

House Foreign Affairs Committee
Tom Lantos Human Rights Commission

Hearing
on
The Rights of Indigenous Peoples in the Americas

November 20, 2020 - 10:00 a.m.
Virtual via Cisco WebEx

STATEMENT SUBMITTED FOR THE RECORD

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On behalf of the Center for International Environmental Law (CIEL), we express our appreciation for the attention paid by the Tom Lantos Human Rights Commission to the rights of Indigenous Peoples in the Americas. We welcome today's hearing on these important issues.

Since 1989, CIEL has used the power of law to protect the environment, promote human rights, and bring about a just and sustainable society. As part of this work, CIEL has accompanied various Indigenous communities in the American continent whose ancestral lands and traditional ways of life have been threatened by internationally financed development projects. At present, CIEL supports Ngäbe, Buglé, and Campesino communities in Panama who would be affected by the country's Fourth Electrical Transmission Line.

We recall that this Commission held another hearing on the subject of the Rights of Indigenous Peoples in Latin America ten years ago, on April 29, 2010. At that hearing, Mr. Feliciano Santos testified¹ on behalf of the Ngäbe people about the threats posed to them by plans to construct hydroelectric projects on the Changuinola River. He highlighted key challenges that the affected Ngäbe communities faced in seeking to defend their rights as Indigenous Peoples, including

¹ Throughout this submission, we make reference to Feliciano Santos's testimony from the hearing held by this Commission on April 29, 2010. A transcript of this testimony is available on the Commission's website and can be accessed via the following link: https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/04_29_2010_The_Rights_of_Indigenous_Peoples_Latin%20America.pdf.

inadequate protections of their lands and insufficient or non-existent processes to ensure their right to Free, Prior, and Informed Consent (FPIC).

These same challenges continue to undermine the rights of Ngäbe and Buglé communities today. In the context of the aforementioned project to construct the Fourth Transmission Line, CIEL is working to support the Movement for the Defense of the Territories and Ecosystems of Bocas del Toro (MODETEAB), coordinated by Mr. Santos, and the Ngäbe, Buglé, and Campesina Territorial Organization of the Region of Northern Santa Fe in their efforts to defend their rights.

We dedicate the following section of this statement to providing an update on the situation of the Ngäbe people in the context of the hydroelectric projects that were the focus of the statement made by Mr. Santos before this Commission ten years ago. We then address the situation of the Indigenous communities that would be affected by the Fourth Transmission Line, which is the latest project to jeopardize the rights, economic and social well-being, and cultural survival of the Ngäbe and Buglé Indigenous Peoples in Panama.

I. The Chan-75 dam and its impacts on Indigenous communities in Panama

Indigenous peoples of Panama have long experienced incursions into their ancestral lands, with devastating consequences for their relationship to the environment, their ancestral heritage, and the cultural identity of their communities. In his testimony before this Commission in 2010, Mr. Santos described in detail the actions undertaken by Virginia-based Allied Energy Systems Corporation (AES) and its plans to construct hydroelectric projects on the Changuinola River in the province of Bocas del Toro, including the Chan-75 hydroelectric project. In the years since the 2010 hearing, the Chan-75 dam severely impacted Indigenous communities in the area. Upon its construction, the Chan-75 dam flooded 750 hectares (approximately 1853 acres) and displaced thousands of indigenous people,² including five Ngäbe communities.³

It should be noted that the Chan-75 dam was constructed despite the fact that, on June 18, 2009, the Inter-American Commission of Human Rights (IACHR) had granted precautionary measures for members of the affected Ngäbe communities, asking the Panamanian State to suspend construction on the dam and to take measures to protect the rights of members of the Ngäbe communities.⁴

² See La Estrella de Panama, *Proyecto Chan-75*, (May 23, 2011), available at: <https://www.laestrella.com.pa/economia/110523/75-chan-proyecto>.

