REPORT No. 29/13
PETITION 1288-06
ADMISSIBILITY
AYMARA INDIGENOUS COMMUNITY OF CHUSMIZA-USMAGAMA AND ITS MEMBERS
CHILE[1]
March 20, 2013

I. SUMMARY

1. On November 21, 2006, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") received a complaint filed by the Aymara Indigenous Community of Chusmiza-Usmagama, represented by Mr. Luis Humberto Carvajal Pérez and the Observatorio Ciudadano (hereinafter "the petitioners")[2] on behalf of the Aymara Indigenous Community of Chusmiza-Usmagama and its members[3] (hereinafter "the Indigenous Community," "the Community," or "the alleged victims"), against the Republic of Chile (hereinafter the "Chilean State", "Chile", or the "State"). The petitioners initially alleged that the State had deprived the Community of material possession of and ancestral property rights over the waters of the spring called the Socavón de Chusmiza. Subsequently, they alleged the failure to enforce the 2009 judgment by the Supreme Court of Justice that recognized that the Community did indeed have that right, and the unwarranted delay on the part of the courts in resolving an action for damages filed in 2001 by the Community against the Treasury of Chile and the company Empresa Agua Mineral Chusmiza S.A.I.C.. Consequently, they alleged a failure to make full reparation to the alleged victims for the violation of several rights contained in the American Convention.

2. In their initial petition, the petitioners maintained that the Chilean State was responsible for violating the rights enshrined in Articles 21 (right to property), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in relation to Articles 1(1) (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law) of that same instrument.

3. In its initial response, the State alleged that the petition should have been found inadmissible because the petitioners had not exhausted domestic remedies; no facts were alleged or stated that would tend to establish a violation of human rights; and that the IACHR was not competent to act as a court of appeals or a "fourth instance." Subsequently, the State alleged that, with Supreme Court recognition in 2009 of the Indigenous Community's right to the waters claimed, the petitioners' claims had been satisfied. It also argued that the resolution of the petitioners' action for damages against the Treasury of Chile and the Empresa Agua Mineral Chusmiza S.A.I.C. filed in 2001 was still pending, as was the administrative regularization of the Community's rights recognized in the 2009 Supreme Court decision. Accordingly, the State reiterated that the petitioners had not exhausted

[1] Commissioner Felipe González, of Chilean nationality, did not participate in the deliberations or the decision in this petition, in keeping with Article 17(2)(a) of the Commission's Rules of Procedure.

[2] On September 13, 2011, the representatives of the *Observatorio de Derechos Humanos de los Pueblos Indígenas* changed its legal name to *Observatorio Ciudadano*.

[3] In their initial complaint, the petitioners listed 73 persons as affected by the alleged violations; they were identified as members of the Indigenous Community of Chusmiza-Usmagama.

domestic remedies. It maintained that the authorities acted in keeping with the law and the rules of due process, and that they respected the rights of the Indigenous Community.

4. After analyzing the parties' positions, and pursuant to the requirements provided for in Articles 46 and 47 of the American Convention, the Commission decides to declare the petition admissible for the purposes of examining the alleged violation of the Indigenous Community's rights, enshrined in Articles 8, 21, 22, 24, and 25, in conjunction with Articles 1(1) and 2. The Commission also decides to notify both parties of this decision, and to publish it and include it in its Annual Report to the General Assembly of the OAS.

II. PROCEDURE BEFORE THE COMMISSION

5. On November 21, 2006, the Commission received the petition and assigned it number 1288-06. On April 26, 2007, the Commission forwarded the pertinent parts to the State, asking that it submit its response within two months. The State requested two extensions for submitting its response, on May 14, 2007 and July 27, 2007, which were granted. On November 7, 2007, the IACHR received the State's response, which was duly forwarded to the petitioners.

6. The IACHR received observations and additional information from the petitioners on December 7, 2007, January 11, 2008, October 28, 2008, January 24, 2010, and September 13, 2011. These communications were duly forwarded to the State. The State submitted observations and additional comments on April 15, 2008, February 6, 2009, February 26, 2009, and January 13, 2010.

