

**REPORT Nº 69/04^[1]**

PETITION 504/03

ADMISSIBILITY

COMMUNITY OF SAN MATEO DE HUANCHOR AND ITS MEMBERS

PERU

October 15, 2004

I. SUMMARY

1. On February 28, 2003, the Inter-American Commission on Human Rights (hereinafter the Commission or IACHR) received a petition from the National Coordinator of Communities of Peru Affected by Mining (*Coordinadora Nacional de Comunidades del Perú Afectadas por la Minería—CONACAMI*) (hereinafter the petitioners),^[2] claiming that the Peru (hereinafter Peru, the State or the Peruvian State) is responsible for the violation of the fundamental individual and collective rights of the members of the Community of San Mateo de Huanchor (hereinafter the Community of San Mateo or the Community), for the effects sustained by the members of the community as a result of the environmental pollution produced by a field of toxic waste sludge next to the community.

2. The petitioners claim that the State is responsible for violating the rights to life, humane treatment, personal liberty, a fair trial, protection of honor and dignity, freedom of association, protection of the family, rights of the child, property, freedom of movement and residence, to participate in government, equal protection before the law, judicial protection, and progressive development of economic, social, and cultural rights enshrined in Articles 4, 5, 7, 8, 11, 16, 17, 19, 21, 22, 23, 24, 25, and 26 of the American Convention on Human Rights (hereinafter the American Convention or the Convention), all of which are in accordance with Article 1(1) of the same inter-American instrument.

3. As for the State, it claims that the denunciation is inadmissible because remedies under domestic law have not been exhausted, inasmuch as, at the time the petition was filed, criminal proceedings were under way and are still pending.

4. The Commission concludes in the present report that, without making any prior judgment on the merits of the case, the petition is admissible pursuant to the provisions of Articles 46 and 47 of the American Convention and that it will continue to examine the alleged violations of Articles 4, 5, 8, 17, 19, 21, 25, and 26 in keeping with Articles 1(1) and 2 of the same instrument. Furthermore, it decides to notify the parties of the decision and to publish it in its Annual Report.

II. SUBMITTAL TO THE INTER-AMERICAN COMMISSION

1. Petition

5. On February 28, 2003, the IACHR received a petition submitted by the National Coordinator of the Communities of Peru Affected by Mining (*Coordinadora Nacional de Comunidades del Perú Afectadas por la Minería*—CONACAMI), which claimed that the Republic of Peru was responsible for the violation of fundamental individual and collective rights of the members of the community of San Mateo de Huanchor, for the effects stemming from the environmental pollution emitted by a field of toxic waste sludge in the place referred to as “Mayoc” belonging to the Lizandro Proaño S.A mining company. The Commission recorded the petition under number 504/2003 and transmitted the respective notifications to the State on August 6, 2003, requesting that it reply within two months. On September 1, 2003, the petitioners submitted additional information.

6. On October 6, 2003, the State requested an extension of the time-limits to present its reply, which was granted for 15 days. On October 30, 2003, the State submitted its reply, which was transmitted to the petitioners on November 21, 2003, with one month to present their observations. On December 18, 2003, the petitioners requested the Commission to grant them an extension of the time-limits to present their observations and they were given 15 days.

7. On December 22, 2003, the Center for International Environmental Law (CIEL) became a co-petitioner in the case. On January 7, 2004, the petitioners presented observations on the State’s reply. On February 3 and 13, 2004, respectively, the State presented additional information to the Commission, which was transmitted to the petitioners on February 20, 2004.

2. Precautionary Measures

8. On June 3, 2003, CONACAMI requested the Commission to adopt precautionary measures to protect the rights to life, personal security and health of the persons affected by exposure to the toxic waste sludge in the place called Mayoc in the Community of San Mateo de Huanchor.

9. On August 25, 2003, the Commission requested the Peruvian State to provide information on the request for precautionary measures. On September 12, 2003, the State requested an extension of the time-limits to present the information and it was granted 15 days. On October 15, 2003, the State presented information, which was transmitted to the petitioners on October 28, 2003 with a 15-day time-limit to present their observations. On November 14, 2003, the petitioners presented additional information to the Commission.

10. On December 1, 2003, the IACHR requested the State to provide specific information about the steps taken to remove the sludge from the Mayoc dump. On December 15, 2003, the State presented information, which was transmitted to the petitioners on January 20, 2003.

11. On July 21, 2004, the petitioners presented additional information and reiterated their request for precautionary measures, claiming that severe environmental pollution caused by the mining sludge field had triggered a public health crisis in the Community of San Mateo de Huanchor and that every day the risk associated with exposure to the metals in the sludge was increasing. The petitioners added that those who were most severely affected were the children; because of their exposure to lead and other mineral waste, the children are running the risk of suffering irreparable damage to their neurological abilities and psychological

development.

