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REPORT No. 279/21
PETITION 2106-12
REPORT ON ADMISSIBILITY

HUITOSACHI, MOGOTAVO AND BACAJIPARE COMMUNITIES OF
THE RARAMURI INDIGENOUS PEOPLES
MEXICO

Approved electronically by the Commission on October 29, 2021.

Cite as: IACHR, Report No. 279/21, Petition 2106-12. Admissibility. Huitosachi, Mogotavo and Bacajipare Communities of the Raramuri indigenous peoples.. Mexico. October 29, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Governors and governesses of the Huitosachi, Mogotavo and Bacajipare, Carmen Herrera, Awe Tibuame, C.A. communities and Community Technical Consultants, C.A.
Alleged victim:	Huitosachi, Mogotavo and Bacajipare Communities of the Raramuri indigenous peoples.
Respondent State:	United Mexican States ¹
Rights invoked:	Articles 21 (right to property) in relation to article 23 (right to participate in government), and 25 (judicial protection) 4 (life) and 2 (obligation to abide by domestic legal effects) of the American Convention on Human Rights ² in relation to its article 1.1 (obligation to respect rights).

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	November 12, 2012
Additional information received at the stage of initial review:	January 30, 2014 and July 28, 2017
Notification of the petition to the State:	March 15, 2018
State's first response:	November 29, 2018
Additional observations from the petitioner:	October 25, 2020
Notification of the possible archiving of the petition:	July 28, 2017
Precautionary measure granted:	MC-427-12 (request dismissed)

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 accession deposited on March 24, 1981)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, 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 (humane treatment), 8 (fair trial), 13 (freedom of thought and expression), 21 (right to property), 23 (right to participate in government), 24 (equality before the law), 25 (judicial protection) and 26 (economic, social, and cultural rights) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) and 2 (obligation to abide by domestic legal effects)

¹ Pursuant to the set forth in article 17.2.a of the Commission's Rules of Procedure, Commissioner Joel Hernández, a Mexican national, participated neither in the discussion nor in the decision of the present matter.

² Hereinafter "the American Convention".

³ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of section VI
Timeliness of the petition:	Yes, in the terms of section VI

V. ALLEGED FACTS

1. The Huitosachi, Mogotavo and Bacajipare communities of the raramuri indigenous peoples claim the violation of their right to collective property and guarantees related to land, territory and natural resources, as well as the violation of their right to free determination, and prior consultation and to participation in the decisions and economic benefits of the “Barrancas del Cobre” touristic project, which is carried on their ancestral territory. Also, they claim that the hotels that have settled in their territory have polluted the water sources that they used for domestic purposes due to a wrongful use of wastewaters.

2. The petitioners narrate that the raramuri or tarahumara peoples are preexistent to the Mexican State and have settled since immemorial times at the Sierra Tarahumara, which is part of the Sierra Madre Occidental of the State of Chihuahua. The raramuri peoples use the land for cultivation, the breeding of animals and construction of houses. They manifest that the raramuri communities have a special relationship with the environment, since they look after the flora and the fauna, the resources, and the lands they inhabit as their means of subsistence and that they associate to biocultural values and social elements. They refer that, historically, they have faced difficulties to obtain the recognition and deed to their territories for the kind of seminomadic settlement of the raramuri peoples, since the communities perform temporary migrations in winter and summer. They hold that many native communities have no recognition of their right to property over their ancestral territory by the Mexican State. And, that, in fact, in different moments, the deeds to the surface belonging to the Huitosachi and Mogotavo communities were unduly given in favor of privates and the one which belongs to Bacajipare is included in the surface of endowment provisioned to Ejido San Alonso in 1936.

3. On October 10, 1996 the at the time governor of Chihuahua submitted an initiative of Decree to the congress of the State for the approval of a trust contract for the concretion of the Barrancas del Cobre touristic project, located in the ancestral territory of the raramuri people. The petitioners stress that the president of the republic had affirmed at a speech given in 1995 that the project would have a social sense and that it would impact the life of the communities in a positive way. By means of Decree 409/96, published on the Official Journal of the State of Chihuahua on January 1, 1997, the State Congress approved the execution of said contract, according to the petitioners, in violation of the right to free, previous and informed consultation to the native communities, and against the requests of information of the indigenous governors and petitions of being consulted. They hold that Decree 409/96 created the figure of the Regional Consultive Council (hereinafter “RCC”) to ensure the consultation of the indigenous peoples affected by the project. Its essential goal was to establish the necessary mechanisms of consultation to define and propose the goals, priorities, policies and strategies of regional development in their area of operations.

4. In their initial petition, the petitioners hold that by 2012 the State government had not yet created the RCC. However, in latter communications of the petitioners and of the State, the IACHR was informed that the RCC was created in 2015 as part of compliance of a sentence of amparo issued by the Supreme Court of Justice of the Nation (hereinafter “SCJN”) in favor of the Huitosachi community. Nonetheless, the petitioners claim the futility of the amparo remedy and of the RCC to address their claims concerning the touristic project. They also claim that they have been subject to pressure and threats from both the government and private investors to abandon their lands due to the hotel and touristic interests that exist in the zone. In particular, they claim to have received threats of death, threats of destruction of their shelters, and even an attack occurred on January 4, 2009 in which unknown individuals shot child R.M. of the community.