7. On January 24, 2010, the petitioners requested a working meeting, which was granted by the IACHR and took place on March 20, 2010, during the 138th regular period of sessions of the IACHR. Both parties were present.

III. POSITION OF THE PARTIES

A. Position of the petitioners

8. The petition was initially lodged because the State had deprived the Aymara Indigenous Community of Chusmiza-Usmagama and their members of the material possession and ancestral property right over the waters of the spring called the Socavón de Chusmiza, waters that the petitioners argue the Community used since time immemorial for their productive farming and silvo-pastoral activities and for human consumption, as it is the only water resource available in the area. They assert that access to those waters "constitutes the fundamental basis for preserving their habitat, rendering the territory environmentally viable, developing their culture, their spiritual life, and their integrity, and to ensure their economic survival."

9. The petitioners indicate in their original petition that the Community was deprived of its ancestral waters because in 1996 the State, through the General Bureau of Water *(Dirección General de Aguas*), by means of a discriminatory, arbitrary, and unlawful procedure, had granted the Community's water rights to a company. They report that it was not until 2009 that the rights of the Community to its ancestral waters were recognized by rulings of the courts of justice. Nonetheless, such rights were not recorded by the administrative authority, nor had reparations been made to the Community for the harm caused during the years in which it was deprived of the use of water resources, even though an action was brought against the State for that purpose in 2001.

10. The petitioners allege that since 1996 the State, through discriminatory, arbitrary, and illegal acts, impeded the Indigenous Community from accessing their waters, which were theirs as a matter of ancestral right. They argue that "the loss of water rights by the community has meant significant changes in the customs and ways of life of the community, and which have translated into displacement of the population and loss of cultural expressions and rites that must be reconstructed." In this respect, they indicate that during the time they were deprived of the water irreversible harm had occurred to the Community, especially because "the agricultural projects and tourism development projects presented for state subsidies [had been] rejected, these activities being the basis of the community's economic development. This situation has led to the impoverishment and depopulation of the Aymara town of Chusmiza-Usmagama."

- **Factual background presented by the petitioners**

11. With respect to the origins of the Aymara Indigenous Community of Chusmiza-Usmagama, the petitioners indicate that the towns of Chusmiza and Usmagama, like all the old towns of the Quebrada de Tarapacá, were part of the Incan structure of the Tawantinsuyu. They argue that after the arrival of the Spaniards, those towns were integrated to the Andean colonial space. They indicate that the fact that there was such an old human settlement in the Quebrada de Tarapacá and, therefore, in the territory of Chusmiza and Usmagama, was due to the hydrological wealth of the space in the middle of a desert.

12. They argue that the members of the Indigenous Community are owners and possessors by ancestral right of the lands they occupy from time immemorial in the Quebrada de Chusmiza y Usmagama. They report that after 1821, with the advent of the Republic of Peru, the indigenous inhabitants of the old District (Corregimiento) of Tarapacá were forced to enter their lands in the property tax rolls of the Peruvian State (in 1845 in the Registry of Taxpayers of Tarapacá and in 1876 in the Registry of Rural Properties). Since the area later came to form part of the territory of Chile, the Indigenous Community is at this time situated in the Comuna of Huara, Province of Iquique, Region I of Tarapacá, Chile.

13. They argue that the ancestors and current members of the Community have possessed and used, for farming, stock-raising, and domestic use, the waters of the spring called Socavón de Chusmiza or spring of Chusmiza. They report that the water of the spring is captured by gravity through an underground channel built by their ancestors in the late 19th century[4], to take it to a canal for distribution of irrigation waters to the town of Usmagama, 10 kilometers downstream from where it is taken. In addition, they report that the mechanism for water distribution among the community members is set forth in old documents.[5] They argue that the Community depends on the waters of the Socavón de Chusmiza to ensure the viability of its production, which from time immemorial has been based on farming and stock-raising. They assert that throughout the 20th century a progressive

[4] The petitioners report that given that the water was beginning to grow scarce around 1890, the Community hired an explosives specialist to build an underground channel through the rock of the hill to carry water from the spring, which meant an arduous effort in economic terms, and in which some even lost their lives. Initial petition received November 21, 2006.