12. On August 17, 2004, the Commission adopted precautionary measures on the basis of the terms of Article 25(1) of its Rules of Procedure to guarantee the life and personal security of Oscar González Anchurayco and others of the Community of San Mateo de Huanchor and requested the Government of Peru to report, within 15 days, on the adoption of the following measures:

1. Starting up a health assistance and care program for the population of San Mateo de Huanchor, especially its children, in order to identify those persons who might have been affected by the pollution so that they can be given relevant medical care.
2. Drawing up as quickly as possible an environmental impact assessment study required for removing the sludge containing the toxic waste, which is located in the vicinity of the town of San Mateo de Huanchor.
3. Once the environmental impact assessment study has been completed, the work required to treat and transfer the sludge to a safe site, where it will not produce pollution, in line with the technical conditions set forth in the above-mentioned study, shall start up.
4. Drawing up a timetable of activities to monitor compliance with the measure adopted by IACHR.
5. According to the effects of the implementation of this measure, the community and its representatives, as well as the information and studies that can be used as part of these procedures, shall be taken into account.

13. On August 30, 2004, the State requested the IACHR to grant an additional extension of time, which was granted. On September 13, 2004, the State reported that the responsibility for transferring the mining sludge pertained to the mining company holder of the respective mining concession, that is, Wiese Sudameris Leasing S.A., which had undertaken some actions to remove the sludge. Nevertheless, these actions had not been approved by the Ministry of Energy and Mines because they did not comply with the suitable technical environmental standards required by environmental regulations. The State added that the Ministry of Energy and Mines, in view of the negligence of the concession-holding mining company and the severe risk to the health of the population of San Mateo Huanchor, had hired a consultant to conduct technical environmental studies needed to remove the sludge from Mayoc. The State also reported that a Technical Commission was established to offer a better alternative for the final disposal of the Mayoc sludge.

III. POSITION OF THE PARTIES

A. Position of the petitioners

14. The petitioners claim that the State of Peru has infringed the fundamental individual and collective rights of the Community of San Mateo de Huanchor, because of the effects being suffered by the members of the community from the environmental pollution caused by a field of toxic waste sludge in the place called Mayoc, belonging to the Lizandro Proaño S.A. mining company and which has not been removed, although there is an administrative order requiring its removal. Because of the above, they claim that the State is responsible for the violation of the rights set forth in Articles 4, 5, 7, 11, 16, 17, 19, 21, 22, 23, 24, 25, and 26 of the American Convention, all of which is in keeping with Article 1(1) of

the same inter-American instrument.

15. The town of San Mateo de Huanchor is located in the northeastern zone of the province of Huarochiri, Department of Lima, in the upper basin of the Rímac River 95 km from Lima and at 3,200 meters above sea level. It is the capital of the district bearing the same name and has a population of 5,600. The inhabitants of San Mateo de Huanchor are dedicated mainly to raising livestock and farming, thanks to the extensive grazing land surrounding the area, and are also involved in trade and small-scale mining activities.^[3]

16. According to the petitioners, most of the people living in the community of San Mateo de Huanchor identify themselves as indigenous and have close spiritual ties to their ancestral lands, which aggravates the situation of San Mateo de Huanchor, because the pollution is affecting not only material values and health, but also spiritual values associated with the land and environment.

17. Regarding the facts, the petitioners claim that the Lizandro Proaño S.A. mining company, by means of Supreme Decree No. 016-97-EM of the Ministry of Energy and Mines, acquired from CENTROMIN-Peru the farm of Mayoc located in the basin of the Rímac River, 50 meters away from the districts of Daza and Mayo of San de Mateo de Huanchor. The petitioners claim that the mining concession infringed legal provisions for the mining sector, especially Law 27015 on mining concessions in urban areas and urban expansion, because it was granted in a zone of urban expansion, did not observe the provisions requiring submittal of an environmental impact assessment (EIA) study on the effects of the mining, and was not authorized by the respective municipal permit from the office of the mayor.

18. Although the respective legal provisions were not complied with, according to the petitioners, in February 1999, operations began in the mining sludge^[4] dump in Mayoc belonging to the *Minera Lizandro Proaño S.A.* mining company

19. The petition adds that, after a denunciation by the local authorities of San Mateo, on July 6, 1999, the General Mining Department, by means of Executive Resolution 110-99-EM/DGM, decided to halt the metallurgical operations of the Tamboraque processing plant also located in San Mateo de Huanchor and the Mayoc sludge dump, because it did not have the authorization to operate and was violating legal environmental regulations. Nevertheless, in November 2000, at the request of the company, this resolution was declared null and void by the Mining Council, which by means of Executive Resolution No. 170-200-EM/DGM once again authorized the company's operations and the functioning of the Mayo sludge dump.

20. In the denunciation, the petitioners reported a series of studies conducted by State institutions and academic research centers pointing to the impacts of the environmental pollution produced by the Mayoc sludge dump, which has caused severe damage to the members of the Community of San Mateo de Huanchor. Regarding this, they added that the audit firm *M&S Especialistas Ambientales* and EQUAS S.A conducted a study on May 3, 1999, which observed high concentrations of pollutants such as lead, zinc, arsenic, iron, and copper in the sludge dump and in the farming areas in the zone of influence of the Mayo sludge dump.