5. The petitioners hold that the hotel infrastructure built in their territory disregarded the effective mechanisms to dispose garbage and wastewaters, which has generated the pollution of the natural water sources of domestic use for the communities. This has caused health problems on members of the

community, with gastrointestinal diseases and skin infections, along with the lack of access to medical services. In their request for Precautionary Measures, MC-427-12 before the IACHR, the petitioners claim that several persons “present injuries on upper and lower limbs of chronic evolution, which in spite of that of having been treated, reappear, with itch and bleeding ulcers, some of which also have secretions along with other squamous ones”. They manifest that, since 2002 the community of Bacajipare has filed public claims before the Federal Bureau of Environmental Protection (hereinafter “PROFEPA”), before the National Water Commission (hereinafter “CONAGUA”) and before the Health Services Directorate of the State of Chihuahua for the pollution of their waters. They deem that the punitive procedures initiated upon their claims have turned out to be unfoundedly tardy and inefficient to halt and redress the damage on the environmental and natural resources, and much less the persons and the communities. They hold that the government only sent doctors and attended the persons who became ill due to the of the pollution of the water when the communities filed their claim to the IACHR.

6. In regard to the claim for the lack of prior consultation, the petitioners refer that each one of the three communities filed different remedies to demand the consultation and participation in the touristic project. First of all, the community of Bacajipare filed an amparo remedy on August 6, 2010, before the Eighth District Court in the State of Chihuahua, registered under casefile no. 634/2010. In it, they challenged the approval of Decree 409/96 I.P.O., the trust contract of the Master Plan of the Barrancas del Cobre touristic project of December 11, 1999, and the signing of the lease contract of the ejido San Alonso, municipality of Urique on March 1, 2009, to install a cable car in Bacajipare territory. On August 18, 2010, the Court dismissed the claim considering it “notoriously inadmissible” since the acts challenged in the amparo did not affect the juridical interest of the Bacajipare community. On September 2, 2010 the community filed a review remedy against said decision, which was rejected on October 21, 2010 by the First Collegiate Court on Criminal and Administrative matters of the Seventeenth Circuit. The Court filed a claim before the SCJN for the contradiction of case law. On March 9, 2011, the SCJN dictated a resolution declaring the inexistence of contradiction of the case law.

7. For its part, the Community of Mogotavo filed an agrarian controversy before the Unitary Agrarian Tribunal of District Five on January 24, 2011. By means of this remedy they raised the total fully legal nullity of the agreement called “Barrancas del Cobre Trust” and of Decree 409/96. This controversy was registered under casefile no. 64/2011, in which, apart from claiming for the absence of a prior consultation, they claimed that the environmental pollution of the place known as Mesa de la Barranca - Mogotavo and Divisadero, as well as the affectation on their cultural patrimony and traditional institutions. The IACHR received information from the State in the sense that the Court had refused the exception of incompetence by virtue of the issues raised by the PROFEPA, for which reason this remedy is currently ongoing. The Commission lacks updated information as to the outcome of these proceedings.

8. On the other hand, the Community of Huitosachi filed an amparo remedy on August 6, 2010, before the Eighth District Court in the State of Chihuahua and registered under casefile no. 634/2010. In said remedy, the Huitosachi Community challenged the approval of Decree No. 409/96 without prior consultation. At first, the claim was dismissed, in a decision that was revoked by means of a review remedy, and afterward dismissed on February 11, 2011, in first instance. The Community filed a review remedy against the dismissal, which caused the Court to forward the casefile to the SCJN to exert its power of attraction. On March 14, 2012, the Second Chamber of the SCJN issued a resolution confirming the dismissal of the amparo regarding the authorization granted via Decree 409/96 I.P.O. yet granting the amparo for the omission of creating the Regional Consultive Council.

9. The Huitosachi Community filed a process of enforcement of sentence of the amparo granted by the SCJN on August 27, 2012, whereby, ten meetings were held with authorities of the governance and on April 16, 2015 the Regional Consultive Council was finally created, composed by five members: one representative of the indigenous communities, one representative of the ejidal communities, one representative for the civil society, one representative of the touristic services providers and a representative of State authorities. The petitioner party stresses that the communities do not recognize the RCC, did not sign the agreement of its creation, and ceased to attend its meetings, due the fact that their concerns and requests raised were constantly ignored in it. They claim lack of representativity of the communities affected in the RCC

due to its composition which included other stakeholders not included in the Decree of creation of the Trust. The petitioner holds that the RCC is incompatible with the right to consultation and participation since they hold a minority vote and their claims and proposals are disregarded, especially, concerning the environment degradation and destruction and the lack of drinking water.

10. The petitioners refer that the communities decided that they would sign the agreement of constitution of the Consultive Council provided they guaranteed their right to prior consultation of native communities, for which they required the halt of the works of the touristic project. On August 23, 2013, they requested information regarding the original plan of the project, the progress in its implementation, the financial status, its investors, and other relevant information. The chief of the department of juridical services of the Secretariat of Economy of Chihuahua told the petitioners that they had to file a request of information in writing through the portal of transparency within the ten days following.