[5] In this respect they state that in 1909, by the Act of Distribution of Waters of Chusmiza-Usmagama, a distributor of water was appointed to distribute the waters by equitable turns to each farmer; this distribution was reaffirmed in 1959 by a new act. Initial petition received November 21, 2006.

depopulation of the area unfolded, to the closest cities, which was accentuated as of 1960 due to the scarcity of water.

14. In this context, they indicate that a mineral water bottling company called "Ostoic y Papic," which was installed across the way from the Socavón, began to operate in 1928. They state that the Community opposed the facility but that they reached an agreement for the company to extract only 0.38 liters/second, without affecting the productive activities of the Community or the supply for human consumption. They report that in 1968 the company was sold and the new owner moved it 600 meters below the Socavón de Chusmiza, promoting a process of modernization that was said to include movement of the water through pipes from the spring to the new processing plant.

15. They report that in 1981 the Water Code was promulgated (Decree Law 1,221); it was used by the company to establish water rights in its favor. They state that by a ruling of 1983, the Court of Letters (*Juzgado de Letras*) of Pozo Almonte regularized on behalf of the company a right of non-consumptive use or 10 liters/second. In addition, by resolution of September 29, 1983, the General Bureau of Water for Region I (hereinafter "DGA": Dirección General de Aguas) established a permanent and continuous right of use for 50 m^3/day; 27.5 m^3/day were non-consumptive rights and 22.5 m^3/day were consumptive rights. They report that this caused a conflict without precedent up until that time between the Community and the company, which was resolved because its owner undertook to make restitution of the waters such that its use not have a detrimental effect on the activities of the Community, considering that most of the rights granted to it were non-consumptive, that is, that once the rights were used the water had to be returned. They indicate that in 1991 the company's owner died and his heirs formed a joint-stock company called Agua Mineral Chusmiza S.A.I.C. (hereinafter "Chusmiza S.A.I.C.").

- **Alleged deprivation of the Community's water rights**

16. The petitioners indicate that on October 11, 1995, the company Chusmiza S.A.I.C. presented a request to the DGA for a right of consumptive use of surface water for permanent and continuous use for a flow of 10 liters/second over the waters of the Socavón de Chusmiza spring. Subsidiarily, the company asked to avail itself of what was called the "procedure for transformation of right of use, in keeping with the pertinent criteria currently in force in the service."

17. They indicate that on November 29, 1995, the Sociedad Comercial Colectiva "Moscoso Cayo y Compañía," a company made up of the farmers of Chusmiza and Usmagama, and the Board of Residents of Chusmiza (Junta de Vecinos de Chusmiza), presented their respective oppositions to the application of Chusmiza S.A.I.C. to the DGA based on the lack of sufficient water in the spring to satisfy the 10 liters/second required by the bottling company because all the water was consumed for farming by the inhabitants of Chusmiza and Usmagama, who used that water from time immemorial. They report that the motions in opposition were rejected by a ruling of the DGA on April 22, 1996, as were the motions for reconsideration filed before the same body, by ruling of August 9, 1996.

18. The petitioners report that the DGA accepted the procedure for the transformation of the non-consumptive rights recorded in the Registry of Property Rights of Waters of the Registrar of Real Property of Pozo Almonte and, by resolution 956 of December 11, 1996 and resolution 38 of January 21, 1997, established in favor of Chusmiza S.A.I.C. a right of consumptive use of surface and running waters, of permanent and continuous use, for 5 liters/second in the Socavón de Chusmiza. They argue that in its technical report the authority considered that the Indigenous Community required 3.5 liters/second for its needs and that the supply was approximately10 liters/second.

19. In relation to the supply of water, the petitioners allege that according to studies of the DGA itself, the real historical supply of water fluctuated from 6.8 to 8.1 liters/second. In other words, if 5 liters/second was being delivered to Chusmiza S.A.I.C., more than the DGA itself had recognized for the company that was the predecessor to Chusmiza S.A.I.C. in September 1983, the Community would have a water supply that fluctuated from 1 to 2.3 liters/second, which spelled the extinction of the Community due to environmental displacement as a result of the lack of water. In this respect, they argue that while the DGA study was incorrect because the Chusmiza-Usmagama Aymara Community used all the waters coming from the Socavón de Chusmiza, the same DGA study showed that the economic and cultural survival of the Community was becoming impossible with the decision of the administrative authority.