21. The Environmental Health Department of the Ministry of Health (hereinafter DIGESA) conducted two assessments in the year 2000, an environmental assessment and another on the health of the population in the area adjacent to the Mayoc sludge field in San Mateo Huanchor. The first assessment concluded that the cumulative power and chronic effect of arsenic, lead, and cadmium in the sludge field of the Lizandro Proaño S.A. mining company, constituted a high risk of exposure of the people living in Mayoc and Daza and demonstrated that the Rímac River running alongside the town is polluted by arsenic and lead and that these concentrations in the crops exceed risk limits. The petitions add that the second assessment

provided a description of the deleterious effects of the pollution on the health of the persons in the sector of Mayoc and Daza, because of concentrations of the metallic elements of lead, arsenic, and mercury, whose principal source is the Mayoc sludge field. The report also indicates that the level of lead concentration in the blood is higher in the children of the community. Both studies conclude that environmental pollution is affecting the health of the inhabitants of Mayoc and Daza.

22. In March 2001, the IV Health Department of Lima conducted a clinical and epidemiological assessment of 58% of the population of San Mateo de Huanchor; it concluded that there are physical and psychological problems, among which alterations of memory, attention, and concentration, anxiety syndrome, learning impairments, personality changes, among others.

23. According to the information presented by the petitioners, another study carried out by the IV Health Department of Lima in October 2001 proved that the inhabitants of San Mateo de Huanchor were contaminated by heavy metals. Monitoring of the levels of exposure to heavy metals in the population of San Mateo demonstrated that 67.8% recorded lead content levels over permissible limits, 24.9% had cadmium levels over permissible limits, and 19% had mercury levels over permissible limits. This study proved that the proximity of the sludge had a significant incidence on metal pollution. Likewise, the study observed that the persons living close to the sludge had arsenic levels of 90.9% and lead levels of 68.9%.

24. The Health and Labor Institute (*Instituto Salud y Trabajo*—ISAT) conducted a study in October 2002, which found that the majority of the children of Mayoc suffer from chronic dermatitis, liver dysfunction, sensorineural hearing loss, and chronic malnutrition. It also determined that, in terms of psychological health, 56% of the children recorded below-average intelligence.

25. Likewise, the petitioners attached the results of a research undertaken by the University of San Marcos de Lima in 2003, which determined that, among 121 persons, of whom 45 came from Mayoc (37.2%), 14 from the community of Tamboraque (11.6%), and 62 from the community of Daza (51.2%) located in the district of San Mateo, infectious-type dermatological diseases associated with the chronic exposure to heavy metals from mining sludge were found. The study concludes that the population being evaluated had some type of dermatological disease and that if the sludge is not relocated and the population's time of exposure increases, the appearance of skin cancer would be imminent.

26. According to the petitioners, the effects of the pollutants in the Mayoc sludge field have produced a public health crisis in the population of San Mateo de Huanchor, and those who are most severely affected are the children, who show high indices of lead, arsenic, and mercury in their organism, which if not treated will have severe consequences for their integral development because the effects of exposure to the sludge over time are prolonged and heightened when no adequate treatment is given. They add that the farming activities of the inhabitants have been affected by the high content of pollutants, especially lead, cadmium, arsenic and mercury, found in the vegetation of the zone, as a result of the pollution of the land they farm and the water of the Rímac River.

27. As for the exhaustion of remedies under domestic law, the petitioners claim that the domestic remedies available in the domestic juridical framework of the Peruvian State to protect and guarantee the human rights of the Community of San Mateo de Huanchor affected by the mining, are not effective because of the slowness of the judicial system and because of the scarcity of the economic means needed for an adequate defense of their rights, which are out of proportion compared to the resources of the mining company and the State itself. The petitioners thus express that there is unequal treatment of the communities compared to the treatment accorded to the mining companies by state institutions as a result of policies aimed

at strengthening mining activities.

28. Likewise, the petitioners point out that those affected have undertaken a series of activities to denounce and disseminate the problem of pollution to which they have been exposed. For example, in October 1999, the Ecological and Environmental Defense Commission of the District of San Mateo de Huanchor (*Comisión de Defensa de Ecología y Medio Ambiente*—CODEMA), chaired by the Mayor and comprised of the affected communities, was established. They add that, after the denunciation lodged by the District Mayor of San Mateo with the Joint Provincial District Attorney of Huarochiri, on May 7, 2001 criminal proceedings against the general manager of the mining company were filed for the crime against natural resources and the environment, which are now being examined by the Magistrate of the Joint Trial Court of Matucana.

