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REPORT No. 113/20
PETITION 211-12
REPORT ON ADMISSIBILITY

64 INDIGENOUS COMMUNITIES OF THE MOJEÑO, YURACARÉ,
AND TSIMANE INDIGENOUS PEOPLES
BOLIVIA

Approved electronically by the Commission on April 24, 2020.

Cite as: IACHR, Report No. 113/20, Petition 211-12. Admissibility. 64 indigenous communities of the Mojeño, Yuracaré, and Tsimne peoples. Bolivia. April 24, 2020

I. INFORMATION ABOUT THE PETITION

Petitioner:	Mariss Vahlsing and Juan Pablo Calderón Meza, ¹ Pedro Nuny Caity, Rubén Pinto Vargas, Ramiro Armando Otero Lugones, and Patricia Molina ²
Alleged victim:	64 indigenous communities of the Mojeño, Yuracaré, and Tsimne peoples
Respondent State:	Bolivia
Rights invoked:	Articles 21 (private property) and 23 (political rights) of the American Convention on Human Rights, in connection with Articles 1 (obligation to respect rights) and 2 (adopt decisions with domestic legal effects) thereof. ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	February 8, 2012
Additional information received at the stage of initial review:	February 9, 2012, July 23, 2012, August 1, 2012, August 14, 2012, December 20, 2012, June 4, 2013, May 20, 2014, and July 30, 2014
Notification of the petition to the State:	December 1, 2015
State's first response:	May 13, 2015
Additional observations from the petitioner:	May 18, 2017 and August 18, 2017
Additional observations from the State:	May 23, 2018

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 adopted on July 19, 1979)

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 5 (humane treatment), 8 (due legal guarantees), 21 (property), 23 (political rights), and 25 (judicial protection) of the American Convention, in connection with Articles 1 (obligation to respect rights) and 2 (adopt decisions with domestic legal effects) thereof.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exception provided for under Article 46(2)(a) of the American Convention applies.
Timeliness of the petition:	Yes, under the terms of Section IV

¹ These individuals joined the process on May 20, 2014 as legal counsel for the *Confederación de Pueblos Indígenas de Bolivia* [Confederation of Indigenous Peoples of Bolivia] (CIDOB).

² By means of an October 15, 2015 communication, the petitioners forwarded a document to the Commission stating that Dr. Evelin Mamani, Sonia Maldonado, and Dr. Jhonny Cárdenas would no longer be involved in the instant case and that all further correspondence should be addressed to Ms. Patricia Molina Carpio, as representative of the *Foro Boliviano sobre Medio Ambiente y Desarrollo* [Bolivian Forum on the Environment and Development] (FOBOMADE), Adolfo Moye, former President of the TIPNIS, and Dr. Rubén Pinto Vargas.

³ Hereinafter, the "Convention" or "American Convention."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petitioners allege the international responsibility of the Plurinational State of Bolivia for the alleged violation of the right to collective property of the *Territorio Indígena y Parque Nacional Isiboro Sécore* [Isiboro Sécore National Park and Indigenous Territory] (TIPNIS) and the 64 indigenous communities that reside in the area, among them, some in voluntary isolation. The petitioners assert that the State failed to engage in prior consultation before work began on the “Villa Tunari road project,” which was set to pass through the TIPNIS.

2. The petitioners argue that the 64 indigenous communities of the Bolivian Amazon are native peoples and the ancestral owners of the territory they inhabit; such territory was designated a national park in 1965, and thereafter, in 1990, was recognized as an indigenous territory. In 2009, the Bolivian state recognized the area as collective territory and handed over title to an expanse of 1,091,656 hectares to the indigenous peoples living there. This was how the TIPNIS came under a collective property title as an indigenous territory that does not include the piece of land known as *Polígono 7* [Polygon 7], inasmuch as the State has never made clear whether or not *Polígono 7* is part of the indigenous territory or whether, to the contrary, it consists of individual properties consolidated inside the national park.