³ James Anaya, *The status of indigenous peoples' rights in Panama*, A/HRC/27/52/Add.1, par. 46 (July 3, 2014), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/072/34/PDF/G1407234.pdf?OpenElement> (hereinafter: 'Status of Indigenous Peoples' Rights in Panama').

⁴ Inter-American Commission of Human rights, *PM 56/08—Ngöbe Indigenous Communities et al.*, available at: <http://www.cidh.org/annualrep/2009eng/Chap.III.e.eng.htm>.

CIEL understands that concessions for additional dams on the Changuinola River have been granted.⁵ Plans for a second hydroelectric project on the Changuinola River (“Chan-II”) have been included in the Expansion Plan for 2019-2033 of Panama’s state-owned transmission company, ETESA, which indicates that the project is currently in the “final design” phase.⁶ Communities who live near the Changuinola River remain concerned that such future projects will further undermine their rights as Indigenous peoples.

Insufficient protections for Indigenous land rights in Panama

During his testimony before this Commission in 2010, Mr. Santos referenced two critical issues that have served to systematically undermine the rights of Indigenous peoples in Panama, including in the context of the Chan-75 hydroelectric project. First, he referred to the fact that while certain Indigenous territories have been legally recognized as *comarcas* in Panama, the failure of the Panamanian authorities to establish clear demarcations of some of these territories has left several Indigenous communities without formal recognition of their land rights. This uncertain legal status has left these communities unprotected in the face of pressures from outside entities to access their lands and profit from their resources.

This is the case of a number of Indigenous communities located in and around the Ngäbe, Buglé and Campesinos Comarca. When Law no. 10/1997 established this Comarca, it also identified certain areas in the province of Bocas del Toro as *áreas anexas* of this Comarca. Although the law stipulated that an official demarcation of these areas should be undertaken within 20 months’ time,⁷ this has yet to occur. As a result, CIEL understands that neither the *áreas anexas* nor the Comarca itself have fully recognized boundaries. This has left the Indigenous communities in the area in a position of legal uncertainty. As Mr. Santos testified before this Commission in 2010:

In 1997, Law Number 10 was approved. It creates the region of the [Ngäbe] People. However, there is no clear delineation of the surrounding territories which are now occupied by the [Ngäbe] community.

CIEL understands that Indigenous land rights in Panama have been further undermined through the establishment of “protected areas” or “conservation areas,” which have been utilized by the Panamanian authorities in order to grant concessions to natural resources that might otherwise fall

⁵ Autoridad Nacional de los Servicios Públicos, *Listado de Concesiones*, available for download at: https://www.asep.gob.pa/?page_id=12866 (last accessed Nov. 19, 2020).

⁶ Empresa de Transmisión Eléctrica, S.A., *Plan de Expansión del Sistema Interconectado Nacional 2019-2033: Tomo II - Plan Indicativo de Generación 2019-2033*, table 5.5 on p. 153 (June 2020), available for download at: <https://www.etesa.com.pa/es/plan-expansion> (last accessed Nov. 19, 2020).

⁷ Asamblea Legislativa de la República de Panamá, Ley No. 10 de 1997: *Por la cual se crea la Comarca Ngöbe - Bugle y se toman otras medidas* (March 7, 1997), available at: <https://docs.panama.justia.com/federales/leyes/10-de-1997-mar-11-1997.pdf>.

within an Indigenous comarca or *área anexa*.⁸ CIEL notes that the concessions granted for the hydroelectric projects on the Changuinola River—including the Chan-75 dam—are located in the Palo Seco Protected Forest, within the *área anexa* to the Ngäbe, Buglé and Campesinos Comarca in the province of Bocas del Toro.

It is useful to note that concerns about inadequate territorial protections for Indigenous people in Panama were expressed by the former U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, following a visit conducted to areas affected by the Chan-75 dam in 2009. In his report to the U.N. Human Rights Council regarding the situation of communities affected by Chan-75, he concluded that “[t]heir insecurity as regards land tenure and natural resources contributes to the vulnerability of the communities affected by the project.”⁹

Inadequate guarantees for the right to Free, Prior, and Informed Consent

During his testimony before this Commission in 2010, Mr. Santos identified inadequate guarantees for FPIC as the second key issue that serves to undermine Indigenous rights in Panama. Speaking about the AES project to construct the Chan-75 dam, Mr. Santos stated:

From the very beginning, no efforts were made to obtain the prior and free and informed consent from our people.

