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REPORT No. 36/18
PETITION 837-07
REPORT ON ADMISSIBILITY

MAPUCHE HUILICHE “PEPIUKELLEN” COMMUNITY
CHILE

Approved by the Commission at its session No. 2125, held on May 4, 2018.
168th Regular Period of Sessions

Cite as: IACHR, Report No. 36/18. Admissibility. Huilliche “Pepiukelen” Community. Chile.
May 4, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioners:	Mapuche Huilliche “Pepiukelen” Indigenous Community and Inter-American Observatory on the Rights of Migrants
Alleged victim:	Mapuche Huilliche “Pepiukelen” Indigenous Community
State denounced:	Chile ¹
Rights invoked:	Articles 4 (life), 5 (integrity), 8 (due legal guarantees), 16 (freedom of association), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights, ² in relation to Articles 1(1) (obligation to respect rights) and 2 (obligation to adopt domestic legislation) thereof

II. PROCEDURE BEFORE THE IACHR³

Filing of the petition:	June 25, 2007
Notification of the petition to the State:	February 28, 2008
State’s first response:	January 17, 2012
Additional observations from the petitioners:	April 8, 2012
Notification of the possible archiving of the petition:	March 28, 2017
Petitioners’ response to the notification regarding the possible archiving of the petition:	July 25, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument of ratification deposited on August 21, 1990)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, CHARACTERIZATION, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS OF THE PETITION

Duplication of procedures and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 4 (life), 5 (integrity), 8 (due legal guarantees), 24 (equal protection), and 25 (judicial protection) of the Convention, in relation to Articles 1(1) (obligation to respect rights) and 2 (obligation to adopt domestic legislation) thereof
Exhaustion of domestic remedies or where an exception applies:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

¹ Pursuant to the provisions of Article 17(2)(a) of the Commission’s Rules of Procedure, Commissioner Antonia Urrejola, a Chilean national, did not participate in either the debate or the decision on this case.

² Hereinafter, the “Convention” or “American Convention.”

³ Each party’s observations were duly forwarded to the other party.

V. FACTS BEING ALLEGED

1. The petitioners allege that that State is internationally responsible for the lack of protection of the most basic rights of the Mapuche Huilliche “Pepiukelen” indigenous community (hereinafter, “the Community”), located in the village of Pargua, Calbuco Comuna, in the Los Lagos region of Chile, for failing to halt the polluting activities of a fishing company that have been impacting their indigenous territory.

2. By way of context, the petitioners explain that the State certified the Community’s legal indigenous ownership [of their territory] in 1935, but then on August 25, 1961, it expropriated and divided up these lands, granting 4.6 hectares thereof to an individual based on gratuitous title of ownership. The petitioners indicate that the State recognized the Community members’ ownership of 20 hectares of their ancestral lands in 1964. They add that the individual’s hectares, which border the Community’s territory to the north and to the east, were acquired by the fishing company “Long Beach S.A.” in September 2001; this same company also purchased an access easement from one of the area’s co-proprietors, enabling it to cross through the Community’s lands.

3. As part of the background information, the petitioners report that the fishing company brought machinery onto the land on January 25, 2002 and began to illegally build an industrial road through the Community’s territory. On January 28, 2002, members of the Community filed a remedy of protection with the Puerto Montt Court of Appeals to halt the construction. They state that the remedy was rejected on March 2, 2002, with no position taken on the merits, and subsequently confirmed by the Supreme Court. The petitioners claim that on September 7, 2002, the company began work to install a fishmeal and fish oil factory. They add that the State has disregarded indigenous communities’ status as native communities, requiring them to pursue administrative actions in an effort to be recognized as such. For this reason, in tandem with the legal actions, and for purposes of protecting their violated rights, the Community registered its 20 hectares as indigenous land with the National Indigenous Development Corporation’s Lands Office [*Oficina de Tierra de la Corporación Nacional de Desarrollo Indígena*] (CONADI) on May 9, 2002; and on November 29, 2003, members of the Millaquen-Marichahuin family registered as an Indigenous Community (Pepiukelen Community), as prescribed by Law 19.253 (Indigenous Law).

4. The petitioners hold that “Long Beach S.A.” obtained an environmental qualification resolution from the Regional Environmental Commission (COREMA) in January 2004 to move forward with its project. They allege that, despite the fact that the environmental assessment was supposed to have been done with an Environmental Impact Assessment (EIA), the company was only required to submit an Environmental Impact Statement (EIS); an EIS contains fewer technical requirements than an EIA. The petitioners indicate that they filed a remedy of protection against COREMA with the Puerto Montt Court of Appeals, requesting the project be rejected. They state that the remedy was declared inadmissible on July 14, 2004 based on issues of form and that the Supreme Court upheld the decision. The petitioners further indicate that on July 12, 2005, they filed an ancestral possession claim with CONADI that was never processed.