20. They indicate that on December 3, 1997, the Aymara Indigenous Community of Chusmiza-Usmagama – which as of that date had juridical personality under Law 19,253[6] on the Protection and Development of the Indigenous of 1993 – filed a motion for annulment as a matter of public law (*una demanda de nulidad de derecho público*) before the Court of Letters for Civil Matters of Santiago. The purpose of the motion was to challenge the administrative procedure of transformation of water rights carried out by the DGA because it was not contemplated in the Code of Waters or in any other statute, and therefore the administrative agency acted beyond the scope of its authority, committing an abuse of authority ("*desviación de poder*").

21. They indicate that on July 11, 2000, the Seventh Judge of Letters for Civil Matters of Santiago declared the nullity of resolution 956 of December 11, 1996 and resolution 38 of January 21, 1997, respectively. The company Chusmiza S.A.I.C. filed an appeal with the Court of Appeals of Santiago. On June 2, 2005, the Court overturned the judgment of first instance and concluded that the administrative acts of the DGA were valid because they had emanated from an administrative agency that acted within its authority. Accordingly, the Indigenous Community challenged the ruling of the Court of Appeals before the Supreme Court by bringing a motion for cassation, which was denied on May 31, 2006.

22. The petitioners indicate that prior to and in tandem with the process referred to above, on January 13, 1988, the Indigenous Community asked the DGA to establish water rights in the Socavón de Chusmiza through the Sociedad Comercial Colectiva "Moscoso Cayo y Compañía," also known as "Comunidad Agrícola Chusmiza-Usmagama y Cía," an entity under which the Community was organized prior to its recognition by Law 19,253 of 1993. The DGA did not rule on that request.

23. They report that on May 20, 1996 – before the request for transformation of water rights was ruled on by the DGA in favor of Chusmiza S.A.I.C. – the Indigenous Community presented a second request for regularization of water rights, which Chusmiza S.A.I.C. opposed on June 24, 1996. On October 30, 1996, the DGA forwarded the background information to the Court of Letters of Pozo Almonte, which ruled on August 31, 2006 to accept the request of the Indigenous Community in all respects, recognizing ancestral indigenous property rights to the water up to a flow of 10 liters/second,

[6] The petitioners report that the Indigenous Community was entered on January 11, 1996, in the Registry of Indigenous Communities of the National Indigenous Agency (Corporación Nacional Indígena, hereinafter "CONADI") under No. 020/96, with juridical personality as of that date, in keeping with Law 19,253 on Protection and Development of Indigenous Communities of 1993.

consumptive in nature, and of permanent and continuing use, based on the provisions of Article 64 and Transitory Article 3 of Law 19,253 of 1993.

24. They indicate that on October 3, 2006, the company filed an appeal with the Court of Appeals of Iquique, which on April 9, 2008, upheld the judgment of first instance in its entirety. The company appealed to the Supreme Court with a motion for cassation. In a judgment of November 25, 2009 the Supreme Court established that the Indigenous Community had ancestral property rights in the waters that emanate from the Socavón de Chusmiza.

25. The petitioners argue that, with the Supreme Court judgment of November 25, 2009, domestic remedies had been exhausted with respect to recognizing ancestral indigenous property rights to the water. Nonetheless, they argue that the Supreme Court judgment did not constitute full reparation for the violation of their rights because: (a) the judgment was not enforced with the registration of their right; (b) neither the Court of Appeals nor the Supreme Court of Justice ruled on the process of transformation of water rights in favor of Agua Mineral Chusmiza S.A.I.C.; (c) no actions were anticipated to hold the State accountable and to require it to make reparation for the harm caused the Indigenous Community from having been illegally deprived of its rights.