29. As for the administrative proceedings that were lodged, the petitioners point out that after ordering the stoppage of the metallurgic activities of the Tamboraque processing plant and the Mayoc sludge dump, on September 27, 1999, the Ministry of Energy and mines imposed an administrative sanction on the Proaño Mining Company for "*not implementing a precautionary and control program in the Mayoc sludge dump*;"^[5] the mining company appealed this decision twice but to no avail. Despite the above, the administrative authority itself later authorized the Mayoc sludge dump to function once again by means of Executive Resolution No. 170-2000-EM/DGM.^[O1]

30. On the basis of the above, the petitioners claim, the State permitted the problem of environmental pollution caused by the sludge field and arsenic, lead, and mercury poisoning of the members of the Community of San Mateo de Huanchor to continue. Finally, in 2001, the Ministry of Energy and Mines ordered the definitive shutdown of the Mayoc mining sludge dump and its relocation.^[6] In view of the mining company's failure to comply with the administrative order, on February 25, 2003, the Ministry of Mines and Energy fined the company 210 tax units. Nevertheless, the problem persists, the sludge has not been transferred, and it continues to cause severe damage to the health of the population of San Mateo and its means of subsistence, that is, the farmland and irrigation water.

31. The petitioners claim that the State refuses to accept removal of the toxic sludge of the Mayoc field to avoid establishment of an adverse precedent, because there are other population groups suffering from pollution who are requesting removal of the sludge dumps in their vicinity. Meanwhile, the situation of the polluted population is becoming more acute over time and the State has not only failed to guarantee the fundamental rights of the community of San Mateo, it has also not provided any effective remedy to call for the observance of the human rights of the persons affected by the mining activity in Peru.

B. Position of the State

32. The Peruvian State, in its report No. 65-2003-JUS-CNDH-SE, sent to the Inter-American Commission on October 30, 2003, claims that the prior remedies under domestic law in Peru have not been exhausted, nor have serious efforts been made to exhaust these remedies and to use the many mechanisms that are provided by Peru's environmental protection legislation.

33. The State specifies aspects of the environmental protection system in Peru and, regarding this, indicates that Article 123 of the Political Constitution of Peru of 1979 recognizes the right to live in an environment that is healthy, ecologically balanced, and suitable for the development of life and preservation of landscape and nature.^[7] It adds that the Political Constitution of 1993 expressly recognizes the fundamental right of persons to enjoy a balanced environment that is suitable to live their lives.^[8] The State adds that the above proves the

Peruvian State's interest in promoting environmental protection and the rational use of natural resources, which has accorded high priority to environmental rights and enshrined them as fundamental rights of the person.

34. The State claims that the enactment of legislation to implement the above-mentioned constitutional principles includes regulations for punishment, prosecution, and prevention, as well as the recognition of the capacity of any natural or juridical person to file the proceedings it may deem necessary to defend diffuse interests,^[9] such as environmental protection. In the case of environmental legislation for mining activity, it places special emphasis on preventive aspects. In its reply, it adds that the domestic remedies afforded by the Peruvian State, both administrative and judicial, are capable of equitably resolving the case set forth in the petition and guaranteeing due process of law.

35. As for the actions adopted by the State, it claims that it has made major progress, which shows the political will to enforce environmental regulations for mining activities.

36. In report No. 63-2003-JUS-CNDH-SE, presented on October 30, 2003, the State states that, in October 2000, extraction activities in the Mine of Coricancha came to a halt.^[10] They add that, in the Resolution contained in Report No. 034-2001-EM-DGM-DFM/MA of February 15, 2001, the Ministry of Energy and Mines ordered the shutdown of the Tamboraque processing plant and rendered null and void the authorization to function granted by Executive Resolution No. 333 of June 8, 1961, as well as Article 2 of Executive Resolution No. 170-2000EM/DGM. Exceptionally, temporary functioning for testing purposes was permitted by the Resolution of March 1, 2002. Nevertheless, the shutdown was ordered on July 4, 2002 by means of Report No. 206-2002-DM-DGM-DFM,^[11] which was complied with. Likewise, the Resolution contained in Report No. 108-2001-DM-DGM-DFM/MA of March 26, 2001, ordered the definitive shutdown of the Mayoc sludge dump, where the discharge of sludge came to a complete halt, and the implementation of a series of civil actions to mitigate the impacts of pollution.^[12]

37. In addition to all the orders for shutdown that were issued and implemented, the Ministry of Energy and Mines, by means of the resolution contained in Report No. 348-2003-EM-DGM, ordered that a plan for the definitive shutdown of the entire operation, as well as a definitive remediation plan, be presented. By this action, the Ministry renders permanent the consequences of the orders for shutdown that were issued until the environmental liabilities that were generated have been completely remedied.^[13]

38. The State points out that, on September 23, 2003, the Public Prosecutor was authorized^[14] to file criminal proceedings against the mining concession holders that are allegedly responsible for the environmental pollution produced by the mining activities in the Mayoc sludge dump, and adds that these criminal proceedings may lead to the effective imprisonment of the concession holders and/or their legal representatives, bearing in mind that the penalty for crimes against the environment, the most severe of which involve up to eight years of deprivation of liberty and not only mere mandates to appear as may occur with crimes involving lighter penalties. It indicates that the criminal proceedings stem from the conclusions drawn from a series of administrative procedures lodged with the Ministry of Energy and Mines.