3. As to the indigenous peoples in voluntary isolation, there are approximately 20 families living near the headwaters of the Sécore river who enjoy legal protection under Law 180, but who have seen their way of life upended by tourism companies that offer, as part of their tour packages, the opportunity to observe those communities. According to the petitioners, this is prompting disruptions and potential ethnocide in those communities in voluntary isolation. The petitioners further note that, since 1992, the presence of *campesinos* [rural farmers] who came to the area reportedly to expand their illegal coca crops, has grown disproportionately. They assert that, as a result, the indigenous communities have been displaced from their ancestral lands, which the *campesinos* have proceeded to appropriate. Because of this, the State reportedly decided to demarcate the area in an effort to preserve the TIPNIS and prevent the *campesinos* from continuing to appropriate indigenous territory. To achieve this, a regularization and titling process was conducted, tracing a line that could not be breached by the *campesinos* called *Polígono 7* or “red line.”

4. The petitioners indicate that the State entered into a contract in 2008 with the Brazilian company OAS S.A. for construction of a highway that would pass through the TIPNIS, connecting the department of Cochabamba with Trinidad. The project is part of the Bi-Oceanic Corridor (Brazil-Bolivia-Chile-Peru), which falls under the Initiative for Integration of Regional Infrastructure in South America (IIRSA), and was meant to run in parallel with the Sécore oil block, for which the company REPSOL had signed a contract with Bolivia in 1994 securing oil extraction rights for 30 years.

5. The petitioners state that the highway construction project consists of three (3) stretches: (i) Segment I, which was already beginning to be built at one of the edges of the TIPNIS when the present petition was lodged; (ii) Segment II, which would cut through the heart of the TIPNIS; and (iii) Segment III, which had also already begun to be built at another end of the TIPNIS. From the petitioners’ standpoint, the building of this highway would fragment and divide up the indigenous territory and jeopardize the very existence of the communities that live in the area since it would bring about mass deforestation and degradation of the region’s biodiversity.

6. On June 3, 2011, the Government of the time inaugurated the construction works for the Villa Tunari-San Ignacio de Moxos highway, for which reason, on August 15 of the same year, the National Indigenous Commission decided to march peacefully as a form of defense of the indigenous territory and the Isiboro Sécore National Park, they argue, however, that while around 1,600 indigenous people who participated in the marches rested, the national police brutally intervened in their settlements, hitting and separating the families to the point of having tried to transfer the marchers to unknown places, until the residents of San Borja and Rurrenabaque intervened and supported the marchers who were being attacked. In addition, according to information released by mass media, as a result of the disproportionate use of force, 37 protesters disappeared, including 7 children and a baby, as well as, the existence of an undetermined number

of injured people⁵. Due to those events, the government apologized for what had happened and stated that it had ordered a halt to the construction. Days later, however, the manager of OAS spoke to the media saying that he had never received any such order and that construction was moving forward.

7. On October 24, 2011, the Legislative Assembly passed the “Law on the Protection of the Isiboro Sécore National Park and Indigenous Territory (TIPNIS) as Sociocultural and Natural Heritage and Area of Ecological Preservation, Historical Reproduction, and Habitat of the Chimán, Yuracaré, and Mojeño-Trinitario Indigenous Peoples” (Law 180). The petitioners contend, however, that on February 10, 2012, the State acted in bad faith by passing the “Law on Consultation with the Indigenous Peoples of the Isiboro Sécore National Park and Indigenous Territory (TIPNIS)” (Law 222), in an effort to secure the consent of the indigenous peoples and ask local residents in the territory whether or not they wanted the TIPNIS to be designated an “intangible area.” They assert that construction of the highway had already begun prior to the passage of Law 222, meaning, in their view, that the consultation had not been held in a timely manner and that its main objective had been to rectify a situation that had already transpired.