11. The native communities sent their request of information in writing, which was rejected by the Committee of information of the Secretariat of Economy on September 7, 2013, under the argument that the information requested was classified. The communities filed a review remedy as part of the public mechanism of access to information before the Chihuahua's Institute for Transparency and Access to Public Information, which was admitted on November 4, 2013, ordering the issuance of a duly founded answer. The Secretariat of Economy of the Government of the State issued an answer in the same terms. On September 26, 2014, the Court in charge of verifying the compliance of the sentence of amparo dictated by the SCJN ordered the Secretariat of Economy to provide the information requested by the community. The petitioners hold that the order was ignored and that they continue to not receive crucial information of the real estate investment of the project which could directly affect the collective rights of the petitioning communities.

12. The petitioners contend that, in the reunions of the RCC, they raised the problem of the lack of drinking water and suggesting the planning and organization of the touristic activity concerning the care for water, the garbage collection and the cleaning of the polluted areas; and they also proposed that part of the profits of the project be destined to the needs of the communities and of the territory. Likewise, they suggested the realization of culturally appropriate touristic projects to generate income for the communities and expressed at the RCC their inconveniences to sell their traditional crafts due to the presence of outdoor vendors external to the territory. The governance responded that the proposed touristic projects would not be funded by the trust, but with the budget from public entities, which led to most of the proposals being turned down and others being put on hold indefinitely for lack of funding. The request of investment in the communities has been denied and the problems raised has not made the daily minute of the RCC. The petitioner party holds that only until 2019, when there was a crisis of the discharge of waters an administration committee by checkpoints was assembled by persons of the communities and two mestizos, indigenous communities had access to financial income, and there was generation of employment and a percentage of the profits was distributed to the communities that destined the funds to urgent works such as the repair of roads, the construction of a small health house in Bacajipare and the purchase of a vehicle for the transportation of ill people. However, they claim that in July 2020 the native communities were once again excluded from the financial benefits.

13. On March 28, 2019, the Eighth District Court of Chihuahua declared that the government had complied with the ruling issued by the SCJN. It upheld that the governance executed all the three "granting" effects of the judgement, namely: the constitution of the RCC, the participation of the representatives of the community of Huitosachi freely elected, and the implementation of actions seeking a balanced integral, just and sustainable development of the zone of influence while ensuring the participation of the complaining indigenous community. Nonetheless, the petitioners argue that the amparo remedy was inefficient to grant them judicial protection since, far from addressing and redressing the absence of consultation, the lack of participation and the environmental damage claimed by the communities; the impact of the touristic project and its consequences over the communities has increased and deepened. They invoke, then, the exception of inexistence of judicial remedies able to provide protection before the violations claimed. Due to the foregoing, the communities filed an inconformity appeal against the declaration of compliance which is still awaiting a resolution.

14. The Mexican State replies that both the proceedings before the PROFEPA as the amparo judgments were raised and decided pursuant to domestic law, and proposes four preliminary exceptions, namely: (i) the lack of exhaustion and the wrongful exhaustion of domestic remedies, (ii) the lack of a colorable claim in the alleged facts, (iii) the use of the IACHR as a fourth instance court, and (iv) the current lack of substance.

15. The State refers to all the remedies activated in the domestic jurisdiction. First, concerning the proceedings conducted by the PROFEPA, the State narrates that the entity opened four administrative casefiles in 2014 in which it investigated 9 hotel establishments, out of which only one had a permit for wastewater discharge issued by CONAGUA. In February and March 2014, the PROFEPA conducted an inspection in the hotels and confirmed that seven of them had a septic tank, one with wastewater treatment plants and one of them discharged wastewaters directly onto the soil. Most of the establishments discharged their filtered waters from septic tanks in to the subsoil. Although nine of them had no permit of discharge of wastewaters, the PROFEPA issued an acquitting resolution in three of the four administrative proceedings because it found no violations of the General Law on Ecological Balance and Environmental Protection of the Environment. The remaining proceedings are pending the issuance of a resolution. The State holds that the PROFEPA analyzed the discharges and their impact on the Urique river and on the spring waters of the zone of the municipality of Urique.

16. Due to the claims raised by the Bacajipare community on November 28, 2002, a casefile of popular complaint was opened and forwarded to the CONAGUA and to the Directorate of Health Services of the Government of the State. The CONAGUA informed that it had performed an inspection the on May 29, 2001, that resulted in the imposition of an economic sanction against a hotel for infractions to the Law of National Waters. On July 13, 2003, the CONAGUA communicated a the PROFEPA that the inspected and sanctioned hotel in 2001 had a permit to discharge wastewaters and the treatment in the septic tanks, for which reason the waters of said hotel did not get to flow by the Bacajipare brook. The State asserts that on December 8, 2003 the PROFEPA declared the popular complaint's proceedings concluded, since the claiming community sent no comments when inquired as to the acts of the CONAGUA. Said resolution was notified to the community on December 22, 2003.

17. The PROFEPA opened a second casefile of popular complaint on May 18, 2015 due to the request of creation of the Consultive Council of the Barrancas del Cobre touristic project, in which the petitioners claimed the construction of a septic tank in the middle of the brook, approximately 200 meters away from water tanks for domestic use of the Areponapuchi peoples. On June 12, 2015, the PROFEPA issued an agreement of conclusion since it lacked competence and it ordered to forward the claim over to the Local Directorate of the CONAGUA. The State does not specify the outcome of said proceedings before the CONAGUA.

