories and with the natural resources linked to their culture that are found there.[284]

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[280] See *inter alia* IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States), December 27, 2002, para. 127; IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of Toledo District v. Belize, October 12, 2004, para. 87; IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para.6; I/A Court H.R. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 127-129.

[281] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of Toledo District v. Belize, October 12, 2004, para. 151. See *inter alia* IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States), December 27, 2002, para. 130; IACHR, Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 160. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 75.

[282] I/A Court H.R. *Case of the Awas Tingni Mayagna (Sumo) Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79. para. 149. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 131; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146. para. 118; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214, paras. 85-87; *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 85; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 145.

[283] IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann v. United States, December 27, 2002, para. 128. I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79. Para. 149. See also: I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006. Series C No. 146, para. 222.

[284] IACHR, Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 156. I/A Court H.R.. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148. I/A Court H.R.. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R.. Case of Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121.

194. The right to territory includes the use and enjoyment of the natural resources found in the territory, and is directly tied to, indeed is a prerequisite for, the rights to a dignified existence, food, water, health, and life.[285] For this reason, the IACHR has indicated that "an indigenous community's 'relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.'"[286]

195. Similarly, the IACHR and the Inter-American Court have established that indigenous peoples, as collective subjects distinguishable from their individual members, are rightsholders recognized by the American Convention. In that respect, in its recent judgment in *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, the Inter-American Court stated that "international legislation concerning indigenous or tribal communities and peoples recognizes their rights as collective subjects of International Law and not only as individuals." In addition, the Court stated that "[g]iven that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective."[287] In that sense, and as in previous cases,[288] the IACHR will analyze the present case from a collective perspective.

2. The indigenous territorial claim in the instant case

196. The Commission notes that, pursuant to the international and domestic rules mentioned above, even at the time of the construction of Hydroelectric Bayano, Panama was required to not dispossess the property, even for a public purpose, without the payment of fair and adequate compensation, and without discrimination.

2.1. Breach of the duty to pay just and prompt compensation for the alienation of the ancestral territories of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members – Article 21 of the Convention, in relation to its Article 1(1)

197. The IACHR and the Court have recognized that indigenous and tribal peoples have a right to reparation in those exceptional cases in which there are objective and justified reasons that make it impossible for the State to restore their territorial rights. It has been explained by the Inter-American Court in the following terms:

> when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative

[285] IACHR, Democracy and Human Rights in Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1076-1080.

[286] IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, 2010, para. 184.

[287] I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 231.

[288] See, e.g., IACHR, Case presented to the Inter-Am. Court H.R. in the Case of Mayagna (Sumo) Community Awas Tingni vs. Nicaragua, June 4, 1998; IACHR, Case presented to the Inter-Am. Court H.R. in the case of Yakye Axa Indigenous Community vs. Paraguay, March 17, 2003; Report No. 40/04, Case 12.053, Maya Indigenous Community of the District of Toledo v. Belize, October 12, 2004; IACHR, Case presented to the Inter-Am. Court H.R. in the Sawhoyamaxa Indigenous Community v. Paraguay, February 2005; IACHR, Case presented to the Inter-Am. Court H.R. in the Case of the Saramaka People vs. Suriname, June 23, 2006; IACHR, Case presented to the Inter-Am. Court H.R. in the Case of Yákmok Kásek Indigenous Community v. Paraguay, July 3, 2009; IACHR, Case presented to the Inter-Am. Court H.R. in the Case of the Kichwa Indigenous People of Sarayaku and its members v. Ecuador, April 26, 2010.

> lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.[289]

198. In the instant case, the IACHR has accepted as proven that on May 8, 1969, the State adopted Cabinet Decree 123 by which it alienated an area of 1,124.24 km^2, belonging to the non-adjudicable areas of the Bayano Reserve, which constituted the ancestral territory of the Kuna people of Madungandí and the Emberá people of Bayano. From 1972 to 1976 the State built the Ascanio Villalaz Hydroelectric Complex, which entailed the creation of a manmade lake of approximately 350 km^2.

199. Based on the information available to it and as has been affirmed by the parties, the IACHR observes that said project entailed the flooding of the ancestral territory of the Kuna people of Madungandí and the Emberá of Bayano. In that regard, the IACHR understands that restitution of those territories would not be materially possible, as they are under the manmade lake created by the dam. If restitution of their ancestral territories to the indigenous peoples of Bayano is impossible, the state obligation to grant them reparation through alternative lands and/or by payment of just and prompt compensation takes on special relevance. As determined in the facts proven in this report, the State undertook precisely to grant such compensation. The IACHR will refer to economic reparations at this point and to the performance of its obligations in relation to the lands granted in the following section.

200. As has been considered proven, the State repeatedly agreed to pay individual and collective compensation to the Kuna people of Madungandí and the Emberá of Bayano, and their members. Nonetheless, in the face of the petitioners' allegation regarding the failure of the State to pay such compensation, the State did not show that it was carrying out this commitment; to the contrary, the information available to the IACHR leads it to conclude that those amounts were not actually paid, constantly breaching the legal commitements made between 1973 and 2010.

201. In this respect, the IACHR observes that on July 8, 1971, Cabinet Decree 156 was issued, which established a "Special Compensation Assistance Fund for the Indigenous of Bayano" that established the payment of 30% of the total amount of the revenues of the Forestry Fund of the State, established as of January 1, 1971, and those revenues that come in from the promulgation of that Decree and for three years from that date. In addition, as has been considered proven, point 2 of the Agreement of Fuerte Cimarrón – signed by representative of the Corporación del Bayano, the National Guard, and representatives of the Kuna people of Madungandí – established a new timetable for updating the commitments to pay compensation on which the government was delinquent. In addition, in 1980 the Kuna indigenous people of Madungandí signed an agreement with the then-Vice President of the Republic, Ricardo De La Espriella, which extended the payment of compensation to eight years. The IACHR understands that the signing of subsequent agreements is evidence of the failure to carry out the first ones.

202. Along these lines, during the stage of the procedure before the IACHR when a friendly settlement was being pursued, an Indigenous-Government Commission was established with the participation of traditional authorities of the Kuna and Emberá peoples of Bayano, and authorities from the national, provincial, and local governments. The IACHR notes that one of the sub-commissions formed referred precisely to "Compensations and Costs," whose objective was "to review the compensation for the Kuna Comarca of Madungandí and to quantify the new compensation for the Kuna and the Emberá on an individual, *comarca*, and community basis."

203. In addition, as the IACHR has considered proven, as part of the actions for reaching a friendly settlement agreement, the petitioners commissioned the preparation of the "Technical Socio-Economic Report on Compensation and Investment: Kuna Comarca of Madungandí and Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera," submitted to the Ministry of Interior and Justice on May 12, 2003. Subsequently, in July 2009, a new study called "Technical Socio-Economic Report on

[289] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 135.

Compensation and Investment: Kuna Comarca of Madungandí and Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera" was prepared at the request of the authorities of the Kuna Comarca of Madungandí and of the Emberá of Bayano.

204. The Commission also notes that the State indicated, based on a report by the director general of the Corporación del Bayano, that compensation was paid from 1974 to 1978 to seven communities (Maje, Pintupo, Aguas Claras, Río Diablo, Saderhuila, Ibebsigana, and Ipetí).[290] It added that in 1999 "the Darién sustainable development program, for example, found that the compensation payments were made for three years, of the eight promised."[291]

205. In view of the foregoing, the IACHR considers that the relationship between the alleged victims and the state authorities in respect of the payment of compensation was a relationship the contours of which were determined by legally recognized rights. Moreover, it observes that the 1946 Constitution of Panama, at Article 46[292], and subsequently the 1972 Constitution, at Article 44, contained the state obligation to pay compensation for the expropriation of private property.[293] Nonetheless, as has been proved, these legal obligations, with the rights that derived from them, were not carried out; rather, the State has not shown, after four decades, that it has paid just and prompt compensation in its entirety to the alleged victims.

206. The IACHR also recalls that even though referring to individual property the Inter-American Court has explained that "just compensation" presupposes that it be "prompt, adequate and effective."[294] In addition the Court has understood that in cases of expropriation of private property – whether individual or collective, indigenous or non-indigenous – by the State, the payment of just compensation is not only a right under Article 21 of the American Convention, but also a general principle of international law, widely reiterated by the international case-law.[295]

207. It is not up to the IACHR to determine the amount to be paid the alleged victims, but to recall that, as the Inter-American Court has noted: "Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State."[296] Rather, such a decision should be reached by consensus with the indigenous peoples affected, ensuring their effective participation in keeping with their own procedures for consultation, values, uses, and customary law.

208. According to the standards in the Inter-American system, to this end one must consider that the alienation of the ancestral territories of the Kuna people of Madungandí and the Emberá of Bayano entailed the loss of sacred places, forests, dwellings, crops, animals, and medicinal plants that not only had a material value for these indigenous peoples but that were an essential part of their cultural identity and traditional way of life. Based on the facts proven in this report, the IACHR is of the view that

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[290] Communication from the State of June 29, 2001. p. 6.

[291] Communication from the State of June 29, 2001. p. 6.

[292] 1946 Constitution, Article 46. "For reasons of public utility and social interest defined in the Law, there may be expropriation, by judicial judgment and prior compensation."

[293] 1972 Constitution, Article 44. "Private property implies obligations for the owner by reason of the social function it must perform. For reasons of public utility or social interest defined in the Law, there may be expropriation by means of special proceedings and compensation." The IACHR observes that the equivalent of this provision was included in the subsequent constitutions, namely: Article 45 of the 1972 Constitution, with amendments in 1978, 1983, and 1994; and Article 48 of the 1972 Constitution, with amendments in 2004.

[294] I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179. para. 96.

[295] I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179. paras. 96-97.

[296] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 151.

their loss entailed not only material losses, but also cultural and spiritual losses impossible to recover, for which compensation is due.

209. Therefore, the Commission concludes that the failure to make reparations to the alleged victims in the terms described above, more than 40 years after their ancestral territories were alienated, constitutes a violation of Article 21 of the American Convention in relation to its Article 1(1).