26. They argue that the Chilean legal order does not have the appropriate means or mechanisms for securing reparation for the damages stemming from the lack of recognition of the ancestral property right of the Indigenous Community over the water resources. Nonetheless, they report that in 2001 they had brought a civil action for damages against the State and Agua Mineral Chusmiza S.A.I.C. in relation to the illegal "transformation" of rights. They state that the supposed injunctive relief for 800 million pesos decreed by the Civil Court of Santiago on the assets of the company and to which the State referred was not effective because the company was declared bankrupt.[7]

27. With respect to the admissibility requirements, the petitioners argue that they exhausted available remedies with the 2009 judgment of the Supreme Court on the recognition of ancestral indigenous property rights to the water. Nonetheless, they note that the first efforts of the Community to obtain such recognition began in 1988 and were resolved 21 years later, in 2009, during which time, due to the activity of the State, grave consequences ensued to the detriment of the Aymara Indigenous Community of Chusmiza-Usmagama; accordingly, they allege that the State did not resolve the domestic procedures in a reasonable time. In addition, they allege that to date, despite the domestic actions pursued, the State had not administratively regularized the right recognized by the Supreme Court nor had it made reparation to the Community for the damages caused by the rulings of the authority.

28. They indicate that the facts they allege tend to establish violations of the human rights of the Indigenous Community and that they were not making abusive use of the international forum as a "fourth instance," as argued by the State.

B. The State's position

[7] The petitioners report that since 2003 the company ceased operating, without making use of the water from the Socavón de Chusmiza or promoting the development of the town. They add that the company was declared bankrupt, that the water rights were auctioned, and that the community members who worked in the plant were dismissed without having been compensated.

29. The State initially asked that the petition be found inadmissible on three grounds: (i) failure to exhaust domestic remedies by the Indigenous Community, as there were domestic decisions pending; (ii) failure to state facts which, if true, would tend to establish violations of the rights protected by the American Convention, and; (iii) the petitioners' use of the inter-American protection system as a "fourth instance."

30. With respect to the failure to exhaust domestic remedies, it initially argues that the petitioners had recognized, when submitting the petition, that the proceeding on "constitution of rights" to water in the Socavón de Chusmiza, brought by the Indigenous Community, was pending. In this respect, it asserts that the Court of Letters of Pozo Almonte has recognized the ancestral property rights of the Indigenous Community to the waters of the Socavón de Chusmiza, consumptive and of permanent and continuing use, and that injunctive measures were even decreed to keep Chusmiza S.A.I.C. from exercising the consumptive rights to use water granted by the DGA.

31. With respect to the failure to state facts that tend to establish violations of rights protected by the American Convention, it alleges that both the Indigenous Community and the company Chusmiza S.A.I.C. held real property rights to use the waters of the Socavón de Chusmiza, as a matter of ancestral right and by act of the administrative authority, respectively. Therefore, it was up to the domestic courts to consider the facts and evidence produced to resolve the dispute, and no definitive judgment had been being handed down on the issues raised, and they were unable to state facts which, if true, would tend to establish violations of the rights of the Indigenous Community and its members, particularly as favorable judgments have been handed down.

32. With respect to the inadmissibility of the petition under the "fourth instance" doctrine, the State alleges that even if the decision of the domestic courts was contrary to what the petitioners wanted, that did not give the petitioners the right, under the "fourth instance" doctrine, to promote an international case that reviews that same arguments pled and resolved before the domestic jurisdiction, with full adherence to the rules of due process of law.

33. Once the judgment of November 25, 2009 of the Supreme Court of Justice was handed down, the State argues that the petitioners' claims were satisfied, as there was express recognition of the rights of the Indigenous Community to the waters of the Socavón de Chusmiza.