This concern was also echoed by Special Rapporteur Anaya following his visit to communities affected by Chan-75 in 2009. In the report cited above, he concluded that the Chan-75 hydroelectric project “made a significant impact on the indigenous communities in the surrounding area, without the consultation process required by international standards on free, prior and informed consultation with indigenous peoples.”¹⁰

II. Panama’s Fourth Transmission Line poses new threats to Ngäbe, Buglé, and Campesino communities

It is now widely accepted that Indigenous Peoples are among the best environmental stewards of the lands, waters, and forests that are home to much of the world’s biodiversity. Despite this growing recognition, ETESA has advanced with a project to construct the country’s Fourth

⁸ Most recently, in 2019 the Panamanian government announced the creation of a new protected area, called the Padre Héctor Gallego protected area, in the district of Norte de Santa Fe, Veraguas. Indigenous communities living in the area view this as an improper imposition by the Panamanian government. These communities have consistently spoken out against the creation of this protected area, which they fear threatens their right to their ancestral lands.

⁹ James Anaya, A/HRC/12/34/Add.5, (Sept. 7, 2009), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/160/90/PDF/G0916090.pdf?OpenElement> (hereinafter: ‘Chan 75 Report’).

¹⁰ *Id.*

Electrical Transmission Line on and through Indigenous Ngäbe and Buglé lands. The Transmission Line would extend over 330 km (some 205 miles) along the Atlantic coast region of the country and is expected to pave the way for further development projects, which may include extractive projects, additional hydroelectric dams, and/or real estate speculation. The Fourth Transmission Line thus puts at risk one of Panama's last intact tropical forests, as well as the traditional ways of life of the Indigenous peoples who have lived in this region for generations.

For Mr. Santos, this project represents a continuation of a pattern of marginalization of the Ngäbe and Buglé peoples. Speaking about this project, he has said:

For many years, our peoples have been subordinated in the face of a push toward energy development, as well as tourism and mining development. This has had devastating consequences for our communities, including the disintegration of families, increased rates of forced migration to non-indigenous areas of the country, and the destruction of our traditional way of living in harmony with nature. We do not want this pattern to be reproduced by the Fourth Transmission Line.

As in the case of the Chan-75 dam, the Fourth Transmission Line project has been facilitated by insufficient or non-existent protections for Indigenous land rights, as well as inadequate guarantees of FPIC. In addition to the concerns laid out in the previous section regarding the demarcation of the *área anexa* to the Ngäbe, Buglé and Campesinos Comarca, Mr. Santos points out that the territories of Indigenous communities located in the district of Norte de Santa Fe, in the province of Veraguas, were left completely outside of this Comarca when it was created in 1997. As such, these communities lack any form of legal recognition of their claims to land in the area. This has allowed companies, including ETESA, to ignore the presence of Indigenous peoples in affected areas as they move forward with their projects.

Such legal uncertainty about Indigenous communities' land rights has also had ramifications in terms of which communities have been informed and consulted about the plans for the Fourth Transmission Line. To CIEL's knowledge, the communities located in the district of Norte de Santa Fe, Veraguas Province—whose territorial rights have yet to be officially recognized—have not been included in any consultations regarding the Fourth Transmission Line. Nor have any consultations been held with communities living in the *área anexa* to the Comarca.