2.2. Breach of the obligations relating to the territorial rights of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members - Article 21 of the Convention in relation to Articles 1(1) and 2

b) Obligation to title, demarcate, and delimit the collective property of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members

210. The 1972 Constitution of the Republic of Panama, amended in 2004, recognizes at Article 90 the ethnic diversity of the Panamanian population[297], although it refers to the historical existence of the indigenous peoples in a folkloric sense, as per Article 87.[298] In addition, the Constitution provides for a set of specific norms on indigenous peoples which refer, in particular, to the study, conservation, and dissemination of "folkloric traditions"[299]; to the study, conservation, and dissemination of the indigenous languages ("*lenguas aborígenes*"), and to "bilingual literacy"[300]; to the development of education and promotion programs to achieve their active participation as citizens[301]; and to receiving special attention for their economic, social, and political participation in the national life.[302]

211. Article 127 of the Panamanian Constitution recognizes the collective property rights of the indigenous communities and establishes that the specific procedures for recognizing them shall be determined by law.[303] In addition, Article 126 of the Constitution, which refers to the agrarian regime, establishes at the relevant part:

> To carry out the purposes of agrarian policy the State shall develop the following activities:
> 1. Endow the peasants with the necessary lands to work, and regulate the use of water resources. The Law may establish a special collective property regime for the peasant communities that so request.
> …
> 4. Establish means of communication and transport to link the peasant and indigenous communities to the centers of storage, distribution, and consumption.
> 5. Settle new lands and regulate their tenure and use, and the tenure and use of those that are integrated to the economy as the result of the building of new roads.
> 6. Stimulate the development of the agrarian sector through technical assistance and fostering organizing, training, protection, technification, and other forms as determined by Law.
> …
> The policy established for this Chapter shall be applicable to the indigenous communities in keeping with the scientific methods of cultural change.

212. While the Panamanian Constitution recognizes ethnic diversity and protects certain fundamental rights of the indigenous peoples, such as their collective property rights, it maintains provisions that evidence an integrationist approach that stands in contrast to the constitutional trend of

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[297] Constitution of Panama, Article 90.

[298] Constitution of Panama. Article 87.

[299] Constitution of Panama. Article 87.

[300] Constitution of Panama. Article 88.

[301] Constitution of Panama. Article 108.

[302] Constitution of Panama. Article 124.

[303] Constitution of Panama. Article 127.

recent decades in the Americas, and to the development of the human rights of indigenous peoples internationally.

213. In addition, Panama is one of the states for which ILO Convention 107 still holds, as it has not ratified ILO Convention 169. Article 11 of Convention 107 provides:

> Article 11. The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

214. In addition to the constitutional recognition of the fundamental rights of indigenous peoples in Panama, there are several provisions in the domestic legal order on those rights, especially the five laws establishing *comarcas*, which recognize the collective property rights of certain indigenous peoples over their ancestral territories.

215. The Commission considers that in this case the right to property enshrined in Article 21 of the Convention includes the right to community property, in keeping with what is stipulated in the Constitution and legislation of Panama. This consideration is consistent with what the Inter-American Court held on this point:

> Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.[304]

216. In view of the foregoing, it is established that the Panamanian legal order expressly recognizes and obligates the State to guarantee the property rights of the indigenous peoples, including the Kuna of Madungandí and the Emberá of Bayano. Pursuant to Articles 21 and 29 of the American Convention, that regulation is protected by the Convention.

217. In the instant case, the State of Panama signed, over nearly three decades, a series of agreements with the Kuna of Madungandí and the Emberá of Bayano, and also promulgated decrees and resolutions formalizing the commitment to recognize, in their benefit, a title to the collective ownership of the lands granted in compensation for the alienation of their ancestral territories.

218. Specifically with respect to the Emberá indigenous people of Bayano, recognition by the State of the collective property rights to their lands, and the commitment to formally recognize this right was set forth, in at least the following: (i) the 1975 Agreement of Majecito, which ordered the resettlement of the Emberá communities that inhabited the Bayano region before the construction of the dam to the localities of Piriatí and Ipetí; (ii) Article 2(e) of Decree 5-A of 1982, which ruled out the adjudication of plots established that their "demarcation is a responsibility of the National Bureau of Indigenous Policy"[305]; (iii) the agreement of September 6, 1983, among the Kuna of Madungandí, the Emberá of Piriatí, and a representative of the Ministry of Interior and Justice by which it was agreed to establish boundaries

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[304] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118.

[305] Article 2(e) of Decree No. 5-A of April 23, 1982. "Adjudication under any guise is prohibited of the state lands included and described: … (e) In the area of the Kuna and Emberá indigenous comarcas whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of those communities. While that physical demarcation is determined, the Kuna and Emberá communities may veto requests for adjudication of plots that belong to the territories of those *comarcas*."

between the territories occupied by those indigenous peoples[306]; (iv) the Mutual Agreement of August 15, 1984, in which the Corporación Bayano undertook to "take all steps necessary to see the attainment of the indigenous aspirations as regards the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriatí"[307]; (v) the Plan of Action adopted in 1999 by the Darién Sustainable Development Program, under the Ministry of Economy and Finance, which recommended the demarcation, delimitation, and marking of the lands of the indigenous communities of Ipetí and Piriatí; (vi) Article 2 of Executive Decree 267 of 2002, extending the scope of application of Executive Decree 267, which carves out an exception for the adjudication of the collective lands of the Emberá population of Piriatí and Ipetí[308]; (vii) Resolution No. D. N. 132-2003 of the National Bureau of Agrarian Reform of 2003, which suspends all processing of requests for adjudication and transfers of possessory rights to lots situated within the area occupied by the Emberá populations of Ipetí and Piriatí[309]; and (viii) the "Agreement on Action and Decision" signed in November 2011, among the authorities of the Emberá people and representatives of the ANAT and the Ministry of Interior and Justice, by which the state authorities undertake to proceed with the collective titling of their lands.

219. The IACHR cannot fail to note that despite the existence of acts that recognized, directly and indirectly, the collective property rights of the Emberá communities over the lands of Piriatí and Ipetí, the State, throughout the procedure before the IACHR, maintained contradictory positions that went from expressly recognizing their territorial rights to denying the existence of a "special regime for the purposes of tenure, conservation, and use by the indigenous population."[310] This ambivalence is a reflection of its actions domestically, which, as the IACHR has been able to observe, have been characterized by the signing of commitments, and the subsequent denial of them, which has resulted in the situation of formal non-recognition of their property rights that continues to affect them, constantly breaching its commitments.

220. In addition, it has been considered proven that on October 27, 2009, the Emberá communities of Bayano filed a request for adjudication of lands with the National Bureau of Agrarian Reform, based on Law 72. As the IACHR has verified, while some steps were taken by the administrative agencies in charge of processing that request, approximately three years after the procedures required were initiated, to date their property rights over their traditional territory have not received effective protection.

221. Yet in addition to breaching the commitments acquired to formally recognize their territorial rights, which the IACHR has considered proven, state authorities adjudicated plots situated in the territory claimed by the Emberá people of Bayano to third persons, granting them individual property titles. In the opinion of the IACHR, this entails a total repudiation of the legal obligations assumed by the

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[306] Annex 24. Agreement of September 6, 1983. Annex 14 to petitioners' initial petition of May 11, 2000; and Annex 7 to the State's communication of June 29, 2001.

[307] Annex 26. Agreement of Mutual Accord, August 15, 1984. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[308] Annex 42. Article 2 of Executive Decree 267 of October 2, 2002. "The following lands shall be exempted from the application of this Decree: … 2. The collective lands of the Emberá population of Ipetí and Piriatí, in the district of Chepo, province of Panamá."

[309] By Resolution No. D. N. 132-2003 of March 18, 2003, the Agrarian Reform Bureau of the Ministry of Agricultural Development established as follows: "To suspend all processing of applications for adjudication and transfers of possessory rights over lands situated within the area occupied by the Emberá populations of Ipetí and Piriatí, in the district of Chepo, province of Panamá." State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[310] Specifically, the State in briefs before the IACHR argued: "The Emberá people of Bayano inhabit state lands and those lands do not have a special regime for purposes of their tenure, conservation, and use by the indigenous population." Communication of the State of May 18, 2007, received by the IACHR May 22, 2007; and Additional observations on the merits presented by the State by brief of April 27, 2010, received by the IACHR May 3, 2010. In another brief the State noted: "The case of the Emberá of Ipetí and Piriatí is very different because they are two communities which in conjunction with other Emberá communities are attempting to define their legal situation over the land, administration, and organization, a proposal that is in the Legislative Assembly by the initiative of the interested parties. The legal definition has involved persons of black [ethnicity] and peasants who share, with the Emberá the area known as the province of Darién."

State, and the aggravation of the situation of juridical insecurity in which these communities find themselves. As the IACHR has indicated, the legal order, should provide the indigenous communities effective security and legal stability with respect to their lands.[311] Legal insecurity with respect to these rights renders indigenous and tribal peoples "especially vulnerable and open to conflicts and violation of rights."[312] The existence of property titles that are in conflict with titles has been specifically identified by the IACHR as a factor that causes legal insecurity for the indigenous communities.[313]

222. In summary, the unilateral denial of the legal rights contained in commitments assumed by the State since 1975 and its own Constitution, laws and international obligations, and the consequent repudiation of the right that the indigenous communities of the Emberá people of Bayano to the effective performance and implementation of the agreements that recognized their property rights, constituted a violation of Article 21 of the American Convention, in connection with Articles 1(1) and 2.

223. As regards the Kuna indigenous people of Madungandí, the IACHR observes that recognition of their collective property rights over their lands and the obligation of the State to formally recognize this right was expressed, at least, in: (i) Cabinet Decree 123 of 1969, which provided for the granting of new lands, as an area of 1,124.24 km^2 was being alienated, that belonged to the Indigenous Reserve of Bayano of the construction of the hydroelectric dam; (ii) the Agreement of Farallón of 1976 in which the "National Government undertakes to demarcate the reserve and relocate the settlers and Indians"; (iii) Article 2(e) of Decree 5-A of 1982, which ruled out the adjudication of lots within their territories and established that their "demarcation is entrusted to the National Bureau of Indigenous Policy"[314]; (iv) the agreement of September 6, 1983, among the Kuna of Madungandí, Emberá of Piriatí, and a representative of the Ministry of Interior and Justice by which it was agreed to establish boundaries between those indigenous groups[315]; (v) the "Agreement of Mutual Accord" of 1984 in whose first point the State reiterated, through the Corporación para el Desarrollo Integral del Bayano, its obligation to create a *comarca* for the Kuna people of Bayano. In addition, as has been proven, there were multiple agreements and resolutions that stipulated the commitment to evict the non-indigenous persons who were illegally occupying their territories, which recognized that collective property rights that would prevail over third persons.[316]

224. The titles and rights that were derived from the agreements signed with the State pursuant to the Constitution and international obligations were not formally recognized until 30 years later, by Law 24 of January 12, 1996. The IACHR notes that this long process of claiming indigenous territory was marked by the successive signing of commitments and their systematic repudiation and failure to

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[311] IACHR, *Second Report on the Situation of Human Rights in Peru.* Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, para. 19.