39. The State claims that the petition refers to mining operations that were shut down before the petition was filed and that the Ministry of Energy and Mines, on the basis of the actions it took, has been able to terminate the situation of severity and urgency that existed before the shutdown of operations and the disposal of the sludge, so that preexisting

environmental liabilities coming from the period prior to the shutdown of operations would not be made worse and to permit the imposition of criminal penalties, with a real probability of incarceration for those judged responsible for the alleged acts of pollution.

40. The State points out that the relocation of the Mayoc sludge in any case requires between eight months and one year. And that a implemented precipitously relocation might generate damages if a study is not conducted before removal and an implementation guaranteeing that pollutant articles will not be released is not ensured. It adds that, in addition to the prudential time required for the mitigation and rehabilitation processes that are already under way, there is a criminal process, with actions that have their own time-limits for materialization to respond to both the nature of the matter and the constitutional right of mining representatives to appeal and due process of law. Likewise, the State questions the representativity of CONACAMI.

41. As for the criminal proceedings, the State points out that at present there is a criminal proceeding against Mr. Jaime Rodríguez Mariátegui for alleged crimes against the environment and natural resources, filed by CONACAMI, which will lead to a judicial ruling, ordering the relocation of the Mayoc sludge. They add that the time estimated for relocating the sludge would be about six months, once the respective resolution has been finalized and accepted or, in its absence, the mining representatives have decided to no longer file new appeals against the resolution.

IV. ANALYSIS OF ADMISSIBILITY

A. Commission's jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

42. The petitioner is empowered by Article 44 of the American Convention to submit denunciations to the IACHR. The petition identifies the members of the Community of San Mateo de Huanchor^[15] as the alleged victims, whose rights as enshrined in the American Convention Peru has pledged to honor and guarantee. As for the State, the Commission points out that Peru is party to the American Convention since July 28, 1978, on which date it deposited the respective instrument of ratification. Therefore, the Commission has jurisdiction *ratione personae* to examine the petition.

43. The Commission has jurisdiction *ratione loci* to hear the petition, because it alleges the violation of rights protected by the American Convention that supposedly took place in the territory of a State party to this treaty. Likewise, the IACHR has jurisdiction *ratione temporis*, because the obligation to honor and guarantee the rights protected in the American Convention was already binding for the State on the date on which the events alleged by the petition occurred. Finally, the Commission has jurisdiction *ratione materiae*, because the petition denounces alleged violations of human rights protected by the American Convention.

B. Other requirements of admissibility

1. Exhaustion of remedies under domestic law and time-limits for presentation

44. The State alleges that the petition does not meet the requirement of prior exhaustion of remedies under domestic law provided for in Article 46(1)(a) of the American Convention because there are criminal proceedings against Mr. Jaime Rodríguez Mariátegui by virtue of his office of General Manager of the Lizandro Proaño S.A. mining company, for alleged crimes against the environment and natural resources. The State points out that, in the domestic system, there are regulations for punishment, prosecution, and prevention, as

well as administrative and judicial remedies that provide legal protection for the rights whose violation is being alleged by the petitioners in the present case.

45. The State contends that the remedies provided by Peru's domestic law have not been exhausted, nor have serious efforts been made to exhaust these remedies and use the many mechanisms provided by the environmental protection legislation of Peru.

46. The Commission observes that, in the present case, two proceedings have been filed under domestic law, an administrative proceeding and a judicial proceeding.

47. The administrative proceeding was aimed at stopping the activities of the Lizandro Proaño Mining Company and removing the toxic sludge dump called Mayoc, for the purpose of halting the environmental pollution affecting the population of the Community of San Mateo de Huanchor.

48. On March 26, 2001, the Resolution contained in Report No. 108-2001-DM-DGM-DFM/MA of the Ministry of Energy and Mines, ordered the definitive shutdown of the Mayoc toxic waste dump. This resolution is a consequence of a Report leading to the same individualization and recommending, among other things, the presentation of "a plan for the definitive shutdown of the Mayoc sludge dump with its corresponding timetable for implementation and estimated investment, considering the removal of the sludge that is stored as its compact state does not guarantee its physical stability and is a source of pollution. Time-limits: 60 days."^[16]

49. Because of the company's failure to comply with the administrative order, it was fined; the last fine was imposed on April 25, 2003 and amounted to 210 tax units. ^[17]

50. The Commission observes that, at the date of the present report, the pollutants located in the Mayoc sludge have not been removed as recommended in 2001 and ordered in 2003 by the Ministry of Energy and Mines, although the pollution it is producing has not by any means ceased. According to the petitioners, the failure to comply with the administrative order jeopardizes continuously and permanently the fundamental rights of the members of the community of San Mateo de Huanchor.