34. At the working meeting of March 20, 2010, the State indicates that still pending was the administrative regularization of the rights of the Indigenous Community so as to confer certainty as to their existence, regularity, and use. It also argues in its first response that the action for damages brought by the Indigenous Community in 2001 against the State of Chile and the company Chusmiza S.A.I.C. is pending. During the procedure before the IACHR, it reports that as regards that trial, injunctive measures were decreed over the property of said company for an approximate value of up to 800 million pesos. It argues that the trial is in the evidentiary stage with evidence-gathering activities pending, thus the petitioners have not exhausted domestic remedies.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

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

35. Under Article 44 of the American Convention and Article 23 of the IACHR's Rules of Procedure, the petitioners have standing to submit petitions to the Commission regarding alleged violations of the rights enshrined in that treaty. As for the State, Chile is a party to the American Convention and, therefore, takes responsibility internationally for violations of that instrument. The petition identifies the Indigenous Community and its members[8] as the alleged victims, with respect to whom the State undertook to guarantee the rights enshrined in the American Convention. Based on all the foregoing, the Inter-American Commission is competent *ratione personae* to examine the complaint.

36. The IACHR is competent *rationae materiae* given that the petition alleges violations of human rights protected by the American Convention. Additionally, it is competent *ratione temporis* insofar as its obligation to respect and ensure the rights protected in that treaty with respect to the facts alleged in the petition that occurred after August 21, 1990, the date on which the Chilean State ratified the American Convention. Finally, the Commission is competent *ratione loci* to hear the petition, insofar as it alleges violations of human rights protected by the American Convention said to have taken place in the territory of a state party to that instrument.

B. Requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

37. Article 46(1) of the American Convention establishes as a requirement for admissibility of a petition that domestic remedies have been pursued and exhausted in accordance with generally recognized principles of international law in order. Article 46(2) establishes that this requirement shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and, (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. Both the Commission and the Inter-American Court have indicated that only those remedies adequate to cure the alleged violations must be exhausted.[9]

38. The Commission observes that the State alleges that the petition should be found inadmissible because the petitioners have not exhausted domestic remedies. After the Supreme Court judgment of 2009 – which recognized the Community's property right over the use of its ancestral waters – it argues that the petitioners' claims have been satisfied. Additionally, it states that the resolution of the action for compensation filed in 2001 by the petitioners against the Treasury of Chile and the Empresa Chusmiza S.A.I.C, and the administrative regularization of the Community's rights as

[8] The alleged victims are the members of the Aymara Indigenous Community of Chusmiza-Usmagama and make up a socially and politically organized community. The Community is in a specific geographic location and its members can be identified individually. The petitioners identified 73 members of the Community in their initial petition. See: Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment of August 31, 2001, I/A Court H.R., Series C No. 79 (2001), para. 149; IACHR Report No. 62/04, The Kichwa Peoples of the Sarayaku community and its members v. Ecuador, October 13, 2004, para. 47; IACHR, Report No. 58/09**,** Kuna of Mandungandí and Emberá of Bayano Indigenous Peoples and their Members (Panama), April 21, 2009, para. 26.

[9] The Inter-American Court has stated that an adequate remedy is one that is suitable to address an infringement of a legal right. If a remedy is not adequate in a specific case, or leads to a result that is manifestly absurd or unreasonable, it obviously need not be exhausted. I/A Court H.R., Case of Velásquez Rodríguez, Judgment of July 29, 1988. Merits. Series C No. 4. para. 64.

recognized by the Supreme Court, are still pending; accordingly it insists that domestic remedies have not been exhausted.

39. The petitioners allege that although the Supreme Court recognized the Indigenous Community's ancestral property right over their waters in 2009, the judgment was not carried out, which means their right was not registered. They also allege that the courts did not rule on the process of transforming water rights applied by the DGA in favor of the Chusmiza S.A.I.C., which the petitioners allege is illegal and arbitrary, and that the resolution of the civil action for compensation filed by the Community in 2001 is still pending.

40. Regarding the proceeding to regularize water rights brought by the Community in 1996, the Commission notes that on August 31, 2006, the Court of Letters of Pozo Almonte ruled favorably on the request to regularize rights to water use filed by the Indigenous Community[10]; that said judgment was confirmed by the judgment of the Court of Appeals of Iquique on April 9, 2008[11]; and that Agua Mineral Chusmiza S.A.I.C. presented a motion for cassation against said judgment, which was rejected by the Supreme Court judgment of November 25, 2009.[12]

41. Based on the information submitted by both parties, the Commission observes that the State and the petitioners agree that the competent authorities' registration of the rights to water use recognized in favor of the Community is pending; the last such decision was that of the Supreme Court in 2009. The Commission also observes that the parties agree that the decision in the action for compensation filed by the Indigenous Community in 2001 against the State of Chile and Agua Mineral Chusmiza S.A.I.C. is pending. Taking into account these factors and the lack of arguments to explain the time that has elapsed since 2001, the Commission concludes that for purposes of admissibility the exception to the prior exhaustion domestic remedies set forth at Article 46(2)(c) of the American Convention is applicable.