[312] IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, para. 57.

[313] IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, para. 57. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 8.

[314] Article 2(e) of Decree No. 5-A of April 23, 1982. ""Adjudication under any guise is prohibited of the state lands included and described: … (e) In the area of the Kuna and Emberá indigenous *comarcas* whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of those communities. While that physical demarcation is determined, the Kuna and Emberá communities may veto requests for adjudication of plots that belong to the territories of those *comarcas*."

[315] Annex 24. Agreement of September 6, 1983. Annex 14 to petitioners' initial petition of May 11, 2000; and Annex 7 to the State's communication of June 29, 2001.

[316] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001; Annex 31. Working Agreement for the Renewed Land Use Management of Alto Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí, and other Communities of July 16, 1991. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 32. Resolution 002 of January 24, 1992. Annex 19 to petitioners' initial petition of May 11, 2000; and Annex 14 to the State's communication of June 29, 2001; Annex 33. Resolution 63 of March 17, 1992. Annex 20 to petitioners' initial petition of May 11, 2000; and Annex 13 to the State's communication of June 29, 2001.

perform by the State. In addition to these agreements giving rise to legal rights, they gave rise to a series of legitimate expectations in the leaders and members of the indigenous people that were constantly frustrated.

225. The IACHR also observes that while Law 24 granted formal recognition to the collective property rights of the Kuna indigenous people of Madungandí, the boundaries of the Comarca were not demarcated or physically delimited until four years later. In this respect, the IACHR recalls that, as the Court has noted, the failure to delimit and effectively demarcate indigenous territories, even when there is formal recognition of the right to communal property of their members, causes "a climate of constant uncertainty" in which the community members "do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property."[317]

226. Similarly, as the IACHR has indicated, based on Article 2 of the American Convention, the indigenous peoples have a right to effective implementation of the law. Under this provision, the states must ensure the practical implementation of the constitutional, statutory, and regulatory provisions of their domestic law that enshrine the rights of indigenous and tribal peoples and their members, so as to ensure the effective enjoyment of those rights.[318] While attaching a positive value to the adoption of legal provisions on the collective rights of indigenous peoples, the IACHR has insisted that the adoption of legal provisions does not suffice to carry out the international obligations of the states.[319] Similarly, the Inter-American Court has explained that "legislation alone is not enough to guarantee the full effectiveness of the rights protected by the Convention, but rather, such guarantee implies certain governmental conducts to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights."[320]

227. As regards specifically the right to property over their territory, the mere abstract recognition of the right to community property of indigenous and tribal peoples does not suffice; rather, the states must adopt concrete measures to ensure it is observed in practice.[321] In the words of the Court, "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[322] As affirmed by the IACHR and the Court, under Article 21 it is necessary for the statutory and constitutional provisions that recognize the right of the members of indigenous communities to their ancestral territory be translated into the

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[317] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 153.

[318] IACHR, *Democracy and Human Rights Venezuela*, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1062. See also: IACHR, *Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, paras. 220, 297 - Recommendation 4. IACHR, *Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, paras. 134, 149.

[319] See, among others: IACHR, *Democracy and Human Rights in Venezuela*, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1052-1061. IACHR, *Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, paras. 218, 219. IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Referred to in: I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 120(b). See also: IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, para. 36. IACHR, *Third Report on the Situation of Human Rights in Paraguay.* Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, para. 28.

[320] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 167. I/A Court H.R.. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 142.

[321] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 141.

[322] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143.

restitution and effective protection of those territories.[323] Even if the territorial rights and other rights of indigenous and tribal peoples are formally enshrined, the failure of the states to take the measures necessary for recognizing and ensuring those rights gives rise to situations of uncertainty among the members of their communities.[324]

228. Accordingly, the IACHR considers that the State of Panama has not guaranteed the right to property of the Kuna of Madungandí and the Emberá of Bayano, and their members, to their ancestral and traditional territory, therefore depriving them not only of the material possession of their territory, but also of the fundamental basis for developing their culture, spiritual life, integrity, and economic survival. Based on the foregoing considerations, the Commission considers that the State violated Article 21 of the American Convention to the detriment of the Kuna people of Madungandí and the Emberá people of Bayano, and their members, in relation to Articles 1(1) and 2 of the Convention.

c) Obligation of protection vis-à-vis third persons of the territory and natural resources of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members

229. The IACHR has indicated that indigenous and tribal peoples have the right to be protected from conflicts with third persons over the land through the prompt granting of title, and the delimitation and demarcation of their lands without delay, so as to prevent conflicts and attacks by others.[325] In this same vein, indigenous and tribal peoples and their members have a right to have their territory reserved for them, without there being settlements or the presence of non-indigenous third persons or settlers on their lands. The State has a correlative obligation to prevent the invasion or settlement of the indigenous or tribal territory by other persons, and to take initiatives and actions necessary to relocate those non-indigenous inhabitants who may have settled there from the territory.[326]

230. Following this line, the IACHR has established that the States are under an obligation to "Carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the [indigenous] people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the [indigenous] people."[327] The

[323] IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, para. 50, Recommendation 1.

[324] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 170. Applying these rules, in the case of the community of Awas Tingni the Inter-American Court said that "it [is] necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community." [I/A Court H.R.. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 138]. In the same terms, in the case of the Sawhoyamaxa community v. Paraguay, the Inter-American Court explained that in light of the obligation derived from Article 1(1) of the American Convention on Human Rights, read together with Article 21: "Even though the right to communal property of the lands and of the natural resources of indigenous people is recognized in Paraguayan laws, such merely abstract or legal recognition becomes meaningless in practice if the lands have not been physically delimited and surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right by the members of the Sawhoyamaxa Community are lacking." [I/A Court H.R.. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 143]

[325] IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1137 – Recommendation 2. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 113.

[326] IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter- American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 114.

[327] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 197 – Recommendation 2.

IACHR has characterized the illegal invasions and intrusions of non-indigenous persons as threats, usurpations, and reductions of the rights to property and effective possession of the territory by indigenous and tribal peoples that the State is obligated to control and prevent.[328]

231. In addition, the case-law of the inter-American human rights system on indigenous peoples' right to communal property has explicitly incorporated within the material scope of this right the natural resources traditionally used by the indigenous peoples and bound up with their cultures, including for spiritual or cultural uses. In this respect, the Inter-American Court has indicated:

> [T]he right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life.[329]

232. According to the case-law of the Inter-American Court, "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake."[330] Accordingly, the right of indigenous peoples to property over, access to, and the use of the natural resources present in their traditional territories is closely bound up with the survival of the indigenous peoples as differentiated peoples, mindful of aspects that go to both their material sustenance and their cultural survival. As the Court has affirmed, this connection between the territory and the natural resources that the indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival, as well as the development and continuity of their cosmovision, must be protected under Article 21 of the Convention to guarantee that they can continue their traditional way of life and that their cultural identity, social structure, economic system, customs, beliefs, and distinct traditions will be respect, ensured, and protected by the states.[331]

233. In addition, although neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights includes any express reference to the protection of the environment, it is clear that several fundamental rights enshrined therein require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. The IACHR has emphasized in this regard that there is a direct relationship between the physical environment in which persons live and the rights to life, security, and

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[328] IACHR, *Report on the Situation of Human Rights in Brazil*. Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, Chapter VI, paras. 33, 40. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 114.

[329] I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 124, 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121. I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 146.

[330] I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172. para. 121. See also: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118. I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 147.

[331] I/A Court H.R. *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 146. See also: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 125 and 135. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 18 and 21.

physical integrity.[332] These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm on their ancestral territories.[333]

234. The IACHR considers that the States have the duty to adopt measures to prevent harm to the environment in indigenous and tribal territories and to adopt the measures necessary to protect the habitat of the indigenous communities, taking into account the special characteristics of indigenous peoples, and the special and unique relationship that they have with their ancestral territories and natural resources found therein. In adopting these measures, as the IACHR has pointed out, the states should place "special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities."[334] Similarly, the IACHR has previously expressed that States are under an obligation to control and prevent illegal extractive activities such as logging, fishing, and illegal mining on indigenous or tribal ancestral territories, and to investigate and punish those responsible.[335]

235. The IACHR observes that along these same lines the Constitution of Panama prohibits, at Article 127, the private appropriation of indigenous lands, and that the legal provisions referring to recognition of the collective property rights of indigenous peoples exists in the Panamanian domestic legal order. It also notes that the Panamanian legal order includes legal provisions that protect forest resources and allow for the imposition of sanctions for illegal logging and environmental harm, in particular the Forestry Law of February 3, 1994, and the General Law on the Environment of July 1, 1998.[336]

236. In light of the foregoing considerations the IACHR considers that the State of Panama was under the international obligation to prevent the invasion and illegal logging, and to effectively protect the territory and natural resources of the alleged victims. In the instant case, the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members constantly and consistently denounced that settlers were continuously appropriating their territories, and that non-indigenous persons were engaged in the logging and illegal extraction of timber and other natural resources, resulting in environmental degradation due to deforestation.

237. The indigenous inhabitants informed the state authorities of these facts in timely fashion, in different forums. In particular, successive agreements were signed whereby the State acquired formal commitments in which the state authorities announced that they would perform the work of controlling the invasion of the territory and the illegal extraction of timber.[337] Nonetheless, it was not shown before the IACHR that those actions had been adopted in an effective manner proportional to the dimension of the invasion of settlers, and to the serious danger of deforestation caused by the irregular loggers in their territories.

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[332] IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

[333] See IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. IACHR – The Situation of Human Rights in Cuba, Seventh Report. Doc. OEA/Ser.L/V/II.61, Doc.29 rev. 1, October 4, 1983, paras. 1, 2, 41, 60, 61.