As far as CIEL is aware, the only meetings held to consult with Indigenous peoples regarding the Fourth Transmission Line have occurred in the Ño Kribo region of the Ngäbe, Buglé and Campesinos Comarca. Yet even these meetings have raised serious concerns. Indigenous community members assert that these meetings have been held in a deficient and expedited fashion, leaving no opportunity for a genuine dialogue between ETESA's representatives and the affected communities. In addition, these meetings have not provided adequate information about the social and environmental risks and impacts of the Fourth Transmission Line. Whatever information is shared has not been communicated in a culturally appropriate manner, nor has it

been translated to the relevant native languages. This has prevented the effective participation of a significant portion of the Indigenous community in these meetings. As a result, these meetings are viewed as falling far short of the required good faith processes of consultation to obtain the Free, Prior, and Informed Consent of the affected Indigenous communities.¹¹

CAO investigation into the IFC's involvement in the Fourth Transmission Line

Significantly, the Fourth Transmission Line project has financial backing from the World Bank's International Finance Corporation (IFC). This support has taken the form of advisory services provided by the IFC for ETESA to structure and tender a public-private partnership for the financing, construction, and operation of the Fourth Transmission Line project.

Notably, the IFC was one of the first development finance institutions to incorporate the rights of indigenous peoples—including the right to free, prior, and informed consultation and consent—into its performance standards.¹² By committing to respect the rights of Indigenous peoples in the context of the projects it finances, the IFC set an important international standard that has now been incorporated into the standards of both public and private finance institutions worldwide.

Given the IFC's involvement in the Fourth Transmission Line project, CIEL has been able to support Mr. Santos, along with MODETEAB and the Ngäbe, Buglé, and Campesina Territorial Organization of the Region of Northern Santa Fe, in submitting a complaint to the Office of the Compliance Advisor Ombudsman (CAO), the independent accountability mechanism of the IFC. This complaint raised concerns about information disclosure, the processes for obtaining Free, Prior, and Informed Consent for the project, and the environmental and social impacts of the project on Indigenous communities.¹³

In response to this complaint, the CAO opened an investigation into the IFC's role in the Fourth Transmission Line project earlier this year. The investigation is set to specifically examine the adequacy of the processes used to identify all of the communities of Indigenous peoples who would

¹¹ Following a 2013 visit to Panama, U.N. Special Rapporteur James Anaya noted that Indigenous peoples in Panama were affected by “the lack of an appropriate governing framework for consultations with indigenous communities” and that in recent cases, “consultations were carried out in an improvised manner. Representatives of both the Government and indigenous peoples stated that those processes were unsatisfactory, partly because the enterprises involved undertook to carry out the consultations on their own and failed to work with the peoples concerned through their representatives.” Status of Indigenous Peoples' Rights in Panama, *supra* n. 3, at para. 41.

¹² International Finance Corporation, *Performance Standard 7 Indigenous Peoples* (2012), available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7.

¹³ Office of the Compliance Advisor Ombudsman, *CAO Case Panama / PL IV-01*, available at: http://www.cao-ombudsman.org/cases/case_detail.aspx?id=1276.

be affected by the project, as well as the appropriateness of the steps taken to consult with the affected Indigenous peoples and obtain their Free, Prior, and Informed Consent.¹⁴

In its preliminary report, the CAO emphasized the IFC's obligation to identify and include all Indigenous communities who would be affected by the projects it finances—including those located outside of officially recognized Indigenous territories.¹⁵ It specifically states that any non-compliance with the relevant standards “is considered serious, as appropriate engagement with the [Indigenous] communities within and outside the Comarca is an essential foundation for FPIC, and as a result, for a socially sustainable project.”¹⁶

The CAO's investigation represents a key test case of the IFC's will and ability to ensure that its own standards regarding Indigenous peoples are upheld in the projects it finances. When the right to Free, Prior, and Informed Consent is carried out properly, it is meant to respect Indigenous peoples' right to self-determination by including them in the decision-making processes for any project that may affect them. It remains to be seen whether, as a result of this CAO investigation, the IFC takes the necessary steps to guarantee the right to FPIC before the Fourth Transmission Line goes forward.