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[10] The judgment of August 31, 2006 of the Court of Letters of Pozo Almonte established that "the Indigenous Community of Chusmiza-Usmagama has invoked the ancestral use of the rights whose regularization it sought from the General Bureau of Water, which implies that it is not brandishing new water rights but, to the contrary, ancestral rights," and it determined "to rule favorably on the request for regularization of the rights to use waters invoked by Salvador Cayo Pérez, in representation of the Aymara Indigenous Community of Chusmiza-Usmagama … with respect to the affluent called the Socavón or Vertiente de Chusmiza and the point of return of the waters by Agua Mineral Chusmiza S.A.I.C. to be obtained from the following points: (a) from the spring or underground channel: 9 liters per second … (b) from the point of return of the waters by the opposing company Agua Mineral Chusmiza S.A.I.C.: 1 liter per second…. The rights that are regularized are consumptive, of permanent and continuing use…."

[11] The judgment of April 9, 2008 by the Court of Appeals of Iquique, concluded "that the judgment appealed has been limited to regularizing pre-existing rights," that one "is judicially recognizing a use of the water resources from time immemorial," and that "the procedure used has as its purpose that once the customary use is recognized, it be considered a right, which, once regularized, can be entered in the corresponding national state registry, which will make it possible for the Indigenous Community to survive on its ancestral land…."

[12] The judgment of November 25, 2009 of the Supreme Court of Chile established that "notwithstanding that it is a fact not controverted by the litigants that the source of water that supplies the community bringing the motion, called Socavón or Vertiente Chusmiza, is situated on a property entered in the name of the company opposing the motion, Agua Mineral Chusmiza, which moreover appears in the respective registration of title...; that circumstance does not stand in the way of applying the special protection contained in Article 64 of the Indigenous Law, which moreover appears in the respective registration of ownership. … that circumstance does not prevent one from applying the special protection contained in Article 64 of the Indigenous Law, which enshrines a presumption of ownership and use of the waters by the Aymara and Atacama indigenous communities…."

42. The IACHR will rule on the petitioners' allegations that the courts did not rule on the illegality of the process of transforming water rights carried out by the DGA in favor of Chusmiza S.A.I.C., and that the domestic proceedings were not resolved within a reasonable time, in its analysis of the merits in the instant case.

43. It is worth clarifying that by its nature and purpose, Article 46(2) is a rule with content that is autonomous vis-à-vis the substantive provisions of the American Convention. Therefore, the decision of whether the exceptions to the prior exhaustion rule apply in this case should be made prior to and separate from the analysis of the merits, given that it depends on a different standard of appreciation from that used to determine possible violations of the American Convention.[13]

2. Time for filing the petition

44. The American Convention establishes that for a petition to be deemed admissible by the Commission, it must be filed within six months from the date on which the alleged victim was notified of the final decision. In the claim under analysis, the IACHR has established that the exception to the prior exhaustion of domestic remedies as per Article 46(2) of the American Convention applies. Article 32 of the Commission's Rules of Procedure establishes that in cases where the exception to exhaust domestic remedies is applicable, the petition must be lodged within a time period deemed reasonable by the Commission.

45. The complaint was received by the IACHR on November 21, 2006, which was within six months of the final resolution of May 31, 2006 regarding the proceeding to transform the rights to water use brought by Chusmiza S.A.I.C. to the detriment of the Aymara Indigenous Community of Chusmiza-Usmagama.