[334] IACHR, Third Report on the Situation of Human Rights in Paraguay. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, paras. 38, 50 – Recommendation 8.

[335] IACHR, Report on the Situation of Human Rights in Brazil. Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, para. 33; IACHR, Democracy and Human Rights in Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009.

[336] Article 98 of the General Law on the Environment provides: "The right of the *comarcas* and indigenous peoples in relation to the use, management, and sustainable traditional tapping of the renewable natural resources situated within the *comarcas* or indigenous reserves created by law is recognized. These resources must be used in keeping with the purposes of environmental protection and conservation established in the Constitution, this Law, and all other national laws."

[337] See Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; Annex 29. Resolution No. 4 issued by the Director of the Corporation dated March 16, 1989. Annex 17 to petitioners' initial petition of May 11, 2000; and Annex 10 to the State's communication of June 29, 2001. Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 25.

238. Similarly, the State was informed of those facts through administrative and criminal remedies pursued before the competent authorities. Specifically, as has been found in the facts proven, the alleged victims filed, at the administrative level, requests for the eviction of occupants with the mayor of the district of Chepo, the governor of the province of Panamá, and the Presidency of the Republic. In addition, once a *corregidor* was established and appointed for the Kuna Comarca of Madungandí, they filed that request with this authority. Furthermore, as has been considered proven, the alleged victims denounced on more than one occasion the illegal extraction of timber and the ecological harm caused to the National Environmental Authority. In the criminal justice realm, many complaints were filed with the competent authorities referring to both the illegal occupation of the indigenous territory and the environmental harm caused by the illegal logging.

239. The IACHR observes that despite the numerous administrative and judicial initiatives and actions attempted by the alleged victims to obtain the relocation of the settlers, impede the continuation of the invasions, and halt the illegal logging, the State did not adopt measures aimed at protecting the territories and natural resources of the alleged victims. It also notes that the State has recognized the existence of this problem in the processing of this case, and has affirmed that it will take action to prevent and control its occurrence. Nonetheless, as reported repeatedly to the IACHR, the constant presence of settlers and illegal logging continue devastating the environmental integrity of the territories occupied by the Kuna of Madungandí and the Emberá of Bayano, generating a permanent state of uncertainty and anxiety among their members.

240. In the opinion of the IACHR, the illegal occupation of settlers and the illegal logging on indigenous lands was due to the failure of the State to adopt timely and effective measures to prevent the occurrence of these acts. It also considers that the lack of effective protection of the territories and natural resources vis-à-vis outside interventions, through the application of its own constitutional and statutory provisions, impeded the Kuna indigenous people of Madungandí and the Emberá of Bayano and their members from freely enjoying their property, in keeping with their community tradition, and also hindered the use and enjoyment of the natural resources in their territory.

241. The IACHR also notes that the instant case is illustrative of the ties that the timely recognition, demarcation, and delimitation have for the purpose of preventing and protecting the indigenous territory and its natural resources. In effect, the breach by the State of its obligations to recognize, delimit, and demarcate the territories claimed by the alleged victims in timely fashion made possible the invasion of settlers on indigenous lands, and brought with it the change in the normal development of the spiritual and cultural life of the alleged victims, as well as the development of their traditional economic survival activities.

242. The IACHR considers it should recall that the fact that these indigenous peoples do not have title to their territory formally recognized by the authorities does not relieve that State of international responsibility, thus as the case-law of the system has established, the guarantees of protection of the right to property under the inter-American human rights instruments can be fully enforced by the indigenous and tribal peoples with respect to the territories that belong to them but that have not yet been formally titled, demarcated, or delimited by State.[338] Indeed, for the IACHR the states have a special obligation to protect untitled indigenous territories from any act that may affect or diminish the existence, value, use or enjoyment of goods, including existing natural resources, since those peoples have communal property rights over lands and natural resources based on traditional patterns of ancestral use and occupation.[339]

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[338] IACHR, Application submitted to the I/A Court H.R. in the case of the Kichwa People of Sarayaku and their members v. Ecuador, April 26, 2010, para. 125. IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, paras. 142 and 153.

[339] IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter- American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 68.

243. Accordingly, the IACHR considers that on having failed to take effective actions to prevent the invasion and illegal deforestation of the indigenous territory, and to effectively protect the territory and natural resources of the alleged victims, the State of Panama triggered its international responsibility for violating Article 21 of the American Convention in relation to its Article 1(1), to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members.

2.3. Failure to provide an adequate and effective procedure for access to territorial property rights and protection vis-à-vis third persons – Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2

a) Obligation to provide an adequate and effective procedure for the recognition, titling, demarcation, and delimitation of the collective property rights of the indigenous peoples

244. As established by the Inter-American Court in its case-law in respect of indigenous peoples, the obligations contained in Articles 8 and 25 of the Convention presuppose that the States granted effective protection that takes account of their own particularities, their economic and social characteristics, and their situation of special vulnerability, their customary law, values, and uses and customs.[340] In addition, the case-law of the inter-American human rights system has determined that indigenous and tribal peoples have a right for there to be effective and expeditious administrative mechanisms to protect, ensure, and promote their rights over ancestral territories by which they can carry out the processes of recognition, titling, demarcation, and delimitation of their territorial property.[341]

245. The procedures in question should abide by the rules of due process of law enshrined in Articles 8 and 25 of the American Convention.[342] In this respect, the Inter-American Court has specified that due process should be followed both in administrative proceedings and in any other proceeding whose decision may affect the rights of persons.[343] In light of this requirement, the case-law of the inter-American system has identified a series of characteristics that these administrative mechanisms should have under Articles 8, 25, 1(1), and 2 of the American Convention.

246. These special mechanisms and procedures should be effective. The Inter-American Court has examined, in light of the requirements of effectiveness and reasonable time established in Article 25 of the American Convention, whether the states have established administrative procedures for the titling, delimitation, and demarcation of indigenous lands, and if they do have them, whether they

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[340] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 63. I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83.

[341] I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 138. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter- American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 335.

[342] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 81, 82.

[343] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 62. I/A Court H.R.. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 127. I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83. The effective remedy that the states should offer under Article 25 of the American Convention "must be substantiated according to the rules of due legal process (Article 8 of the Convention)" [I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 62]. The Inter-American Court has indicated that among the domestic administrative procedures that should ensure the guarantees of due process are, for example, procedures for recognizing indigenous leaders, procedures for recognition of juridical personality, and the procedures for restitution of lands [I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 81, 82].

implement those procedures in practice[344]; and it has explained that it is not sufficient, to meet the requirements established in Article 25, for there to be legal provisions that recognize and protect indigenous property rights – there must be specific procedures, clearly regulated, for matters such as the titling of lands occupied by the indigenous groups or their demarcation, in view of their particular characteristics[345], and that such procedures must be effective in practice to allow for the enjoyment of the right to territorial property – that is, that in addition to the formal existence of the procedures, they must yield results or responses to the violations of legally recognized rights.[346]

247. In the instant case, the IACHR considers that the analysis of those obligations should be done analyzing, first, the formal existence of a procedure for the titling, demarcation, and delimitation of the collective property rights of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano that has the characteristics indicated above. Second, one should consider whether the remedies pursued by the Emberá people of Bayano under Law 72, adopted December 23, 2008, were resolved in keeping with Articles 8 and 25 of the Convention.

248. As for the first aspect, the IACHR observes that, as indicated, Article 127 of the 1972 Constitution of Panama recognizes the collective property rights of the indigenous communities and establishes that the specific procedures for their recognition shall be determined by law.[347] The IACHR finds that the domestic legal order has included a similar provision since the 1946 Constitution.[348]

249. Nonetheless, up until the adoption of Law 72, the procedure available in the Panamanian legal order that would allow for the practical application of such constitutional recognition was to be designated a "*comarca*" through a statute adopted by the Legislative Assembly. In the opinion of the IACHR, that entailed a lengthy process for pressing the claim that was mainly political in nature – and inherently discretional – that the indigenous peoples and their members had to pursue to win recognition of their territorial rights. As the IACHR has noted in the previous section, five *comarcas* were created from 1938 to 2000, leaving out numerous indigenous communities which, though sharing the ethnic origin of the peoples favored by statutes creating *comarcas*, were not included in them.

250. In the case of the Kuna of Madungandí and the Emberá of Bayano, as the IACHR considers has been shown, the process of claiming territorial rights began no later than 1976 and 1975, respectively, with the signing of the first agreements with the State. Given the breach of these initial agreements, the alleged victims, through their representative institutions, have for more than three decades taken innumerable steps vis-à-vis state authorities at the national, provincial, and local levels aimed at obtaining legal recognition for their territories; the Commission considers this period excessive.

251. The IACHR notes that the lack of a clearly regulated suitable and effective procedure for access to indigenous property rights on occasion led the indigenous peoples to adopt measure that would allow them to gain sufficient notoriety and muster enough political pressure to have their claims addressed. The IACHR observes that based on the facts proven, on repeated occasions those actions resulted in the State adopting new commitments or taking measures that did not provide a comprehensive and sustainable response to the underlying claims with the objective of putting an end to

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[344] I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 115.

[345] I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 122, 123.

[346] I/A Court H.R.. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, para. 140.

[347] That provision provides as follows: "The State shall guarantee the indigenous communities reservation of the lands necessary and collective property rights in them for attaining their economic and social wellbeing. The Law shall regulate the procedures to be followed to attain this aim and the corresponding delimitations within which the private appropriation of land is prohibited."

[348] Article 94 of the 1946 Constitution; Article 116 of the 1972 Constitution; Article 123 of the 1972 Constitution, amended in 1978, 1983, and 1994; and Article 127 of the 1972 Constitution amended in 2004.

the actions taken by the indigenous peoples, thereby fostering the use of these practices, instead of creating permanent legal means for claiming their rights.

252. As regards the Kuna indigenous people of Madungandí, this long process of making territorial claims resulted in the adoption, on January 12, 1996, of Law 24 "by which the Kuna Comarca of Madungandí is established," 20 years after signing the first agreement with the State. Nonetheless, in the case of the Emberá indigenous people of Bayano, the innumerable efforts made did not result in the recognition of their territorial rights. In addition, in both cases their territories went without being effective and promptly demarcated or delimited.