8. In light of the foregoing, two legislative deputies filed an unconstitutionality claim against Articles 1, 3, and 4 of Law 180 and a number of articles of Law 222. Bolivia’s Constitutional Court reviewed the claim on June 18, 2012, and in judgment no. 0300 of 2012, determined that the Bolivian government had been engaging in efforts since 2006 to get that section of the highway built, and that it was not until two years after execution of the contract had begun that Law 222 was passed. In view thereof, the Constitutional Court ruled that prior consultation had not been carried out. The petitioners state that, as a result of this ruling, the Bolivian State initiated a consultation on June 22, 2012, subsequently revealing the outcome thereof by means of a report in which the State indicated that, of the 69 communities that had taken part in the consultation process: 11 had not wished to be surveyed; 55 had expressed support for the building of the highway; and just 3 communities had opposed its construction.

9. The aforementioned prior consultation effort was widely criticized by human rights organizations and different social sectors in Bolivia, and as a result, an Intersectional Commission was established to examine the consultation done in the TIPNIS; this Commission was comprised of representatives of the Catholic Church in Bolivia and other organizations. Ultimately, Bolivia’s Permanent Assembly for Human Rights conducted an alternative consultation from November 29 to December 13 of that same year, visiting 35 indigenous communities and the Isiboro Sécore National Park and Indigenous Territory Management Center. The outcomes of this consultation process differed, however, from those published officially by the Bolivian State in its Report on the Prior Consultation. As a result, on March 2, 2012, petitioner and legislative deputy Pedro Nucy Caity filed an *acción abstracta de inconstitucionalidad* [petition for abstract constitutional review] of Laws 222 and 180 with the Plurinational Court of Bolivia, requesting that the Law on Consultation with the Indigenous Peoples of the Isiboro Sécore National Park and Indigenous Territory (TIPNIS) (Law 222) be declared unconstitutional and that the regulation on deferring or postponing the public environmental consultation be repealed.

10. On June 18, 2012, the Plurinational Constitutional Court of Bolivia issued judgment no. 0300 of 2012, wherein it ruled that the convening of the consultation in the TIPNIS was conditionally constitutional and asked the indigenous peoples to willingly engage in a dialogue with the government. The Court further called on the Legislative Assembly and the Executive branch to provide the tools needed to ensure respect for the rights of the indigenous peoples. The petitioners state, however, that the Bolivian Court took no position as to the constitutionality of Law 180, which had also been challenged, or as to the consultation protocols and adoption thereof without the consent of the indigenous peoples. On July 5, 2012, the Bolivian government revealed the names of 41 supposed representatives of the TIPNIS and the CONISUR *Subcentral* [indigenous governing body division], who had reportedly signed an agreement on behalf of the indigenous peoples living in the TIPNIS. The petitioners contend that those individuals do not represent the indigenous peoples living in the area and assert that this amounted to a supplanting of the indigenous communities and institutions that represent the TIPNIS.

⁵ Eju News. A baby boy dies in a violent operation by the Evo government against indigenous people. September 26, 2011. <https://eju.tv/2011/09/indignacin-muere-un-beb-en-violento-operativo-del-gobierno-de-evo-contra-indgenas/>

11. On July 25, 2012, the TIPNIS *Subcentral*, which is part of the CIDOB, had its attorney Fernando Vargas Mosua file a constitutional *amparo* action requesting that the Constitutional Court grant precautionary measures, such as suspension of the consultation, and declare all actions undertaken by the government as of then to be invalid. However, in October 2012, the First Civil Chamber of the Court of Justice of the Department of La Paz dismissed the *amparo* action ruling that it was impossible in its view to put the brakes on a consultation process set in motion as part of the democratic exercise of rights. Nevertheless, after issuing this decision, the judicial authorities acknowledged that not all of the TIPNIS communities had taken part in the consultation process, and therefore, on July 30, 2012, the same court indicated that the errors of form had to be corrected for a hearing to be held. The petitioners proceeded to correct such errors and once again requested a hearing. On October 18, 2012, the First Civil Chamber of the Court of Justice of the Department of La Paz held an *amparo* hearing, declaring the *amparo* action inadmissible and ruling that the consultation in the TIPNIS had not infringed the rights of the indigenous peoples. While that ruling was never challenged, it was forwarded *ex officio* to the Constitutional Court, which, on March 5, 2013, upheld the lower court ruling by means of Judgment No. 0212 of 2013.