46. During the procedure before the IACHR, the Supreme Court, by judgment of November 25, 2009, issued a final judgment recognizing the Indigenous Community's ancestral property rights over their waters. However, as observed above, according to the information submitted by the parties, the entry in the corresponding registries of rights to water use obtained by the Community was still pending, as was the action for compensation filed by the Indigenous Community against the State of Chile and Chusmiza S.A.I.C.. Based on the foregoing considerations, the Commission considers that the petition was filed within a reasonable time.

3. Duplication of procedures and international *res judicata*

47. It does not appear from the record that the petition is pending in another international proceeding or that it reproduces a petition already examined by this or any other international body. Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the American Convention have been met.

4. Characterization of the facts alleged

48. For the purposes of admissibility, the Commission must decide whether the facts alleged, if true, tend to establish a violation of rights, in keeping with Article 47(b) of the American

[13] IACHR, Report No. 13/09, Petition 339-02, Admissibility, *Vinicio Poblete Vilches*, Chile, March 19, 2009. para. 54.

Convention, or if the petition is "manifestly groundless" or "obviously out of order," as per Article 47(c). The criterion for evaluating those requirements differs from the criterion used for ruling on the merits of a petition; the Commission must make a *prima facie* evaluation to determine if the petition establishes the grounds for a possible or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. This determination constitutes a preliminary analysis that does not imply any prejudgment on the merits.

49. Neither the American Convention nor the IACHR's Rules of Procedure require the petitioners to identify the specific rights allegedly violated by the State in a case submitted to the Commission, although the petitioners can do so. By way of contrast, it is up to the Commission, based on the case-law of the system, to determine in its admissibility reports which provisions of the relevant Inter-American instruments are applicable and can be concluded to have been violated if the facts alleged are proven by means of sufficient evidence and legal arguments.

50. According to the information submitted by the parties, the Commission observes that the resolution of the action for compensation filed in 2001 by the petitioners against the Treasury of Chile and Chusmiza S.A.I.C. is still pending, as is the administrative regularization of the Community's property right over their ancestral waters recognized by the domestic courts.

51. The Commission observes that the petitioners allege a series of consequences arising from the lack of recognition of the Community's property rights over their ancestral waters that led to significant changes to the Community's customs and way of life. These changes include the loss of croplands, exclusion from public investment in water supply programs implemented by the State through the DGA, displacement of the population, and the loss of cultural expressions and rituals. This situation, they argue, led to the impoverishment and depopulation of the Aymara town of Chusmiza-Usmagama. The petitioners also highlight that the claims they present are related to the specific context in the zone of an Indigenous Community whose habitat is located in what is considered to be the most arid desert in the world.[14] The petitioners also allege that the Community was subjected to discriminatory, arbitrary, and illegal acts within the process of having their ancestral property rights over the waters recognized, as well as the lack of an effective remedy to make reparation to the Community and its members for the alleged denial of their ancestral property right over the waters of Socavón de Chusmiza.

52. The Commission considers that the petitioners' arguments *prima facie* could constitute a violation of Articles 8, 21, 22, 24, and 25 of the American Convention in relation to Articles 1(1) and 2 of the American Convention.

V. CONCLUSION

53. The Commission concludes that it is competent to examine the complaint, that the petition is admissible in keeping with Articles 46 and 47 of the Convention for the alleged violation of Articles 8, 21, 22, 24, and 25 of the American Convention, all in conjunction with Articles 1(1) and 2.

[14] The area that comprises the Tarapacá Region is located in one of the most arid deserts in the world, which makes living in this area a true challenge for the different human groups which from remote times have lived in that environment. In spite of these geographic, climatic, and environmental circumstances, these peoples maintained a balance and harmony with nature and were able to develop their cultures. Government of Chile, see: http://www.goretarapaca.gov.cl/index.php?main=50000$sub=2100.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition admissible with respect to Articles 8, 21, 22, 24, and 25 of the American Convention on Human Rights, in relation to its Articles 1(1) and 2.

2. To forward this report to the petitioners and to the State.

3. To continue its analysis of the merits.

4. To publish this report and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 20th day of March 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President; Rose-Marie Belle Antoine, Felipe González, Dinah Shelton and Rodrigo Escobar Gil, Commissioners.