253. The IACHR also observes that given the lack of a suitable and effective mechanism for the recognition of indigenous property rights, on June 13, 1995, the communities of the Emberá people of Bayano presented a request for demarcation and titling to the Cabinet Council of the Presidency of the Republic, under Article 12 of the Agrarian Code, which was reiterated subsequently on January 27, 1999 to the Presidency of the Republic. The IACHR has considered it proven that none of those requests obtained a response.

254. The IACHR considers that in addition to having proved ineffective, that procedure cannot be considered suitable for the recognition of indigenous property rights, since it does not constitute a specific mechanism that permits the titling of lands occupied by indigenous peoples or their demarcation or delimitation, taking into account their particular characteristics, based on the historic occupation of the land. It is, on the contrary, a general titling mechanism for individual property, based on the productive use of the land, which ignores the special, unique, and internationally protected relationship that indigenous peoples have with their ancestral territories. In effect, as the Court has noted, in procedures involving indigenous territorial claims that refer to agrarian legislation "the yardstick is whether or not the claimed lands are rationally exploited, regardless of considerations specific to the indigenous peoples, such as what lands mean for them."[349]

255. In summary, in the instant case the non-existence of a procedure in Panamanian legislation to enforce the right to property of the indigenous peoples has meant specifically that the State does not guarantee the right to property of the Kuna and Emberá peoples of Bayano to their ancestral territory. Consequently, the Commission considers that at least until the adoption of Law 72, the Panamanian legal order lacked a suitable and effective mechanism for the recognition, titling, demarcation, and delimitation of the territorial property of the indigenous peoples that took account of their particular characteristics, in violation of Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2.

256. As for the second aspect of the analysis, as indicated above, on December 23, 2008, Law 72 was approved. It "establishes the special procedure for the adjudication of collective property rights over the lands of the indigenous peoples who are not in the *comarcas*." Subsequently, that law was regulated by Executive Decree 223 of July 7, 2010. While Article 4 of Law 72 establishes that the National Bureau of Agrarian Reform of the Ministry of Agricultural Development is the competent authority to carry out that procedure, with the adoption of Law 59 of October 8, 2010, this Bureau was replaced, in terms of its authority, by the ANATI.[350]

257. As has been shown, based on that law, on October 27, 2009, the representatives of the communities of the Emberá people of Bayano filed a request for adjudication of lands with the National Bureau of Agrarian Reform. After this entity was replaced by the ANATI, the alleged victims reiterated that

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[349] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 104. See also *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214. para. 146.

[350] Law 59, of October 8, 2010, "Law that creates the National Land Management Authority, unifies the competences of the General Bureau of Cadastre, the National Bureau of Agrarian Reform, the National Land Management Program, and the 'Tommy Guardia' National Geographic Institute."

request on January 26, 2011. Nonetheless, nearly three years after the procedure was initiated pursuant to Law 72, the communities that make up the Emberá people of Bayano have not obtained formal recognition of their territories, nor have they been effectively demarcated and delimited. In the opinion of the IACHR, the procedure established in that law has proven ineffective in the instant case in relation to the Emberá people of Bayano, insofar as it has yet to provide a definitive and satisfactory solution to their claim.

258. The IACHR emphasizes that as established repeatedly in the case-law of the inter-American human rights system, the obligations of the State in relation to the territorial rights of indigenous peoples entail not only formal recognition of their collective property rights, but also the delimitation and demarcation of their territories, for "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[351] Nonetheless, Law 72 and its regulation established only a "procedure of adjudication of the collective property rights of indigenous peoples' lands," without making reference to obligations of physical demarcation once the property was adjudicated.

259. In addition, the IACHR considers it appropriate at this stage to note that despite the failings pointed out of the process of adopting statutes creating *comarcas* to recognize territorial rights, from the material standpoint, in addition to the collective titling of the territories ancestrally occupied by the indigenous peoples, these laws presuppose the recognition and guarantee of their traditional authorities in the context of the respective *comarca* in different areas of government[352], administration of justice[353], education[354], and use of natural resources[355], among others. While the IACHR attaches a positive value to the establishment of a legal mechanism to make possible the formal recognition of the collective property rights of indigenous peoples in Panama – although it bears in mind that said mechanism was not first consulted with the indigenous peoples – it understands that the mechanism cannot exclude rights of indigenous peoples that are associated mainly with the right to self-government according to their traditional uses and customs, safeguarded through the laws establishing *comarcas* or other instruments which, as mentioned, have won international recognition.

260. In light of Articles 8(1) and 25 of the Convention, the Panamanian State has the obligation to provide the indigenous communities of the Emberá people of Bayano an effective and efficient remedy for solving their territorial claim, the duty to ensure that those communities are heard with the proper guarantees, and the duty to make a determination, in a reasonable time, in order to guarantee the rights and obligations of the persons subject to its jurisdiction.

261. In view of the foregoing, the Commission considers that the State has not guaranteed an effective and efficient remedy for the recognition, titling, demarcation, and delimitation of the territories claimed by the alleged victims, keeping them from being heard in a process with the proper guarantees. Therefore, the Commission concludes that the State of Panama violated Articles 25 and 8 of the

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[351] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143.

[352] See Articles 5 to 7 of Law 24, creating the Kuna Comarca of Madungandí, Article 10 of Law 22 that creates the special legal regime of the Emberá Comarca of Darién; Articles 3 to 6 of Law 34, creating the Kuna Comarca of Wargandi; Articles 17 to 39 of Law 10 of March 11, 1997, which creates the Ngöbe-Buglé Comarca.

[353] See Article 12 of Law 16 by which "the Comarca of San Blas is organized," subsequently called Comarca of Kuna Yala; Article 15 of Law 22, which creates the special legal regime for the Emberá Comarca of Darién; Articles 40 and 41 of Law 10, which creates the Ngöbe-Buglé Comarca; Article 7 of Law 34, which creates the Kuna Comarca of Wargandi.

[354] See Articles 17 to 20 of Law 16 by which "the Comarca de San Blas is organized," subsequently called Comarca of Kuna Yala; Article 21 of Law 22, which creates the special legal regime of the Emberá Comarca of Darién; Article 16 of Law 24, which created the Kuna Comarca of Madungandí; Article 54 of Law 10, which creates the Ngöbe-Buglé Comarca; Article 14 of Law 34, which creates the Kuna Comarca of Wargandi.

[355] See Article 19 of Law 22, which creates the special legal regime for the Emberá Comarca of Darién; Article 9 of Law 24 which creates the Kuna Comarca of Madungandí; Article 50 of Law 10, which creates the Ngöbe-Buglé Comarca; Articles 9 to 13 of Law 34, which creates the Kuna Comarca of Wargandi.

American Convention to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members, in relation to Articles 1(1) and 2.

b) Obligation to provide an adequate and effective procedure for protection of the territories and natural resources of the indigenous peoples vis-à-vis third persons

262. According to the case-law of the inter-American system, the States are under an obligation to adopt measures to guarantee and give legal certainty to the rights of indigenous and tribal peoples with respect to ownership of their properties, among other means by establishing special, swift, and effective mechanisms or procedures to resolve legal claims over such property. As the Inter-American Court has indicated, the procedures in question must comply with the rules of due process as in any other procedure whose decision may affect the rights of persons. The effective remedies that the States must offer under Article 25 of the American Convention "must be substantiated according to the rules of due legal process (Article 8 of the Convention)."[356]

263. In addition, the IACHR has indicated that when land disputes emerge with third persons, indigenous and tribal peoples have the right to obtain protection and reparation through adequate and effective procedures; to be guaranteed the effective enjoyment of their right to property; to have an effective investigation and punishment of those responsible for such attacks; and to having swift special mechanisms established that are effective for solving the legal disputes over the ownership of their lands.[357]

264. In the instant case, as the IACHR has found, the failure to take effective actions to prevent the invasion and illegal deforestation of the indigenous territory, and to effectively protect the territory and natural resources of the alleged victims, made possible the interference in and gradual appropriation of non-indigenous persons in the territories claimed by the alleged victims, as well as the illegal logging by third persons.

265. This happened despite the fact that the alleged victims signed numerous agreements with state authorities and despite the issuance of resolutions that sought the eviction of the non-indigenous persons and the halt of the illegal logging.[358] Nonetheless, such agreements and resolutions did not provide effective protection for the territories of the Kuna and Emberá peoples of Bayano. The alleged victims also pursued administrative remedies and filed criminal complaints with the objective of obtaining protection for their territories and natural resources, whose conformity with the obligations contained in the American Convention is analyzed next.

Administrative remedies for the protection of the indigenous territory and natural resources vis-à-vis the invasion of third persons

[356] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 62. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83.

[357] IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 113. IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1062-1066; 1071; 1137 – Recommendations 1 to 4. IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, February 26, 1999, paras. 21-27 and Recommendation 3.

[358] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001; Annex 31. Working Agreement for the Renewed Land Use Management of Alto Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí and other Communities of July 16, 1991. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 32. Resolution 002 of January 24, 1992. Annex 19 to petitioners' initial petition of May 11, 2000; and Annex 14 to the State's communication of June 29, 2001; Annex 33. Resolution 63 of March 17, 1992. Annex 20 to petitioners' initial petition of May 11, 2000; and Annex 13 to the State's communication of June 29, 2001.

266. As regards the administrative remedies filed by the alleged victims, the IACHR has found that on April 5, 2002, the traditional authorities of the Kuna Comarca of Madungandí began a procedure for evicting illegal occupants with the office of the mayor of Chepo. According to the information in the record before the IACHR, that authority did not offer any response to this request. The IACHR observes that the legal basis for the request filed was found in Article 1409 of the Judicial Code of Panama, which established as follows:

> When the property is occupied without a lease agreement with the owner or his representative or administrator, any of these persons may request that the chief of police have it cleared and hand it over to him or her. If the occupant or occupants do not show title that explains the occupation, the eviction shall take place immediately.

267. The IACHR has answered that after a year without obtaining a response from the local authority, on February 17, 2003, the representatives of the Comarca filed a similar request with the office of the governor of the province of Panamá. The Commission observes that no significant steps were taken in this administrative procedure. In effect, even though that provision establishes that "the eviction shall be carried out immediately" if they do not have titles that explain the occupation – as in the instant case – the first action of the provincial authority was taken on June 6, 2003. It was not until over 11 months had elapsed, since the request, that the provincial governor sought a legal opinion from the Procuraduría de Administración concerning her authority. Nonetheless, as has been proven, the alleged victims reiterated the request for eviction, denounced new invasions, and asked that procedural impetus be given to the matter.