18. In regard to the amparo trials filed by the petitioner communities, the State stresses that the amparo under review no. 247/2010 filed by the Bacajipare community against the congress of the State of Chihuahua was rejected for being notoriously inadmissible on August 18, 2010, in a decision that was confirmed on October 21, 2010, and notified on November 10, 2010. Likewise, the amparo remedy registered under casefile under review number 425/2013 filed by the Community of Mogotavo against the State congress by the celebration of the Barrancas del Cobre trust agreement, was dismissed too, and its corresponding incident registered in casefile no. 581/2013, dismissed on February 21, 2014. On the other hand, the State refers to the dismissal of several amparo remedies filed by the PROFEPA and by an ejido of the zone against the admission of agrarian trial no. 64/2011 filed by the Community of Mogotavo, whose outcome is unknown.

19. As for the compliance of the sentence of the amparo under review no. 781/2011 rendered by the SCJN which granted the demands of the Huitosachi Community concerning the omission of creating the RCC, the State argues that it complied with the Court orders to the letter. Mexico asserts that on March 14, 2012, the CSJN partially admitted the amparo remedy filed by the Huitosachi Community and ordered to establish the necessary consultation mechanisms to define and propose the goals, political priorities and strategies of regional development of the municipalities affected by the touristic project through the institution of the RCC, with intervention of the claiming community. It explains that the ruling provided three orders in favor of the communities, namely: (i) the creation of the RCC; (ii) the definition of mechanisms of participation of the

community; and (iii) the definition of goals, priorities and strategies of regional development to meet the goals of the touristic project.

20. In fact, the State argues that the RCC has already been conformed and that the responsible authorities have carried fifteen meetings at which the representatives of the Huitosachi Community and other members of the Council have participated, thus the first order issued by the SCJN was executed. The community has filed two incidents of inexecution of sentence which were declared unfounded considering that the State's actions fully complied with the Court orders. Although at first the representatives of the community expressed their inconformity concerning several points addressed at the meetings in multiple occasions, the Eighth District Judge in the State of Chihuahua required several times that the responsible authorities give compliance of the sentence issued in the amparo under review no. 781/2011. Likewise, Mexico adds that the authorities established the necessary consultation mechanisms to define and propose the goals, political priorities and strategies of regional development, ensuring the participation of the Huitosachi Community, which would fulfill the second order of the ruling consisting of providing intervention and participation to the indigenous communities on the project. On this matter, the State holds that the representatives of the Huitosachi Community expressed their conformity with the compliance provided to the judgement concerning the first and second orders.

21. In regard to the third order of the sentence, the State stresses that the SCJN ordered to carry out the actions to socioeconomically benefit the indigenous communities settled in the Sierra Tarahumara. In this sense, Mexico holds that the touristic project is the main source of employment in the region and that the communities have presented their community touristic projects before the RCC. It narrates that the representative of the Bacajipare community exposed the "Raramuri Touristic Experiences" and "Best Practices" projects and the governess of the Huitosachi Community presented the "Huitosachi Best Practices" project. The communities divulged the respect for their culture and their surrounding environment in order to prevent that the visitors harm the area and proposed to foster the sale of handcrafts and traditional food. In return, the communities expressed the necessity to install a solar plate to implement the project called "Raramuri Cuisine" and requested training for tourist guides and the installation of stores for the sale of their crafts inside the "Parque Aventura". On March 18, 2019, the Eighth District Court of Chihuahua declared the full compliance of the judgment issued by the SCJN, inasmuch the governance executed the three Court orders.

22. The Mexican State proposes the preliminary exception of lack of exhaustion of domestic remedies by the petitioner communities, whereby it puts forth three arguments, namely: (i) when the petition was filed, the administrative casefiles of the PROFEPA had been neither opened nor resolved, which means that the petitioner party had neglected to exhaust these remedies prior to the filing of their international claim; (ii) the petitioners had wrongfully exhausted domestic remedies, since the second administrative casefile of popular complaint was archived due to lack of procedural activity by the claimant; (iii) the alleged unjustified delay in the resolution of the incident of compliance of the sentence issued by the SCJN is imputable to the petitioners since they had expressed their inconformity with the execution of the sentence in multiple occasions and their procedural activity delayed the adoption of a definitive decision.

23. In addition, the State argues the inexistence of the alleged violation of the right to water of the raramuri communities, since the PROFEPA decided for the acquittal of the private hotels that disposed wastewaters, for their activities fell within the applicable domestic legislation, in particular, in the provisions of the General Law of Ecologic Balance and Protection of the Environment. Likewise, it holds that competent authorities conducted the necessary actions so as to verify that the activities of the hotels would not pollute the Bacajipare brook within the execution of the second popular complaint, in spite of the weak procedural drive of the petitioners. As a result, the State deems that this petition is inadmissible since the alleged violations of rights of the raramuri communities do not arise.