Concluding remarks

As is illustrated by the cases of the Chan-75 dam and the Fourth Transmission Line, Indigenous peoples in Panama—as in much of the rest of the Americas—continue to face existential threats due to the imposition of major infrastructure projects on their lands. Their rights to FPIC and to the lands that they have traditionally used and inhabited are systematically circumvented, watered down through exceptions, or turned into mere tick-the-box exercises in practice, leaving them vulnerable to incursions on their ancestral lands and related violations of their rights.

In light of the foregoing, we would respectfully urge this Commission to dedicate special attention to the ways in which Indigenous land rights and the right to FPIC are being undermined in Panama

¹⁴ Office of the Compliance Advisor Ombudsman, *Compliance Appraisal: Summary of Results*, (Jan. 17, 2020), available at: http://www.cao-ombudsman.org/cases/document-links/documents/CAOComplianceAppraisalPanama-PLIVEnglish_final.pdf (hereinafter: ‘Compliance Appraisal’).

¹⁵ That the obtention of FPIC is required even when Indigenous communities are located outside of officially recognized Indigenous territories is well established, and this principle is reflected in the IFC's performance standards. This point has also been specifically addressed by U.N. Special Rapporteur Anaya, who has stated the following in relation to Indigenous communities located outside of the comarcas in Panama: “The fact that an area may be outside of a comarca does not justify a lack of full enforcement of the right to free, prior and informed consultation. Regardless of the legal nature which the land and natural resources in question may have in domestic law, when a project has a significant impact on the lives and existence of indigenous communities, such as the case of flooding the places where they live and carry out subsistence activities and the resettlement of their members, consultation must be carried out with the goal of obtaining the consent of affected communities before project approval” (translation CIEL). Chan 75 Report, *supra* n. 9, at para. 25.

¹⁶ Compliance Appraisal, *supra* n. 14, at p. 2.

and throughout the Americas and to examine avenues by which this Commission and its members might support the efforts of Indigenous Peoples to secure these rights.

In 2010, Mr. Santos issued a similar call to this Commission, stating:

We believe that international justice can help us to safeguard our ancestral rights as well as our fundamental rights. These rights are included in the Constitution of the Republic of Panama, the Inter-American Convention on Human Rights, as well as the Universal Declaration, and that this is the opportunity for this Commission to help us get the protection that we need for our rights as well as to provide for the survival of our culture.

At that time, Mr. Santos concluded his testimony by asserting his people's demands that their land, water, and cultural identity be respected and calling on this Commission to undertake efforts to suspend the Chan-75 dam project, which caused significant harm to his people. Unfortunately, in 2020, it is too late to prevent the numerous harms to the Ngäbe people that have already been caused by the construction of AES's Chan-75 dam.

However, it is not too late to prevent new violations of the rights of the Ngäbe and Buglé peoples in the context of the Fourth Transmission Line project or other future projects that would affect them. At this time, it is still possible to urge the Panamanian Government to officially recognize the lands of the Ngäbe and Buglé communities that were left outside of the Ngäbe, Buglé and Campesinos Comarca upon its creation in 1997, and to finally comply with the law that established this Comarca by officially demarcating the borders of its *área anexa*.

It is also possible to urge the Panamanian authorities, ETESA, and especially the IFC to guarantee that a genuine process of Free, Prior, and Informed Consent is carried out with all Indigenous communities who would be affected by the Fourth Transmission Line before further advances are made on the project, as well as ahead of any future hydroelectric projects or other projects on or affecting their ancestral lands.

We underscore that development finance institutions such as the IFC have a crucial role to play, not only in setting a high standard for guaranteeing FPIC, but also in setting a positive example for the application of these internationally recognized standards to project settings in practice. By filing the above-described complaint with the CAO, the Ngäbe and Buglé peoples are doing what they can to ensure that their rights are respected in the context of this IFC-funded transmission line project in Panama. We respectfully urge the Members of Congress present at today's hearing to likewise take the measures at their disposal to ensure that the development banks in which the United States is a key player not only adopt and respect the strong standards for FPIC and Indigenous Peoples' rights, but also to see these standards through in practice.

We thank the Commission for its attention to this statement and remain at its disposal to provide additional information as may be of use to its members.