268. That procedure was considered concluded with the resolution of August 2004 by which the provincial authority found itself to lack authority, based on the note issued by the Procuraduría de Administración on March 31, 2004, and ordered the matter archived, considering that it should be forwarded to the Presidency of the Republic. Nonetheless, according to the information available to the IACHR, the record was not forwarded, but rather it was the petitioners who on January 24, 2005, filed the request for eviction of illegal occupants with the Presidency of the Republic. Nonetheless, according to the information before the IACHR, this request did not receive any response whatsoever.

269. In view of those considerations, the IACHR considers that the proceedings initiated by the Kuna Comarca of Madungandí before the national, provincial, and local authorities under Article 1409 of the Judicial Code of Panama did not constitute special, opportune and effective mechanisms that would have enabled the alleged victims to obtain effective protection for their territory; indeed, that state action was at odds with the obligations contained in Articles 8 and 25 of the American Convention.

270. The IACHR also observes that the request for eviction of illegal occupants would have been presented to the Presidency of the Republic, given the lack of a *corregidor* with authority in the Kuna Comarca of Madungandí; a *corregidor* is an authority with the rank of administrative police authorized to order the eviction of illegal occupants. In effect, as the State argued in various briefs submitted to the IACHR, Article 862 of the Panamanian Administrative Code notes who are the chiefs of police in each region.[359] Nonetheless, Law 24, which established the Kuna Comarca of Madungandí, establishes that the General Congress is the maximum authority, without providing for police authorities.[360] The Third Chamber of the Supreme Court of Justice issued a judgment along the same lines on March 23, 2001, which the State also mentioned in the procedure before the IACHR.[361]

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[359] Article 862 of the Administrative Code. "The following are chiefs of Police: The President of the Republic in the entire national territory, the Governors in their Provinces, the Mayors in their Districts; the Corregidors in their Sub-districts and Neighborhoods, the Night Police judges when they are on duty, the *Regidores* in their *Regidurías*, and the *Comisarios* in their sections."

[360] Communication from the State of May 18, 2007, received by the IACHR May 22, 2007; Additional observations on the merits submitted by the State by brief of April 27, 2010, received by the IACHR May 3, 2010. In addition, in the thematic hearing on the right to private property of indigenous peoples in Panama, the State noted that the High-Level Presidential Commission in May 2008 made a visit to areas invaded by settlers in the Kuna Comarca, on which occasion the lack of an administrative authority to handle the requests for eviction was verified, thus it was considered necessary to appoint a *corregidor*. Thematic hearing on the

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271. As was considered proven, by Executive Decree 247 of June 4, 2008, the provisions necessary for the establishment of a *corregidor* were added to the Organic Charter of the Comarca of Madungandí. The IACHR notes that this was done more than seven years after the judgment of the Third Chamber of the Supreme Court of Justice, and more than four years after the issuing of the legal opinion of the Procuraduría de Administración, acts which irrefutably verified the lack of a competent authority for addressing the question of the invasion of settlers in the territory of the Kuna Comarca of Madungandí.

272. In addition, the IACHR takes note of the time periods in which, even though the provisions necessary for appointing a *corregidor* were adopted, this authority had not actually been designated. In particular, it observes that after the adoption of Executive Decree 247, the Kuna Comarca of Madungandí did not have, for at least another year and nine months, a competent authority legally authorized to carry out the eviction of settlers from the indigenous territory. In addition, according to the information available to the IACHR, even when a *corregidor* has already been appointed for the Comarca, this authority did not take decisive actions to obtain a definitive solution to the claim brought by the alleged victims, the remedies pursued proving ineffective.

273. As the expert witness Alexis Oriel Alvarado Ávila explained, this was related to the failure to provide material resources for that authority to be able to devote attention to the actions filed.[362] Without denying that, the State explained to the IACHR that "the Panamanian State approves through the law, the main law that the National Assembly adopts, the Law on the Budget, and five months ago when the *corregidor* was appointed the only thing the Ministry [of Interior and Justice] could do was to approve his salary."[363] The Commission takes note of the information presented by Panama, but recalls that the States cannot allege domestic matters to fail to carry out their international obligations. In addition, the IACHR recalls that the Inter-American Court has referred to:

> … the duty to ensure an accessible and simple procedure [referring to the procedure for processing claims related to the lands of indigenous peoples] and to provide competent authorities with the technical and material conditions necessary to respond timely to the requests filed in the framework of said procedure.[364]

274. The IACHR considers as positive developments the issuance of Resolution No. 5 of April 2, 2012 by the Special *Corregiduria* of the Kuna of Mandungandí Comarca, as well as Resolution No. 197-R-63 of August 22, 2012 by the Ministry of Governance; but it recalls that, in addition, it is necessary to adopt concrete measures that effectively materialize what was ordered in those resolutions, so as to ensure the existence of an effective guarantee of the free and full exercise of the rights of the alleged victims.

Administrative penalizing procedures and criminal actions for the protection of the indigenous territory and natural resources

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…continuation
right to private property of indigenous peoples in Panama, held during the 133rd period of sessions, October 28, 2008. See hearing at http://www.oas.org/es/cidh/.

[361] In that judgment, the Supreme Court of Justice affirmed that the Kuna Comarca of Madungandí is not part of the district of Chepo, and that to be part of it, this would have to be expressly provided for in a law. State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[362] IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Alexis Oriel Alvarado Ávila.

[363] IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Bayano, Panama, 144th regular period of sessions. See hearing at http://www.oas.org/es/cidh/.

[364] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 109. The IACHR has also indicated that the states are obligated to ensure the funds and resources necessary for carrying out their constitutional and international obligations with regard to the territorial rights of indigenous and tribal peoples. IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, para. 50 – Recommendation 2.

275. As the Court has indicated repeatedly, the duty to investigate is a duty of means, and not of results, and must assumed by the state as a legal obligation of its own, and not as a mere formality preordained to be ineffective.[365] In that vein, the investigation should be carried out with due diligence, in an effective, serious, and impartial manner[366], and within a reasonable time.[367] The Inter-American Court has also established that "domestic proceedings must be considered as a whole and the duty of the international tribunal is to find out if all proceedings were carried out in compliance with international provisions,"[368] given that the right to effective judicial protection therefore "requires that the judges direct the proceeding in such a way as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights."[369]

276. The IACHR has considered it proven that the alleged victims filed at least five criminal complaints for the purpose of having those responsible for the attacks on their territories and natural resources investigated and punished: (i) criminal complaint filed December 20, 2006, before the Attorney General of the Nation for the crimes of illicit association to engage in criminal conduct, usurpation, harm to property, illicit enrichment, ecological crime, and all others that result from the illegal occupation of the lands of the Comarca; (ii) complaint filed January 16, 2007, by the General Caciques of the Kuna Comarca of Madungandí with the Specialized Unit on Crimes against the Environment of the Technical Judicial Police, for crime against the environment; (iii) complaint filed on February 1, 2007, by the Corporación de Abogados Indígenas de Panamá, in representation of the Kuna Congress of Madungandí for crime against the environment; (iv) complaint filed January 30, 2007, by Héctor Huertas, attorney for the Kuna Comarca, with the Technical Judicial Police of the District of Chepo; and (v) complaint filed August 16, 2011, by Tito Jiménez, administrative *sahila* of the community of Tabardi, for the invasion and illegal logging in the Kuna Comarca of Madungandí.

277. Regarding the first complaint, the IACHR was not informed of actions taken to investigate effectively the alleged facts and establish the corresponding responsibilities; instead, the State itself informed that it did not have a record of the complaint. According to the information available to the IACHR, the two subsequent complaints were joined in a single proceeding, which has been before the Office of the 11th Prosecutor of the First Judicial Circuit of Panama since February 2007. As of that date, various proceedings took place which concluded with the issuance of Prosecturorial Review No. 151, on May 29, 2008, which requests the provisional stay of the investigation. As regards the fourth complaint filed, according to the evidence in the record before the IACHR, it culminated with the temporary dismissal of the case issued on December 27, 2007, by the Judge of the Tenth Criminal Circuit of the First Judicial Circuit of the Province of Panamá. As for the fifth complaint, the IACHR has no information other than that it was filed and that certain measures were taken, yet it has not been informed, to date, of the existence of further proceedings, or of a definitive decision in the matter.

278. As regards the administrative penalizing procedures pursued for the protection of the natural resources located in indigenous territories, the IACHR has found that the Kuna of Madungandí

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[365] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 131; and I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

[366] I/A Court H.R. *Case of García Prieto et al. v. El Salvador.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101; I/A Court H.R., *Case of the Brothers Gómez Paquiyauri v. Peru*. Judgment of July 8, 2004. Series C No. 110, paras. 146; I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 130.

[367] I/A Court H.R. *Case of Bulacio v. Argentina*. Judgment of September 18 2003. Series C No. 100, para. 114; I/A Court H.R., *Case of the Rochela Massacre v. Colombia*. Judgment of May 11, 2007. Series C. No. 163. Para. 146; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 382.

[368] I/A Court H.R. *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 142.

[369] I/A Court H.R. *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, para. 210. I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para.115.

and the Emberá of Bayano and their members denounced illegal logging to the National Environmental Authority on at least two occasions, in January and March 2007. The IACHR notes that on both occasions that authority made inspection visits in which it verified the illegal logging. In particular, the images that the IACHR has before it evidence the inequality between the forested area and the area invaded by settlers.[370] According to the information available to the IACHR, in the first case the ANAM ordered the persons found responsible to pay a fine of B/.500.00 (five hundred balboas). In the second case, there is no evidence whatsoever in the record that any sanction was applied, even though it was found that Article 80 of the Forestry Law was violated, as affirmed in the respective technical report. It should be noted that Article 81 of that law provides for a prison sentence of 30 days to six months for the violation of said Article 80.