24. Mexico also contends that the petitioner communities intend that the IACHR review the decisions adopted in accordance with domestic law in regard to compliance of the judgment of the amparo under review no. 781/2011 issued by the SCJN. It holds that the SCJN declared that the State had violated the right to free self-determination of the Huitosachi Community and, consequentially, ordered three measures to ensure the reparation for indigenous communities. These measures had been fully complied by the State,

therefore, Mexico considers that the IACHR would violate the principle of complementarity of the regional system of protection of human rights considering that the State has already heard the claim of the petitioner communities domestically. It underscores that Mexico “has recognized by means of remedies from domestic jurisdiction the responsibility of the Mexican State on the breach of the rights, not only of the Huitosachi, Mogotavo and Bacajipare Communities, but of all the communities affected in the zone of the ‘Barrancas del Cobre’ touristic project. Consequentially, the State has taken and continues to take the necessary measures to restore the communities in the enjoyment of their rights”. It therefore requests, that the IACHR declare the petition inadmissible in application of the fourth instance doctrine.

25. Finally, the State holds that the petition is inadmissible since it is unfounded. It argues that the subject of the petition has been met as a consequence of the acts from authorities in order to comply with the judgment issued by the SCJN. It holds that State authorities restored the enjoyment of their rights to the petitioner communities by means of measures ordered by the SCJN in the ruling that declared the State responsible for the violation of the rights recognized for indigenous peoples in domestic law. As a result, it requests to declare the inadmissibility of this petition due to lack of foundation.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

26. The Commission observes that the petitioner party holds three claims concerning the implementation of the “Barrancas del Cobre” touristic project executed in Sierra Tarahumara: i) the lack of recognition of the right to collective property of the raramuri communities; ii) the absence of a consultation to obtain free, prior and informed consent from the indigenous or native peoples as well as the lack of access to information on the project and of participation in its financial benefits; iii) the environmental damage and the pollution of the waters of domestic use, which have resulted in the lack of drinking water in the communities.

27. The petitioners invoke the exception enshrined in article 46.2 (a) of the American Convention concerning the inexistence of an effective remedy to redress the violations claimed. The State, for its part, argues that the petitioner communities did not exhaust the remedy of administrative investigation before the PROFEPA prior to the filing of the petition before the IACHR; the popular complaint was unduly exhausted, since it was archived due to lack of procedural activity; and delayed the issuance of a definitive resolution in the incident of compliance of the ruling issued by the SCJN in the casefile of amparo under review no. 781/2011.

28. For purposes of assessing the suitability of the remedies available in the domestic legislation, the Commission usually establishes which specific claims have been raised, to further identify which judicial remedies are provided by domestic law that are available and fit to make said particular claim. This is the point, precisely, of the suitability and effectiveness of each remedy considered in each case, conceived to provide an opportunity so that the alleged violation of human rights be redressed and solved by national authorities before resorting to the Inter-American system of protection⁴. Under this premise, the Commission is to assess the exhaustion of domestic remedies for each one of the aforesaid claims.

Regarding of the lack of recognition of the right to collective indigenous property

29. In their initial petition, the raramuri communities argue that they lack formal recognition of their right to property over their ancestral territory by the Mexican State, and even part of their lands had been allotted to third parties. The State, on its part, does not say which remedy is there in the domestic jurisdiction for the communities to claim the formalization of the deed of property and demarcation over their ancestral territory. Along this line, it is the State who has the task to identify which remedies would be fit to repair the claimed violation⁵. In similar cases concerning the deed and demarcation of the property of indigenous peoples in Mexico, the Commission has found that the Mexican State fails to provide suitable and effective mechanisms to address the claims of indigenous communities⁶. In accordance with the above, and considering the facts of

⁴ IACHR, Report No. 89/21, Petition 5-12, Mine workers of Cananea and their families. Mexico. March 28, 2021, para. 32.

⁵ IACHR, Report No. 26/16, Petition 932-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru. April 15, 2016, para. 25.

⁶ IACHR, Report No. 48/15, Petition 79-06. Admissibility. Yaqui Peoples. Mexico. July 28, 2015, para. 54.

the instant case, the IACHR considers that the raramuri communities of Huitosachi, Mogotavo and Bacajipare had no access to a suitable and effective judicial remedy to claim the recognition, deed, and demarcation of their ancestral territory. Consequently, it deems applicable the exception to the exhaustion of domestic remedies enshrined in article 46.2 (a) of the American Convention concerning this extent of the petition.

Regarding the absence of consultation and free, prior, and informed consent, and the lack of access to information and participation of the petitioner communities

30. The petitioner party invokes the exception of inexistence of due legal process by the inefficiency of the amparo remedy to make the prior consultation effective. The petitioner holds that the amparo and its latter incident of compliance did not repair the lack of consultation to the communities, and, on the contrary, deepened the existing affectation. The petitioner communities don't recognize the RCC because it provides them no information on the project and their participation in it is ignored. The State replies that the communities unduly exhausted the incident of compliance, since it extended unnecessarily due to the procedural activity of the petitioner party. The Commission notes that, when the State submitted its observations on the admissibility of this petition, the decision which declared the compliance of the judgement issued by the SCJN had not been rendered yet. The IACHR takes note that the communities filed a remedy of inconformity to the declaration of compliance which is pending a resolution.