12. The petitioners explain that they did not directly file a class action lawsuit, rather that they participated as interested third parties in the class action suit filed by Loyola Guzmán Lara de Melgar *et al.* That lawsuit was initially dismissed by the Third Civil Chamber of the Court of Justice of the Department of La Paz, and on February 28, 2013, the Plurinational Constitutional Court rejected the request being made under that class action suit. The Court based its argument on the fact that multiple class action suits had been filed that could have been joined under a single petition, and that in addition, Mr. Guzmán Lara had previously filed another class action suit in connection with the highway slated to pass through the TIPNIS, and in that case a ruling was made that no threat to a healthy environment existed. In light of the foregoing, the petitioners argue that a class action lawsuit is not an effective remedy in the instant case and even if it were, they had already exhausted this remedy as interested third parties.

13. The State, for its part, holds that construction of the Villa Tunari–San Ignacio de Moxos segment of the highway satisfies a public and historic need to connect the Beni to the rest of the country and stems from the vision of national and sub-regional integration that began to take root in the 1980s. With those assumptions in mind, on March 5, 2008, the Bolivian Highway Administration (ABC) issued a public tender for Bolivian and foreign companies interested in submitting highway construction proposals. As a result of this international bidding process, contract ABC N. 218/08 GCT-OBR-BNDS was signed on August 4, 2008. The State argues that Law 180 was passed on October 24, 2011, recognizing the TIPNIS as *Sociocultural and Natural Heritage and Area of Ecological Preservation, Historical Reproduction, and Habitat of the Chimán, Yuracaré, and Moxeño-Trinitario Indigenous Peoples*, meaning that the territory was elevated to the category of “intangible.” The State also indicates that, subsequently, on July 29, 2012, Law 222 was passed, establishing the Bolivian State’s process for prior, free and informed consent; such process was used to consult the inhabitants of the TIPNIS regarding the building of the highway. Of the 69 communities consulted, 58 supported construction of the highway and in the State’s mind, that level of consent given by the indigenous communities was evidence of the high level of protection and guarantees afforded by it to the indigenous peoples.

14. The State further argues that the petitioners did not exhaust domestic remedies inasmuch as instead of filing a petition for abstract constitutional review by the Constitutional Court of Bolivia, the suitable remedy would have been to file a so-called class action lawsuit. According to the State, such a lawsuit essentially becomes an *amparo* action that can be filed by the authorities or individuals in the case of certain acts or omissions that may infringe, or threaten to infringe, the interests of a collective, as it may be preventive, suspensory, or restorative. Lastly, the State also asserts that the petitioners could have challenged the rulings they objected to through litigation by filing an action for nullity but did not avail themselves of such remedies.

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

15. As to exhaustion of domestic remedies, the IACHR observes that the petitioners filed a petition for abstract constitutional review with the Bolivian Constitutional Court and that on June 18, 2012, that Court found that the laws being challenged were conditionally constitutional and encouraged the government to

engage in dialogue with the indigenous peoples who opposed construction of the highway. Furthermore, prior to the filing of that petition, a class action lawsuit had already been brought by a group of people and the petitioners in the instant case joined that suit as interested third parties; that class action lawsuit was dismissed by the Constitutional Court under the argument that another class action lawsuit regarding the same issue had already been reviewed and that no threat against either the environment or the survival of the indigenous peoples of the area had been found. Lastly, on July 25, 2012, the TIPNIS *Subcentral* filed a constitutional *amparo* action, but on October 18, 2012, the First Civil Chamber of the Court of Justice of the Department of La Paz dismissed that action. This ruling was never challenged, but it was forwarded, *ex officio*, to the Constitutional Court, which upheld the lower court decision on March 5, 2013.