279. In this respect, what has been indicated by the Inter-American Court should be recalled, namely:

> … proceedings followed through up until their conclusion and that fulfill their purpose are the clearest sign of zero tolerance for human rights violations, contribute to the reparation of the victims, and show society that justice has been done. The imposing of an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of de facto impunity. In this regard, the Court has emphasized that administrative or criminal sanctions play an important role in creating the type of institutional culture and competence required to deal with the factors that explain certain structural contexts of violence.[371]

280. In light of the foregoing, the IACHR observes that the prolonged and repeated nature of the acts of invasion and illegal logging, as well as the close association of the natural resources present in the traditional territories of the indigenous peoples in aspects fundamental for their material and cultural subsistence, indicate that the procedures followed turned out to be insufficient in the alleged victims' search for protection and justice. The IACHR notes that, despite the several complaints filed by the alleged victims, the authorities failed to carry out a serious and effective investigation aimed at finding out the truth and the determination of responsibility that would allow the cessation of the serious invasion of the indigenous territory and the illegal extraction of natural resources[372].

281. The IACHR considers that the lack of attention to their particular characteristics, together with the improper and ineffective prolongation of the procedures initiated left the alleged victims in a situation of lack of protection in light of the constant invasion of their territories and the destruction of their natural resources. It has not gone unnoticed by the IACHR that this situation places the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members in a permanent state of uncertainty, anxiety, and fear, thereby negatively affecting their right to possess and control their territory without any type of external interference.

282. In view of the foregoing considerations, the IACHR concludes that the administrative remedies initiated by the alleged victims for the protection of their ancestral territories and natural

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[370] Annex 94. Photographic images of the field inspection carried out September 14, 2007, by the Office of the 11th Prosecutor of the First Judicial Circuit of Panama, folios 506-513; Photographic images of the field inspection conducted August 22, 2007, by the Office of the 11th Circuit Prosecutor of the First Judicial Circuit of Panama, folios 468-503. Petitioners' brief of November 13, 2007, received by the IACHR the same day. In addition, in the procedure on precautionary measures, images were produced of logging in the zone. Annex 95. Annexes to the brief requesting precautionary measures of March 14, 2011, received by the IACHR March 15, 2011.

[371] I/A Court H.R.. *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. para. 153.

[372] The ineffectiveness of the actions submitted led to the petitioners to affirm in their request of precautionary measures before the IACHR that "They have filed legal actions internally to impede the illegal entry to their territories both administrative and legal established in the Panamanian jurisdiction; however, these invasions have continued and have increased (....) Desperate and due to the lack of authority in the area, the indigenous have resorted to criminal justice, knowing both the penalty, and the sanctions are laughable to intimidate settlers who have invaded more than a thousand hectares of indigenous forests and crops. " Brief requesting precautionary measures, March 14, 2011, received by the IACHR March 15, 2011.

resources did not constitute special, opportune or effective mechanisms for the protection of the rights of the Kuna of Madungandí or the Emberá of Bayano or their members, in violation of the obligations contained in Articles 8(1) and 25(1) of the Convention, in relation to Articles 1(1) and 2.

C. Right to equality before the law and non-discrimination – Articles 24[373] and 1(1) of the American Convention

283. The American Convention prohibits discrimination of any type, a notion that includes unwarranted distinctions on the basis of race, color, national or social origin, economic position, birth, or any other social condition. The principle of equality and non-discrimination is a protection that underlies the guarantee of other rights and liberties, since in the terms of Article 1(1) of the American Convention, every person is entitled to the human rights enshrined in those instruments, and has the right to have the State respect and ensure their free and full exercise, without discrimination of any kind. In the words of the Inter-American Court: "Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights."[374]

284. The scope of Article 24 of the Convention, which enshrines the right to equality before the law and to receive equal protection of the law, without discrimination, has been described by the Inter-American Court in the following terms:

> Although [the concepts] are not conceptually identical … Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.[375]

285. In this regard, the Inter-American Court has also referred to the obligations that arise for the States from the principle of equality and non-discrimination, affirming that:

> States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws"[376], and that "[i]n compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.[377]

286. One specific manifestation of the right to equality is the right of all persons not to be victims of racial discrimination. This form of discrimination constitutes an affront to the equality and

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[373] Article 24 of the American Convention provides: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[374] I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 83. The Human Rights Committee has also noted: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights." UN Human Rights Committee. *General Comment No. 18. Non-Discrimination.* November 10, 1989. para. 1.

[375] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 54. Along the same lines, see IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, paras. 162 ff.

[376] I/A Court H.R.. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 88.

[377] I/A Court H.R.. *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 103.

essential dignity of all human beings and has been the subject of the unanimous reproach of the international community[378], and of an express prohibition in Article 1(1) of the American Convention.

287. Other instruments of international law applicable to the State of Panama contain the principle of non-discrimination, such as the International Covenant on Civil and Political Rights[379], the Inter-American Democratic Charter[380], and the American Declaration of the Rights and Duties of Man, the preamble to which notes that "[a]ll men are born free and equal, in dignity and in rights" and its Article II provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Specifically, the International Convention on the Elimination of All Forms of Racial Discrimination – to which the Panamanian State is party[381] – defines discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life," and binds the states parties, *inter alia,* "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

288. Accordingly, in light of the applicable international law, persons have a fundamental right not to be victims of discrimination on grounds of their ethnic or racial origin. In addition, the states are internationally bound to refrain from engaging in acts of racial discrimination, and to prohibit such discriminatory acts.

289. Indigenous persons and peoples also have fundamental rights to equality and to be free from all forms of discrimination – in particular all forms of racial discrimination based on their ethnic origin. These rights acquire additional specific content in the case of indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples establishes at Article 2 that "[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity"; and at Article 9 it provides that "[i]ndigenous peoples and individuals have the right to belong to

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[378] See, among others, United Nations Declaration on the Elimination of All Forms of Racial Discrimination of November 20, 1963 [resolution 1904 (XVIII) of the General Assembly], which solemnly affirms the need to quickly eliminate racial discrimination everywhere in all its forms and manifestations, and to ensure understanding and respect for the dignity of the human person. In addition, the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights on July 12, 1993 establish that: "Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community. Governments should take effective measures to prevent and combat them. Groups, institutions, intergovernmental and non-governmental organizations and individuals are urged to intensify their efforts in cooperating and coordinating their activities against these evils." (para. 15.)

[379] Article 2(1) of the International Covenant on Civil and Political Rights establishes the obligation of each State Party to respect and ensure to all individuals who are in their territory and subject to their jurisdiction the rights recognized in the Covenant, without any distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, economic position, birth, or any other social condition. The United Nations Human Rights Committee has understood that the term "discrimination" entails "…any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms." UN Human Rights Committee. *General Comment No. 18. Non-Discrimination.* November 10, 1989. para. 7. Panama ratified the International Covenant on Civil and Political Rights on March 8, 1977.

[380] The preamble to the Inter-American Democratic Charter indicates that the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy. In addition, Article 9 of the Charter establishes: "The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation."

[381] Panama ratified it on August 16, 1967.

an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."[382]

290. In addition, the Committee on the Elimination of Racial Discrimination "has consistently affirmed that discrimination against indigenous peoples falls under the scope of the [International] Convention [on the Elimination of All Forms of Racial Discrimination] and that all appropriate means must be taken to combat and eliminate such discrimination,"[383] which is why it has called on the states to "[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity."[384] In this way, every indigenous person has a fundamental human right, recognized and protected internationally, to effectively enjoy the rights of every human being on an equal footing, and not to be a victim of discrimination in the exercise of those rights on grounds of his or her ethnic origin.

291. With respect to the indigenous peoples in Panama in particular, the Committee on the Elimination of Racial Discrimination, in its Report of Concluding Observations of May 2010, stated:

> 9. The Committee notes with concern the persistence of racial discrimination and its historical roots, which have led to the marginalization, impoverishment and vulnerability of … indigenous peoples.
> …
> 11. The Committee expresses its concern at the fact that, in spite of the adoption of policies and the creation of national institutions, in practice … indigenous peoples still encounter considerable difficulties in exercising their rights and are the victims of *de facto* racial discrimination and marginalization and that they are particularly vulnerable to violations of human rights. The Committee is also concerned by the structural causes which perpetuate discrimination and denial of access to social and economic rights and development, in particular in the areas of employment, housing and education….

292. In connection with the foregoing, that Committee indicated:

> 12. The Committee expresses its serious concern about the information received that, despite the existence of the indigenous region (*comarca*) as an entity, with provision for self-government and communal ownership of land by indigenous peoples, there are some indigenous communities that have not obtained a region or entity of similar status…. The Committee further wishes to express its concern at the very low standard of living in the indigenous regions, such as the area of Darién where there is poor access to basic services and to governmental poverty-elimination policies. The Committee recommends that the State party finalize the procedures still pending to ensure that all Panamanian indigenous communities secure a region or entity of similar status. It also urges the State party to do its utmost to ensure that its governmental poverty-elimination policies are effective throughout the country, and in particular in the indigenous regions.[385]

293. The Human Rights Committee, in its Report of Concluding Observations of April 2008, noted:

> The Committee expressed its concern at the information included in the State party's report and received from non-governmental sources on the existence among the general population of racial prejudices against indigenous people and also on the many problems that affect indigenous communities, including serious shortcomings in health and education services; the lack of an

[382] United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly, with the favorable vote of Panama, through Resolution A/61/295, 61st period of sessions (September 13, 2007).

[383] UN Committee on the Elimination of Racial Discrimination. *General Recommendation No. XXIII on the rights of indigenous peoples*. August 18, 1997. para. 1.

[384] UN Committee on the Elimination of Racial Discrimination. *General Recommendation No. XXIII on the rights of indigenous peoples*. August 18, 1997. para. 4(b).

[385] UN Committee on the Elimination Discrimination. *Consideration of reports submitted by States Parties under article 9 of the Convention. Concluding observations.* CERD/C/PAN/CO/15-20. May 19, 2010. paras. 9-12.