51. According to information provided by the State, a Resolution contained in Report 348-2003-ED-DGM of July 2003 ordered the presentation of a plan for the definitive shutdown of the entire sludge operation mentioned earlier, as well as the presentation of a definitive remediation plan. The State expressed that, "by means of this action, the Ministry [of Energy and Mines] confirms the validity of the effects of the order to shut down until the environmental liabilities that were generated have been completely remedied."^[18] The same Report determined that the facts referring to the environmental pollution could constitute a criminal offense.^[19] On September 24, 2003, Ministerial Resolution 411-2003-MEM authorized the Public Prosecutor in charge of Legal Matters of the Ministry of Energy and Mines to file a criminal denunciation and other corresponding legal proceedings against the persons that were deemed to be responsible for the mining activities carried out in the Mayoc dump.

52. As for the criminal proceedings, on May 7, 2001, the Provincial District Attorney of the Joint Provincial District Attorney's Office of Huarochiri, of Matucana, filed with the Joint Magistrate of Huarochiri, at the request of the District Mayor of San Mateo de Huanchor, a criminal denunciation for the alleged perpetration of crimes against the environment and natural resources against Mr. Jaime Rodríguez Mariátegui by virtue of his office of General Manager of the Lizandro Proaño S.A. mining company, thus opening up case file 2001-66. On June 11, 2001, a preliminary criminal investigation of Rodríguez Mariátegui was opened up. On August 13, 2001, the Public Prosecutor in charge of Legal Affairs of the Sector of Energy

and Mines was designated to handle the proceedings and represent the State. On September 30, 2002, the indictment was broadened to include the inhabitants of San Mateo de Huanchor as injured parties, who were admitted as civil parties to the proceedings on November 1, 2002.

53. On September 11, 2003, the mining companies Lizandro Proaño, S.A and Wiese Sudameris Leasing S.A. were included as third parties held liable in the civil proceedings. During this stage of the criminal proceedings, statements were taken from the alleged injured parties.

54. On October 14, 2003, by virtue of what was ordered in Report 411-2003-ED-DGM of September 2003 of the Ministry of Energy and Mines mentioned earlier, the Public Prosecutor in charge of Legal Affairs of the Ministry of Energy and Mines filed a criminal denunciation with the Office of the Attorney General, the Office of the Joint Provincial District Attorney of Huarochiri, for the crime against the ecology injuring the State and society against the legal representatives of the mining companies holding mining concessions in the area of San Mateo de Huanchor, in charge of the Tamboraque unit, which includes the Mayoc sludge.

55. On December 16, 2003, the Office of the Attorney General charged Mr. Rodríguez Mariátegui and requested four years of imprisonment and payment of civil damages, without detriment to removal of the sludge from the place it is now located to another area where it does not cause damage. Criminal proceedings are under way.

56. The State has filed an objection claiming that remedies under domestic law have not been exhausted by the petitioners; therefore it pertains to clarify what remedies under domestic law must be exhausted in the present case. Article 46(1)(a) of the American Convention provides that, for a petition to be admissible, it must be subject to the following requirement: "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." These principles do not merely refer to the formal existence of such remedies but also to the requirement that they be adequate and effective.^[20] The Inter-American Court has pointed out that only those remedies that are suitable for remedying allegedly committed violations must be exhausted, meaning by adequate that the functioning of these remedies, within domestic law, must be suitable to protect the legal situation that was infringed. An effective remedy is one that is capable of producing the outcome for which it was established.^[21] In all domestic law systems, there are many remedies, but they are not all applicable to all circumstances.

57. The Inter-American Court and the IACHR have repeatedly pointed out that the general rule that requires prior exhaustion of remedies under domestic law recognizes the right of the State to "resolve the problem in accordance with its domestic law before being brought before an international proceeding. This general rule does not only recognize that the State has the aforementioned right but also that it is bound to provide the persons under its jurisdiction adequate remedies to protect the effective infringed situation to produce the outcome for which they were established. If the remedies afforded by the State do not meet these requirements, then the exceptions envisaged in Article 46(2) of the Convention are applicable, which have been established for the purpose of guaranteeing international action when the remedies under domestic law and the their own domestic legal system are not expeditious and effective to ensure the respect for the human rights of the victims.

58. In this regard, the Commission has pointed out on previous occasions that the application of the exceptions to the rule of exhaustion of remedies under domestic law provided for in Article 46(2) of the Convention is closely tied to the determination of possible violations of certain rights enshrined therein, such as guarantees of a fair trial and the effectiveness of the remedies. Nevertheless, Article 46(2), because of its nature and purpose,

is a rule that is autonomous with respect to the substantive rules of the Convention. Therefore, the determination of whether the exceptions to the rule of exhaustion of remedies under domestic law provided for in this regulation are applicable to the case at hand should be undertaken previously and separately from the analysis of the merits of the case, because it depends on a standard of appreciation that is different from the one used to determine violation of Articles 8 and 25 of the Convention.^[22]

59. Regarding the adequate remedy, the Commission observes that the petitioners filed existing administrative and judiciary remedies which led to criminal proceedings; nevertheless, these remedies have not been effective as they have not provided the juridical protection that the petitioners seek under domestic law for the violation of the fundamental rights of the Community of San Mateo de Huanchor as a result of the pollution stemming from a mining activity. The administrative decisions that were taken were not observed, more than three years have elapsed, and the toxic waste sludge of the Mayoc field continues to cause damage to the health of the population of San Mateo de Huanchor, whose effects are becoming more acute over time. In view of the repeated failure to comply with the administrative order, only administrative sanctions of pecuniary nature have been imposed, which has not made it possible to remedy the events on which the petition is based. As for the summary criminal proceedings aimed at punishing the crimes committed against the environment, more than three years have elapsed since they were filed, and as yet no definitive verdict has been pronounced.