31. The Bacajipare and Huitosachi Communities resorted to domestic jurisdiction via an amparo in 2010 to claim the lack of prior consultation in the issuance of Decree 409/96 I.P.O. and in the signing of the Trust Agreement. For its part, the Mogotavo Community filed an agrarian controversy before the Unitary Agrarian Court of District Five of the State of Chihuahua, that, according to information provided by the State, was admitted, whose result is unknown. The amparo remedy filed by the Bacajipare community was definitively dismissed on March 8, 2011, by the SCJN. In contrast, the amparo remedy filed by the Huitosachi Community was partially granted and led to the creation of the RCC. Upon the agrarian controversy filed by the Community of Mogótavo, and due the lack of current information on the outcome of the proceedings, the Commission deems the exception of unwarranted delay in the definitive resolution of said remedy applicable, in the terms set forth in article 46.2 (c) of the American Convention.

32. In regard to the amparo remedy, the Commission notes that it turned out to be a suitable mechanism to raise the violation claimed by the absence of prior consultation, since it was partially granted in favor of the Huitosachi Community on March 14, 2012. Although for the Community of Bacajipare, the remedy was declared inadmissible, the IACHR considers that the unfavorable outcome does not prove the lack of suitability of the remedy⁷. Under this premise, the Commission deems that both communities filed their claims before domestic courts by means of a remedy that was suitable and effective to redress the claimed situation. Concerning the Huitosachi Community, the IACHR considers that the definitive decision that exhausted the amparo remedy filed by said community was the one issued on March 28, 2019, by the Eighth District Court of Chihuahua, whereby the judgement issued by the SCJN was declared to be complied. Since the petition was filed on November 12, 2012, the Commission concludes that this petition meets the requirements of article 46.1(a) and (b) of the American Convention in regard to the Huitosachi Community concerning the claim of lack of free, prior, and informed consultation.

33. The Commission bears in mind that the remedy filed by the Community of Bacajipare was dismissed one year and eight months before filing the petition before the Inter-American system. However, apart from the fact that the remedy had the same grounds as the one filed by the Huitosachi Community, the IACHR understands that the alleged victims are three communities members of the same indigenous peoples who ancestrally occupy the same territory and that the allegations correspond to the same facts, consequentially, the study on the merits is to be performed from a collective dimension since the peoples and

⁷ IACHR, Report No. 18/12, Petition 161-06. Admissibility. Adolescents sentenced to life imprisonment without parole. Unied States. March 20, 2012, para. 47.

indigenous communities or tribes, cohered by their private forms of life and identity, exert some rights recognized by the Convention in a collective dimension⁸.

34. Notwithstanding the foregoing, the Commission notes that the Huitosachi Community exhausted the public mechanism of access to information and their latter review remedy before the Chihuahua's Institute for Transparency and Access to Public Information and before the Eighth District Court in September 2013. The request of information was denied because the information requested became classified by means of Agreement no. 01/2013 issued by the Committee of Information of the Secretariat of Economy of the governance of Chihuahua. Although domestic authorities ordered the submission of the requested information, the community holds that said order was not executed. As a result, the IACHR deems that it is applicable to analyze the possible violation of the right of access to information and of access to justice to the detriment of the Huitosachi Community, once exhausted the mechanism of access to information. Given the fact that the petition was filed on November 12, 2012, the Commission concludes that the claim of lack of access to information involving the RCC meets the requirements of article 46.1(a) and (b) of the American Convention.

Regarding the environmental damage and the lack of drinking water

35. On this claim, the State proposes the preliminary exception of lack of exhaustion of domestic remedies, since the petitioner communities filed their petition before the IACHR prior to the conduction of the administrative procedures initiated by the PROFEPA in 2014. It also alleges the wrongful exhaustion of the first process of popular complaint initiated by the PROFEPA in 2002 due to the claims of pollution of the water filed by the Bacajipare Community were archived in 2003 because of lack of procedural activity by the latter. In return, the petitioner party argues that the information provided by the State confirms the claims of the indigenous communities in the sense that the administrative procedures conducted by the PROFEPA were unwarrantedly delayed and ineffective to halt and redress the environmental damage on natural resources, the persons, and the communities. They hold that, indeed, since 2002 the Bacajipare community has been reporting the pollution of waters of domestic use to PROFEPA, nonetheless, the problem persists while there is no effective remedy at domestic level and the environmental regulations do not protect the health of the people.

36. In regard to the questioning of the State on the fact that the exhaustion was produced after the filing of the petition, the IACHR reiterates its constant position whereby the situation that must be considered to establish whether the remedies of the domestic jurisdiction have been exhausted is the one existing when deciding on admissibility⁹. The IACHR has established that the requirement of having exhausted domestic remedies does not mean that the alleged victims have necessarily the obligation to exhaust all domestic remedies. Consequentially, if the alleged victim approached the matter through any of the appropriate alternatives, as in the case of this petition, and the State had the chance to solve the situation, the purpose of the norm is fulfilled¹⁰. In light of the above, the Commission observes that the Community of Bacajipare has been claiming the environmental pollution and of the waters since 2002, before the PROFEPA and before the CONAGUA. The Mogotavo Community also filed a complaint on the environmental damage by means of the agrarian controversy, which is still unresolved. The Huitosachi Community made the corresponding claim on several sessions of the RCC. It is evident that the petitioner communities have raised their claims through several valid mechanisms so that the State take measures to cause the cease of the pollution and restore the environmental balance.