> institutional presence in their territories; the absence of a process of consultation to seek the prior, free and informed consent of communities to the exploitation of natural resources in their territories; the ill-treatment, threats and harassment to which members of the communities have reportedly been subjected on the occasion of protests against hydroelectric infrastructure construction projects, mining operations or tourism facilities on their territory; and the non-recognition of the special status of indigenous communities that are not within a *comarca* (articles 1, 26 and 27 of the Covenant).[386]

294. Similarly, the Committee on Economic, Social and Cultural Rights noted in its Report of Concluding Observations on Panama, in September 2001, that:

> 12. […] The Committee is deeply concerned about the persisting disadvantage faced in practice by members of indigenous communities in Panama, and in particular about the marked disparities in the levels of poverty and literacy and access to water, employment, health, education and other basic social services. The Committee is also concerned that the issue of land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands.
> …
> 28. … [The Committee] urges the State party to pay particular attention to improving poverty and literacy rates and access to water, employment, health, education and other basic social services for indigenous peoples. The Committee recommends that the issue of land rights of indigenous peoples be fully resolved so as to avoid their coming under threat by mining and cattle ranching activities that result in their displacement from their traditional ancestral and agricultural lands.[387]

295. In the instant case, the petitioners alleged that the repeated refusal to carry out the obligations with respect to the territorial rights of the Kuna indigenous people of Madungandí and the Emberá of Bayano constituted discrimination based on their ethnic origin. They noted the existence of distinct and more preferential attention to individual private property, which contrasts with the situation of lack of protection of indigenous property rights. The State, for its part, did not controvert the allegations specifically related to the violation of the right to non-discrimination.

296. Similarly, the Inter-American Commission approved the prejudicial impact on the traditional forms of subsistence of the Kuna de Madungandí and Emberá de Bayano indigenous peoples, caused by the Bayano Hydroelectric and the Panamerican Highway. Specifically, it referred to the lack of basic services, such as water and electricity, the proliferation of diseases such as malaria, the high malnutrition rates among children under five years old, and the deforestation of the territory, among others.

297. In connection with the obligation of the State to eliminate discriminatory regulations from the legal framewok, the Commission noted that the Constitution of Panama contains provisions that recognize certain rights of indigenous peoples, such as the right to collective property. Similarly, it noted that in the Constitution itself, article 126, which relates to agrarian policy, establishes in its last sub-paragraph that such policy "would be applicable to indigenous communities in accordance with scientific methods of cultural change."

298. In the opinion of the IACHR, this legal framework presupposes the persistence of discriminatory factors in the legal order in relation to protection of the right to property over the ancestral territory and natural resources of indigenous peoples. The application of provisions from the agrarian regime, based on the logic of the productive use of the land, gives rise to a situation of lack of protection in which the special, unique, and internationally protected relationship of indigenous peoples with their

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[386] UN Human Rights Committee. *Consideration of Reports Submitted by the States Parties under Article 40 of the Covenant. Concluding Observations*. CCPR/C/PAN/CO/3. April 17, 2008. para. 21.

[387] UN Committee on Economic, Social and Cultural Rights. *Consideration of Reports by States Parties under Articles 16 and 17 of the Covenant. Concluding Observations*. E/C.12/1/Add.64. September 24, 2001. paras. 12 and 28.

ancestral lands is ignored, a relationship that is absent in the case of the non-indigenous population. Moreover, that framework is not compatible with the right of indigenous peoples and their members to belong to a differentiated ethnic group with its own social and cultural characteristics, traditions, and customs; and rather, it points to their assimilation with the objective of attaining the ends of the agrarian policy.

299. In connection with the obligation of the State to combat discriminatory practices, the IACHR notes in this case that the domestic law did not have adequate and efficient remedies for the protection of community and collective property right of indigenous peoples, what explains the numerous obstacles encountered by the Kuna people of Madungandí and the Emberá people of Bayano to the attainment of their rights, and the obstacles they have encountered gaining access to justice.

300. Additionally, the Commission has already ruled with respect to the systematic repudiation and breach of the commitments acquired with the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, after nearly 40 years from the dispossession and flooding of their ancestral territories, to make way for the construction of the Ascanio Villalaz Hydroelectric Complex, ignoring the alleged victims' claims for decades. The IACHR has found that in addition to depriving the indigenous peoples who are the alleged victims of their right to recognition, delimitation, and demarcation of the territory, the State did not adopt measures of prevention and protection in response to the permanent invasion of settlers, and the continuous illegal extractive activities.

301. The Commission observes that this occurred despite the numerous communications sent and the numerous administrative and judicial remedies pursued, thus placing the alleged victims in a situation of lack of protection and permanent uncertainty. The IACHR considers that in the instant case the lack of equal protection was expressed, *inter alia*, in the failure to address the numerous notes sent by the highest-level indigenous authorities, the lack of an effective response by the administrative institutions in response to the requests submitted, the late or non-existent response of the judicial authorities to the constant and prolonged violation of the alleged victims' territory and natural resources, and the failure to designate or late designation of authorities to protect the indigenous lands. This course of action on the part of the State stands in contrast to the measures adopted to favor the appropriation of lands by non-indigenous persons that directly and indirectly affected the territories of the Kuna people of Madungandí and the Emberá of Bayano, such as the construction of access roads into the zone inhabited by these indigenous peoples and the adjudication of lands under individual title in areas previously declared to be state-owned and on others claimed by the alleged victims.

302. The IACHR and the Inter-American Court have consistently held, preserving the particular connection between indigenous communities and their lands and resources is tied to the very existence of these peoples, and therefore "warrants special measures of protection."[388] Accordingly, it is necessary for the right to property of indigenous and tribal peoples to protect this close bond they maintain with their territories and the natural resources linked to their culture that are found there.[389]

303. In this respect, the IACHR recalls that the rights to equality before the law, equal treatment, and non-discrimination require that states establish the legal mechanisms necessary to clarify and protect the right of indigenous peoples to communal property, and property rights in general under

[388] IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann v. United States, December 27, 2002, para. 128. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79. Para. 149. See also: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C No. 146, para. 222.

[389] IACHR, Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 156. I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121.

the domestic legal system.[390] States violate the right to equality before the law, equal protection of the law, and non-discrimination when, as in this case, they do not grant indigenous peoples "the protections necessary to exercise their right to property fully and equally with other members of the … population."[391]

304. Similarly, the Human Rights Committee has referred to the right to equality before the courts, indicating: "[a] situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence [which addresses that right]."[392] In addition, the current UN Special Rapporteur on the Rights of Indigenous Peoples has noted as part of a context characterized by the lack of effective access of indigenous peoples to the system of justice "the existence of a clear disparity between the institutional response to the complaints against members of the indigenous communities and the impunity of many of the reported acts of abuse, harassment, and physical violence…."[393]

305. In view of the foregoing considerations, the Commission concludes that the State of Panama is responsible for violating its obligation to ensure and respect the rights, without any discrimination based on race or ethnic origin, and the right to equal protection before the law, enshrined in Articles 24 and 1(1) of the American Convention, to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members.

VI. CONCLUSIONS

306. In view of the considerations of fact and law established in this report, the Inter-American Commission on Human Rights concludes that:

1. The State of Panama violated Article 21 of the Convention, in relation to Article 1(1) of the same instrument, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members on having failed to grant just and prompt compensation, more than 40 years after their ancestral territories were alienated.

2. The State of Panama violated the right to property enshrined in Article 21 of the American Convention on Human Rights in relation to Articles 1(1) and 2, to the detriment of the Emberá people of Bayano and its members, for not having providing them effective access to collective property title to their territories; and for having failed to delimit, demarcate, and effectively protect their territories.

3. The State of Panama violated the right to property enshrined in Article 21 of the American Convention on Human Rights, in relation to its Articles 1(1) and 2, to the detriment of the Kuna indigenous people of Madungandí and its members, on having failed to promptly recognize, delimit, and demarcate their territory; and on having failed to provide effective protection for the territories of the Kuna Comarca of Madungandí vis-à-vis third persons.

4. The State of Panama violated Articles 8 and 25 of the American Convention, in connection with Articles 1(1) and 2, due to the failure to provide for an adequate and effective procedure

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[390] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 155. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 61.

[391] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 171. IACHR. Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 61.

[392] UN. Human Rights Committee. *General Comment 32 – Article 14. Right to equality before courts and tribunals and right to a fair trial.* UN doc. CCPR/C/GC/32, August 23, 2007, para. 9.

[393] UN. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. *Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories.* A/HRC/18/35/Add.3. June 7, 2011. para. 65. In addition, see UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen. *Human rights and indigenous issues*. E/CN.4/2004/80. January 26, 2004. paras. 9-43.

for acceding to their property rights over the ancestral territory, and for their protection vis-à-vis third persons, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members.

5. The State of Panama violated Article 24 of the American Convention, in connection with Article 1(1) of the Convention, for breaching its obligation to ensure and respect the rights, without any discrimination based on ethnic origin, and to provide equal protection before the law, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members.

VII. RECOMMENDATIONS

307. Based on the analysis and conclusions of this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF PANAMA THAT IT:

1. Promptly conclude the process of formalizing, delimiting, and physically demarcating the territories of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members, bearing in mind the inter-American standards noted in this report.

2. Grant the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members prompt and just compensation for the removal, resettling, and flooding of their ancestral territories; the amount owed should be determined through a process that ensures their participation, in keeping with their customary law, values, and uses and customs.

3. Adopt the measures necessary for ensuring the effective protection of the territory of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano for the purpose of guaranteeing their physical and cultural survival, as well as the development and continuity of their cosmovision, so that they can continue living their traditional way of life and preserve their cultural identity, social structure, economic system, customs, beliefs, distinct traditions and justice system. Similarly, adopt the necessary measures to ensure that the Kuna de Madungandí and Embera peoples of Bayano have access to culturally pertinent health and education programs.

4. Halt the illegal entry of non-indigenous persons in the territories of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and move the current occupant settlers to territories that do not belong to the indigenous peoples. In addition, ensure the free, prior, and informed consent of the the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano to the plans, programs, and projects sought to be developed in their territories.

5. Establish an adequate and effective remedy that protects the rights of the indigenous peoples of Panama to claim and accede to their traditional territories, and protect their territories and natural resources from third persons, including respecting the right of indigenous peoples to enforce their customary laws through their justice systems.

6. Make individual and collective reparations for the consequences of the violations of human rights found in this report. In particular, repair the lack of protection of ancestral territories of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, the lack of effective and prompt response by the authorities, and the discriminatory treatment to which they were subjected.

7. Adopt the measures necessary to prevent similar events from occurring in the future, in keeping with the duty to prevent violations and ensure the exercise of the fundamental rights recognized in the American Convention.