5. The petitioners add that fishing company “Los Fiordos Ltda.” purchased “Long Beach S.A.’s” lands and project on September 28, 2005. They allege that the new company, in violation of existing laws, submitted the project to the environmental assessment system using an EIS. The petitioners indicate that they filed a claim with the Los Lagos Regional Comptroller on February 28, 2006, requesting a decision in connection with the legality of the environmental assessment. On April 20, 2006, the Office of the Comptroller ruled in favor of the Community, indicating that COREMA had not rigorously enforced the law or regulations, nor had it taken the opinion of the competent sector agency into consideration, and thus a determination would have to be made as to whether an EIA would have to be done for the project to be authorized.

6. The petitioners explain that on March 22, 2006, while the Regional Comptroller was reviewing the claim, COREMA, via Resolution 187, approved the “Los Fiordos Ltda.” project without requesting an EIA. On May 5, 2006, the Community filed a remedy of protection with the Puerto Montt Court of Appeals, requesting that the works be stopped until COREMA complied with the Comptroller’s decision. The Court of Appeals issued a stay-of-action on May 8, 2006, ordering suspension of the works. On July 26, 2006, COREMA reviewed the environmental qualification resolution and reaffirmed the project’s approval, without requiring the EIA;

thereafter, the Court of Appeals lifted its stay-of-action order. The petitioners indicate that, in response to the July 26 decision, they filed a new remedy of protection against COREMA on August 10, 2006; the Puerto Montt Court of Appeals rejected this, arguing that the appeal could only challenge the original March 22, 2006 decision and therefore was time-barred. They alleged that, once the decision had been appealed, the remedy was declared inadmissible by the same Court of Appeals.

7. The petitioners allege that on February 8, 2010, the fishing venture began construction of an enormous tank for storing polluted water just three meters away from their land and 50 meters from where they have an ethno-tourism project and engage in cultural and spiritual activities. They add that the contaminated liquids have flowed into the Río Allipén [Allipén river], adversely impacting the ecosystem, quality of life, and source of work for Community members. They state that on February 25, 2010, the *Lonko* [chief] and legal representative of the Community filed a remedy of protection against the “Los Fiordos Ltda.” fishing company, alleging infringement of the Community’s rights to life and integrity, equality, health, property, and to live in an unpolluted environment. The petitioners indicate that both the Puerto Montt Court of Appeals, on July 27, 2010, and the Supreme Court, on September 15, 2010, admitted the remedy of protection, recognizing the impact the company’s project was having on the Community’s exercise of its rights, as well as the illegal and arbitrary nature of the project insofar as the wastewater siting fell outside the scope of the work authorized by the environmental authority. They maintain, however, that the Supreme Court decision was never enforced, that no measure aimed at halting the works and returning things to their original state was implemented, and that the waste is irreversibly polluting the Río Allipén and its tributaries on a daily basis. The petitioners claim that no authority has punished the failure to comply with the verdict, making evident the lack of protection of the Community’s most basic rights as well as the absence of available remedies.

8. The State, for its part, alleges that the rule of law is in effect throughout its territory, ensuring that all persons enjoy the same rights and guarantees. It adds that there is a special law in place (Indigenous Law, Law 19.253) for indigenous peoples, which demonstrates special regard for them. The State has asked the Commission to declare the petition inadmissible on the basis that there are no human rights violations and that domestic remedies have not been exhausted because the petitioners should have exercised their right to ancestral ownership of the land via a legal claim. The State indicates that the remedies of protection the petitioners filed were not intended to analyze the merits of the case or establish permanent rights and therefore, domestic remedies have not been exhausted.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. The petitioners claim they have filed several remedies of protection with the Puerto Montt Court of Appeals and the Supreme Court since 2003 in an effort to protect their rights to life, integrity, equality, health, property, and to live in an unpolluted environment; the Supreme Court ruled in favor of the most recent of these on September 15, 2010. The State alleges a failure to exhaust domestic remedies since the alleged victims never filed a legal claim.