37. Although the State argues that the casefile of popular complaint initiated in 2002 was archived for lack of response from the Bacajipare community in 2003, the Commission notes that said community continued to report the problem afterward and it was the State itself through PROFEPA who initiated new

⁸ IHR Court., Case of the Kichwa of Sarayaku Indigenous Peoples Vs. Ecuador. Merits, Reparations and Costs. Sentence of June 27, 2012. Serie C No. 245, para. 231.

⁹ IACHR, Report No. 35/16, Petition 4480-02. Admissibility. Carlos Manuel Veraza Urtusuástegui. Mexico. July 29, 2016, para. 33; IACHR, Report No. 4/15, Petition 582-01. Admissibility. Raúl Rolando Romero Feris. Argentina. Match 29, 2015, para. 41.

¹⁰ IACHR, Report No. 150/21. Petition 172-15. Admissibility. Rapa Nui Peoples. Chile. July 14, 2021, para. 28. IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piety Palacios Tejada of Saavedra. Peru. February 24, 2018, para. 12; IACHR, Report N° 67/12 (Admissibility), Petition 728-04, Rogelio Morales Martínez, Mexico, July 17, 2012, para.34.

administrative processes with the ability to exhaust domestic remedies on this matter. Considering that the three petitioner communities have filed different remedies and complaints before the authorities on the environmental damage generated by the touristic project both before and after filing the petition before the IACHR, the Commission deems they have exhausted the domestic remedies available to them. Since the petition was filed on November 12, 2012, the Commission concludes that this claim meets the requirements of article 46.1(a) and (b) of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

38. The petitioner party claims the violation of the right to collective property and guarantees related to the land, territory and natural resources (article 21), of the right to free determination and to the free, prior, and informed consultation (article 23.1), of the right to judicial protection (article 25), of the right to conditions for a dignifying life (article 4), and of the duty to adopt measures to enforce the rights enshrined in the IACHR (article 2); all of them in connection to article 1.1 of the American Convention on Human Rights itself. On the other hand, the State proposes the exceptions of lack of a colorable claim concerning the right to water of the communities, of fourth instance over the sentence of amparo granted in favor of the Huitosachi Community, and of current lack of substance of the petition due to the compliance of the sentence of amparo.

39. The Commission reiterates that, in terms of admissibility, it must decide whether the petition exposes facts that may characterize as a human rights violation, or as Article 47 b) of the American Convention establishes, if the petition is “manifestly unfounded” or if “its inadmissibility is totally evident”, according to subsection (c) of said article. The Mexican State argues that the PROFEPA corroborated that the establishments which disposed wastes were acquitted because their activities met the requirements set forth in the domestic legislation, in particular, in the General Law of Ecologic Balance and Protection of the Environment. Therefore, it contends that it did not violate the right to water of the communities, and that they would be using the IACHR as a higher court to revoke the acquitting decisions adopted pursuant to domestic law. The petitioner party replies that the domestic environmental legislation is unfit for the protection of the health of the communities and adds that the administrative procedures conducted by the PROFEPA were ineffective to grant them the judicial protection that they intended. Petitioners stress also, that the State had confirmed that most hotels that discharge wastewaters do not hold a permit of discharge issued by CONAGUA and “are not complying with the maximum allowable limits of pollutants in their discharge of wastewaters set forth in NOM-001-SEMARNAT-1996”.

40. As for the controversy concerning the violation of the right to water, the Commission takes the definition adopted by the Committee supervising the implementation of the International Covenant on Economic, Social, and Cultural Rights; whereby, “the human right to water is the right of everyone to have at their disposal enough, healthy, acceptable, accessible and attainable water for personal and domestic use”¹¹. In the instant case, the native communities, and in particular, the Community of Bacajipare claims that the discharges of wastewaters of several hotels have polluted the brooks and tanks of domestic use. The State does not contest this fact, but it holds that the discharges of wastewaters comply with domestic legislation on the matter. The only specific information provided by the State is from 2003, when the CONAGUA conducted an inspection on the Mansion del Castillo Hotel that was later sanctioned by said entity, which confirmed that it had a tank of treatment of waters and that, due to the low level of water discharge “it would not reach the flow into the Bacajipare brook”. However, the Commission has no specific and updated information from the other hotels and whether their discharges would flow into said brook or others used by the communities. Thus, the Commission cannot discard *prima facie* the existence of a violation of the right to water,¹² the right to a healthy environment¹³ and the right to health as part of the economic, social and cultural rights (article 26) of the

¹¹ Committee on Economic, Social and Cultural Rights. General Observation No. 15 (the right to water). E/C.12/2002/11. January 20, 2003, para. 2.

¹² The IHR Court declared that the right to water is protected by the scope of Article 26 of the American Convention. On this matter, refer to IHR Court. Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, para. 222.