16. Based on the rule for the exhaustion of domestic remedies provided for under Article 46(1)(a) of the American Convention, the Commission has determined that the petitioners did exhaust such remedies as of March 5, 2013 with the decision handed down by Bolivia's Constitutional Court, bearing in mind that, in the instant case, the remedies generally available and appropriate in the domestic legal system were pursued first. Such remedies must be secure enough, both formally and materially; that is, accessible and effective in resolving the situation in question. The IACHR has established that the requirement to exhaust all domestic remedies does not necessarily mean that alleged victims are obligated to exhaust all remedies at their disposal. If an alleged victim pursued the matter through one of the valid and appropriate options in accordance with the domestic legal system, and the State had the opportunity to remedy the matter in its jurisdiction, the objective of international law has been achieved.⁶ Additionally, whenever a State alleges that a petitioner has not exhausted domestic remedies, it has the burden of identifying the remedies to be exhausted and demonstrate that the remedies that have not been exhausted are "appropriate" for redressing the alleged violation—in other words, that the function of those remedies within the national legal system is suitable for protecting the legal right infringed.⁷ Lastly, bearing in mind that this petition was filed on February 8, 2012, the Commission observes that exhaustion of the requirement set out in Article 46(1)(b) of the Convention occurred while the claim was being processed and that according to the Commission's doctrine, analysis of the timeliness of the petition should be done in light of situation at the time of the ruling on the admissibility or inadmissibility of the claim.⁸

17. Likewise, and with respect to the alleged violations of the right to humane treatment, this Commission has urged the States to adopt measures to investigate the events that may have arisen during the social protest as a result of an abusive use of force by State agents, or else acts of aggression by third parties to the demonstration, or among participants themselves, so as to punish those responsible and provide adequate recourse to anyone whose rights may have been violated.⁹ Based on these suppositions, the Commission holds that even though the State had the obligation to investigate *ex officio* violations of the physical integrity of the members of the National Indigenous Commission who were peacefully protesting, it did not do so. Therefore, taking those factors into account, the IACHR hereby concludes that, with respect to the State's duty to investigate this point, the exception to the rule on exhaustion of domestic remedies provided for under Article 46(2)(a) of the Convention applies.

VII. ANALYSIS OF COLORABLE CLAIM

18. The Commission observes that this petition includes allegations of violations of the right to collective property of the indigenous peoples living in the TIPNIS in connection with their right to free self-determination. There are also allegations of a lack of prior, free and informed consultation of the indigenous communities with respect to a road infrastructure project in indigenous territories. And finally, allegations are being made that the physical integrity of the members of the indigenous communities that took part in the

⁶ IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, paragraph 12.

⁷ IACHR, Report No. 26/16, Petition 932-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru. April 15, 2016, paragraph 25.

⁸ IACHR, Report No. 35/16, Petition 4480-02. Admissibility. Carlos Manuel Veraza Urtusuastequi. Mexico. July 29, 2016, paragraph 33.

⁹ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paragraph 149.

protests in defense of indigenous lands was violated, and that the rights of the indigenous peoples living in voluntary isolation were being violated due to tourism.

19. Regarding recognition of collective property, the Commission has established that members of indigenous and tribal peoples have the right to not have their claim to their property trumped by the real property rights of third parties who come to inhabit traditionally indigenous territory;¹⁰ and likewise, when development projects are being planned in those territories, the indigenous peoples who would be affected thereby must be involved in the planning so as to influence in the decision-making.¹¹

20. In view of these considerations and after examining the elements of fact and law put forth by the parties, the Commission considers that the allegations made by the petitioners are not manifestly groundless and require a study of the merits insofar as, should the facts alleged be shown to be true, they may constitute violations of Articles 5 (humane treatment), 8 (due legal guarantees), 21 (property), 23 (political rights), and 25 (judicial protection) of the American Convention, in connection with Articles 1 (obligation to respect rights) and 2 (adopt decisions with domestic legal effects) thereof.

VIII. DECISION

1. To declare this petition admissible with regard to Articles 5, 8, 21, 23, and 25 of the American Convention, in connection with Articles 1 and 2 thereof; and

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 24th day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.

¹⁰ I/A Court H.R. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, paragraph 115.

¹¹ *Idem*, paragraph 133.