10. Based on the information provided by the petitioners, the Commission notes that, over the course of more than a decade, the alleged victims requested and repeatedly pursued in both administrative and legal bodies State protection of their right to use and enjoy their territory, as well as of other rights of theirs that were reportedly being violated—all such actions allegedly to no avail. In particular, the Commission notes that starting in 2002, the Community filed four remedies of protection in an effort to have their rights safeguarded. As to the State’s argument, the Commission notes that the State does not specify the nature of the legal claim the petitioners were supposed to have exhausted, namely, whether it is a civil action or a claim before CONADI. The Commission observes that an action before the civil courts is limited to a determination of property ownership rights, while the claims in this petition are broader. Furthermore, the Commission notes that the Community did file a claim with CONADI on June 12, 2005 that was never processed. The IACHR has established that the requirement to exhaust domestic remedies does not mean that the alleged victims necessarily have the obligation to exhaust all available remedies. Both the Court and the Commission have repeatedly held that the rule requiring the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. Therefore, if the

alleged victims raised the issue by any lawful and appropriate alternative [provided for in the domestic legal system] and the State had the opportunity to remedy the matter within its jurisdiction, then the purpose of the international rule has been served.⁴

11. Furthermore, the Commission observes that, based on the information available, the September 15, 2010 judgment of the Supreme Court that admitted the remedy of protection and recognized the adverse effects of the project on the Community's exercise of its rights has not been enforced. Therefore, for purposes of examining admissibility, the Commission considers that domestic remedies have not been effective in protecting the Pepiukelen indigenous community, which requires specific protection to exercise its rights. The Commission thus concludes that the exception to exhaustion of domestic remedies provided for in Article 46(2)(a) of the Convention applies to the instant case. The IACHR recalls that Article 46(2), by its nature and purpose, is a norm with autonomous content vis-à-vis the substantive norms of the Convention. Therefore, the determination as to whether the causes and effects that prevented the exhaustion of domestic remedies in the present case will be examined, where relevant, in the report the Commission adopts on the merits of the dispute, to determine whether violations of the Convention have actually occurred.⁵

12. As to timeliness, the petition was filed June 25, 2008, and because the effects of the facts being alleged reportedly still persist, the Commission deems that it was presented in a reasonable period of time, pursuant to Article 32(2) of its Rules of Procedure, and that the admissibility requirement in connection with the timeliness of the petition has therefore been met.

VII. CHARACTERIZATION OF THE FACTS ALLEGED

13. In view of the elements of fact and law provided and the nature of the matter under its review, the IACHR considers that, if proven, the alleged lack of protection of the rights of the Pepiukelen indigenous community by the Chilean State, particularly with respect to the alleged impacts on its ancestral land and consequences of the activities engaged in by private agents, harming the environment and undermining conditions for a decent life for the Community, such as the rights to work, health, and enjoyment of its cultural and spiritual activities, could characterize *prima facie* violations of the rights protected under Articles 4 (life), 5 (personal integrity), 8 (due legal guarantees), 21 (private property), 24 (equal protection), 25 (judicial protections), and 26 (economic, social, and cultural rights) of the American Convention, in connection with Articles 1(1) (obligation to respect rights) and 2 (obligation to adopt domestic legislation) thereof. The Commission notes that the right to life embodies not just the right of every human being to not be arbitrarily deprived of his or her life, but also the duty of the State to take positive actions to prevent conditions that impede or hinder access to a dignified existence.⁶

14. Bearing in mind that Article 26 of the Convention generally refers to economic, social, and cultural rights, and that these must be determined in connection with the OAS Charter, the Commission considers that in cases in which the possible characterization of a violation of Article 26 has been identified, the instruments applicable to the State concerned should be used during the merits stage pursuant to Article 29 of the Convention.

15. As to the alleged violation of Article 16 (freedom of association) of the American Convention, the Commission notes that the petitioners have offered no allegations or elements that make it possible to observe, *prima facie*, the possible violation of such right as a result of acts internationally attributable to the State's actions, and therefore this claim should not be admitted.

VIII. DECISION

⁴ IACHR, Report No. 20/14. Petition 1566-07. Admissibility. Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán. Guatemala. April 3, 2014, paragraph 40.

⁵ *Ibid*, paragraph 41.

⁶ IACHR, Report No. 67/02 (Merits), Petition 12.313, Yakye Axa Indigenous Community of the Enxet-Lengua People, Paraguay, October 24, 2002, paragraphs 161 and 167.

1. To declare this petition admissible with regard to Articles 4, 5, 8, 21, 24, 25, and 26 of the American Convention, in keeping with Articles 1(1) and 2 thereof;
2. To declare this petition inadmissible with regard to Article 16 of the Convention; and
3. To notify the parties of this decision; to continue with its analysis of the merits of the complaint; and to publish this decision and include it in its Annual Report to the OAS General Assembly.

Approved by the Inter-American Commission on Human Rights in the city of Santo Domingo, Dominican Republic, on May 4, 2018. (Signed): Margarete May Macaulay, President (In abstention); Esmeralda E. Arosemena Bernal de Troitiño, First Vice-President; Luis Ernesto Vargas Silva, Second Vice-President; and Francisco José Eguiguren Praeli, Joel Hernández García, and Flávia Piovesan, Members of the Commission.