60. The Commission observes, regarding the summary criminal proceedings filed in 2001, that they have not met the requirement of reasonable time-limits that the present case merits for the permanent damage that the pollution being emitted from the toxic sludge is provoking and that is affecting the inhabitants of San Mateo de Huanchor, especially children, for the irreversible effects that it is causing to their health.

61. The Commission considers that the remedies that were filed with the administrative and judicial authorities for the purpose of legally safeguarding the rights that were violated to the detriment of the inhabitants of the San Mateo de Huanchor have turned out to be ineffective.

62. The Court has pointed out that the State's responsibility does not end when competent authorities issue a decision or judgment, because the State is also bound to guarantee the means whereby these judgments can be definitively implemented.^[23]

63. Because of the unjustified delay in complying with the administrative resolutions that were issued to remove the sludge from Mayoc and the unjustified delay in processing the criminal proceedings, the Commission rules that the requirements set forth in the American Convention that remedies under domestic law must have been exhausted are not applicable in this specific case and in view of its characteristics, it considers that the exception provided for in Article 46(2)(c) is valid.

64. As the exception provided for in Article 46(2)(c) of the American Convention is applicable, the requirements set forth in the American Convention regarding the exhaustion of remedies under domestic law and, as a result, the time-limits of six months for the presentation of the petition are not applicable. It should be clarified that the causes and effects that prevented the exhaustion of remedies under domestic law shall be analyzed in the Report adopted by the IACHR on the merits of the controversy to determine if they constitute violations of the American Convention.

C. Duplication of international proceedings and *res judicata*

65. The case file does not indicate that, in the matter of the petition, another international proceeding is pending or that it reproduces a petition already examined by this or another international body. Consequently, the requirements established by Articles 46(1)(c) and 47(d) of the Convention have been met.

D. Characterization of the facts alleged

66. The Commission considers that the events that were denounced with regard to the effects of the environmental pollution of the Mayoc sludge, which has created a public health crisis in the population of San Mateo de Huanchor, if proven, could be characterized as a violation of the right to personal security, right to property, rights of the child, right to fair trial and judicial protection and the progressive development of economic, social, and cultural rights enshrined in Articles 4, 5, 8, 17, 19, 21, 25, and 26 of the American Convention, related to Articles 1(1) and 2 of the same instrument. Likewise, the Commission consider that, although the petitioners denounced violation of Articles 7, 11, 16, 22, 23, and 24 of the Convention, from the brief and the facts that were denounced, sufficient elements cannot be drawn to characterize a violation of the above-mentioned articles, for which reason they are declared inadmissible. Furthermore, there is no evidence of the absence of grounds or inadmissibility in the petition being submitted. As a consequence, the Commission considers that the requirements set forth in Article 47(b) and (c) of the American Convention have been met.

V. CONCLUSIONS

67. The Commission rejects the objection filed by the Peruvian State that the remedies under domestic law have not been exhausted and concludes that it is competent to examine the claims submitted by the petitioners on the alleged violation of Articles 4, 5, 8, 17, 19, 21, 25, and 26 in keeping with Articles 1(1) and 2 of the American Convention and that they are admissible, in accordance with the requirements established in Articles 46 and 47 of the American Convention.

68. On the basis of the arguments presented above and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to Articles 4, 5, 8, 17, 19, 21, 25, and 26 1(1) and 2 of the American Convention.
2. To notify this decision to the State of Peru and the petitioner.
3. To continue analyzing the merits of the case.
4. To be available to the parties to help reach a friendly settlement based on respect for the right enshrined in the American Convention on Human Rights and to invite the parties to pronounce themselves on this possibility.
5. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 15th day of the month of October 2004. (Signed): José Zalaquett, Chair; Clare K. Roberts, First Vice-Chair; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez, and Florentín Meléndez.

[1] Pursuant to the provisions of Article 17(2)(a) of the Commission's Rules of Procedure, the Commissioner Susana Villarán, a Peruvian national, abstained from participating in the deliberations and decision of the present case.

[2] As of December 22, 2003, the *Center for International Environmental Law (CIEL)* registered as co-petitioner in this denunciation.

[3] According to the petitioners, the *campesino* communities of the zone have built up their community enterprises, basing their development on major irrigation projects such as those of Chacchaina, Chocllapampa, Shococha, Cacray and Patapoma, thus converting San Mateo in a productive environment in the Upper Basin of the Rímac River.

[4] Sludge: Excess mineral particulates from mining operations that can be found in the wash water and runoff, mixed with sterile mud, and which in San Mateo de Huanchor accumulated as a dump in an open field.