¹³ See IHR Court. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23.

petitioner communities. Therefore, the IACHR shall declare this article admissible in order to study at the merits stage whether pollution has been generated on the waters of domestic use for the communities and whether the State has adopted effective measures to mitigate and repair the environmental damage. The IACHR shall also assess the possible violation of the duty of the State to adopt measures domestically (article 2), of the right to humane treatment (article 5) and of the right to equality before the law (article 24), according to the arguments of the petitioner party relating to the environmental legislation not protecting the health of the communities.

41. The second exception proposed by the State concerning the lack of a colorable claim of this petition regarding the alleged use of the IACHR as a higher international court. The Mexican State holds that the petitioners intend that the Commission review the sentence issued by the SCJN, when the latter acted within the sphere of its competence and applying due judicial guarantees. Mexico holds that, although it did not proceed with the prior consultation to indigenous communities, the SCJN declared the State responsible for violating the rights of the petitioner communities and ordered the corresponding reparation upon the lack of prior consultation by means of the creation of the RCC. The petitioner communities oppose to said position, since they consider that their right to consultation has not been met, since the RCC does not constitute a space where they have been able to obtain information of the project, nor to participate in it and where their claims have been ignored.

42. On this point, the Commission recalls that the obligation to conduct the consultation and obtaining free, prior, and informed consent from indigenous peoples in projects which may affect their territory stems from the American Convention itself, in a joint reading of the rights enshrined in articles 13, 21 and 23¹⁴. In turn, the consultation should be conducted prior to the execution of actions which may relevantly affect the interests of the indigenous and tribal peoples, and in good faith with the aim of reaching an agreement. This implies that native peoples should be consulted, pursuant to their own traditions, at the early stages of the development or investment plan, for the early notice grants time for the internal discussion of the communities and to provide a proper answer to the State.¹⁵ Likewise, the IACHR has held that it is necessary that the State ensures the native peoples affected by projects with investment or intervention of the State, information concerning the activities which would affect them, and to offer them the possibility to participate in the different processes to make the respective decisions, and, on the other hand, to ensure their access to judicial protection and due process guarantees should they consider that their rights are not being respected¹⁶. Likewise, it recalls that in light of the set forth in article 29 of the American Convention, the Commission may use Covenant 169 on the rights of indigenous and tribal peoples of the ILO as a guideline of interpretation of conventional obligations.

43. The Commission observes that, *prima facie*, there is a controversy concerning the compliance of the aforesaid standards within the execution of the sentence of amparo issued by the SCJN. It notes that the petitioner communities claim not having relevant information of the project and of how it may affect them, and lacking effective participation in the RCC. The communities also claim that the exerted remedies to ensure their right to a prior, free and informed consultation have been ineffective. The IACHR deems that said allegations are not manifestly unfounded and require a study on the merits in light of articles 8, 13, 21, 23 and 25 of the American Convention. Likewise, the Commission considers that the lack of a domestic remedy to claim the deed to their land and its demarcation in favor of the indigenous and tribal communities may characterize a violation of articles 2 (obligation to abide by domestic legal effects), 21 (right to property) and 24 (equality before the law) to the detriment of the raramuri communities of Huitosachi, Mogotavo and Bacajipare.

44. Finally, with respect to the argument raised by the Mexican State concerning the current lack of substance, the Commission recalls that under the preceding considerations, there is an ongoing controversy

¹⁴ IACHR. Report No. 11/20. Caso 13.082. Merits. Maya Q'eqchi' Indigenous Community Agua Caliente. Guatemala. March 3, 2020, para. 100; IACHR, Report No. 146/19, Caso 11.754. Merits. U'Wa Indigenous Peoples and their Members. Colombia. September 28, 2019, para. 118.

¹⁵ Id., Report No. 11/20, para. 103; Report No. 146/19, para. 124; citing: IHR Court., Caso del Pueblo Saramaka Vs. Surinam. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of November 28, 2007. Serie C No. 172, para. 129; IHR Court, Case of Kaliña and Lokono Peoples Vs. Surinam. Merits, Reparations and Costs. Sentence of November 25, 2015. Serie C No. 309, para. 214.

¹⁶ Id. Report No. 146/19, para. 121.

as to the compliance of the sentence issued by the SCNJ in light of international standards regarding the consultation and free, prior, and informed consent of indigenous communities. In particular, it notes that the complainant communities contend that the RCC does not fulfill the standards on information, participation, and the prior characteristic of the consultation of indigenous communities.

45. In view of these considerations, and after examining the factual and legal elements set forth by the parties, the IACHR considers that the petitioner's claims in relation to the Huitosachi, Mogotavo and Bacajipare communities of the raramuri indigenous peoples are not manifestly unfounded and require a study on the merits, since the alleged facts, if corroborated, may characterize violations of rights established in articles 4 (life), 5 (humane treatment), 8 (fair trial), 13 (freedom of thought and expression), 21 (right to property), 23 (right to participate in government), 24 (equality before the law), 25 (judicial protection) and 26 (progressive development) in relation to articles 1.1 (obligation to ensure rights) and 2 (obligation to adopt domestic legal effects) of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 13, 21, 23, 24, 25 and 26 of the American Convention in connection to Articles 1.1 and 2 thereof;

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 29th day of the month of October, 2021. (Signed:) Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; and Esmeralda E. Arosemena Bernal de Troitiño, Commissioner.