[5] Executive Resolution No. 148-99-EM/DGM which appears in the information presented by the petitioners to the IACHR on December 1, 2003.

[6] Resolution No.108-2001-EM-DGM-DFM/MA, Report No. 034-2001-EM-DGM-DFM/MA which appears in the information presented by the petitioners to the IACHR on December 1, 2003.

[7] Article 123 of the Political Constitution of 1979 points out the following: "All have the right to live in an environment that is healthy, ecological balanced, and suitable for the development of life and the preservation of the landscape and nature. All have the duty to conserve this environment. The State is obliged to prevent and control environmental pollution."

[8] The relevant articles of the Political Constitution of 1993 are as follows: "Article 2. Every person has the right : (...) 22. To peace, tranquility, enjoyment of leisure time and rest, as well as enjoyment of a balanced environment that is suitable for the development of life. Article 67. The State draws up national environmental policy. It promotes the sustainable use of its natural resources. Article 68. The State is obliged to promote the conservation of biological diversity and protected natural areas.

Article 69. The State promotes the sustainable development of the Amazon Region with adequate legislation.

[9] Diffuse interests are those interests relating to an indeterminate group of persons regarding incalculable heritage wealth such as environmental protection, defense of the nation's cultural heritage, or consumer defense.

[10] The mining operation in question includes extractive activities through the "*Mina Coricancha*"; processing activities through the Tamboraque Processing Plan; and the disposal of sludge in the dump of the Mayoc field.

[11] See in Report No. 63-2003-JUS/CNDH-SE presented by the State on October 23, 2003.

[12] 4.1 Carry out necessary work, in accordance with the environmental commitments that were acquired (runoff diversion ditches on the northern side of the sludge dump, etc.), that guarantee that major impacts will not be generated. Time-limits: 45 days.

4.2 Achieve the physical stability of the material that is piled up, it should guarantee that acid drainage of sludge will not be generated, and expand the evaluation of ground areas as a measure to control pollution from metals. Time-limits: 45 days.

4.3 Draw up a program for the frequency of dust migration control (if the case merits it), in which the rehabilitation of forests around the Mayo sludge site. Time-limits: 30 days.

4.4 If the previous item (4.3) is applied, implement permanent control over the TPS (total suspended particulates) and SD (sedimental dust) parameters in the zone of influence of the sludge, such as the settlements of Mayoc, Daza, and Tamboraque. Time-limits: 60 days.

4.5 Avoid forbidding inhabitants from crossing the zone where the sludge is located, opening other roads of access to the central highway, finishing installation of the perimeter fences of the dump and preventive notices. Time-limits: 45 days.

4.6 Install a continuous treatment system to neutralize the acid inflows that might be generated, so as to control and reduce the risks of pollution of the receiving body. Time-limits: 60 days.

4.7 Present a plan for the definitive shutdown of the Mayoc sludge dump, with its corresponding timetable for implementation, estimated investment, taking into consideration the removal of the stored sludge as it is compact and its physical stability cannot be guaranteed and because it is a source of pollution. Time-limits: 60 days."

[13] Report of the State No. 65- 2003- JUS/CNDH-SE, presented to the IACHR on October 30, 2003.

[14] Ministerial Resolution No. 411-2003-MEM/DM, published in the Official Register of Peru, *El Peruano*.

[15] According to information provided by the petitioners, San Mateo de Huanchor is a well-defined community that has a population of 5,600 inhabitants. Regarding this, please see: The Case of the Indigenous People of Sarayaku. Provisional measures, Resolution of the Inter-American Court of July 6; Case of the Communities of Jiguamiandó and del Curbaradó. Provisional measures. Resolution of the Inter-American Court of Human Rights of March 6, 2003, ninth consideration; Case of the Peace Community of San José de Apartadó. Provisional measures. Resolution of the Inter-American Court of Human Rights of June 18, 2002, eighth consideration; and Case of the Peace Community of José de Apartadó. Provisional measures. Resolution of the Inter-American Court of Human Rights of November 24, 2000, seventh consideration. In addition, Case of the Community of Mayagna (Sumo) Awas Tingni. Judgment of August 31, 2001. Series C, No. 79, paragraph 149.

[16] See in Report 108-2001-DM-DGM-DFM/MA of the Ministry of Energy and Mines, which appears in the case file.

[17] See in the brief of the State received on October 23, 2003. Case file on Precautionary Measures.

[18] See in brief of the State received on October 30, 2003.

[19] *Idem.*

[21] IAHR Court *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraphs 63-64; *Godínez Cruz Case*, Judgment of January 20, 1989, paragraphs 66-67; *Fairén Garbi and Solís Corrales Case*, Judgment of March 15, 1989, paragraphs 87-88.

[22] Inter-American Commission on Human Rights, Report N° 25/03, Santo Domingo Colombia, Petition 289/2002 of March 6, 2003.

[23] IAHR Court, *Baena Ricardo et al. Case*, Judgment of November 28, 2003, paragraph 79.