

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**RIGHT TO A HEALTHY ENVIRONMENT AND RIGHTS OF INDIGENOUS COMMUNITIES  
(SOCIAL EVALUATION OF AN ENERGY PROJECT IN YUCATAN)  
[DERECHO A UN MEDIO AMBIENTE SANO Y DERECHOS DE LAS COMUNIDADES  
INDÍGENAS  
(EVALUACIÓN SOCIAL DE UN PROYECTO ENERGÉTICO EN YUCATÁN)]**

**CASE:** *Amparo en Revisión 953/2019*

**REPORTING JUSTICE:** Alberto Pérez Dayán

**DECISION ISSUED BY:** Second Chamber of Mexico's Supreme Court of Justice

**DATE OF THE DECISION:** May 6, 2020

**KEY WORDS:** right to a healthy environment; standing in the environmental *amparo*; precautionary principle in environmental matters; *in dubio pro natura* principle; principle of citizen participation; rights of access to information and public participation in environmental matters; social impact assessment in energy projects; rights of indigenous communities to self-determination and prior, free and informed consultation.

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Amparo en Revisión 953/2019*, Second Chamber, Alberto Pérez Dayán, J., decision of May 6, 2020, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AR%20953-2019.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 953/2019*, Mexico.

## SUMMARY OF THE *AMPARO EN REVISION* 953/2019

**BACKGROUND:** In October 2016, the Ministry of Energy issued a technical opinion and a resolution on the social impact assessment (SIA) of a wind and photovoltaic project to be developed in the state of Yucatan. Ejido S, whose members describe themselves as indigenous Mayan, filed an *amparo indirecto* lawsuit against these acts, as well as article 120 of the Electricity Industry Law (LIE), considering that they affect various rights constitutionally and conventionally recognized for indigenous peoples and communities, including their right to a healthy environment and to prior, free and informed consultation. A district judge in Yucatan dismissed the lawsuit on the grounds that the plaintiffs did not have standing to file it. The Ejido S brought a *recurso de revisión* challenging that determination. The Mexico's Supreme Court of Justice (this Court) decided to assert jurisdiction to resolve the case.

**ISSUE PRESENTED TO THE COURT:** Whether the legal sphere of the members of Ejido S, who consider themselves as indigenous Mayan, is currently and actually affected -either directly or by their special situation in the legal system- by the resolution issued by the Ministry of Energy declaring the evaluation of the wind and photovoltaic project to be developed in Yucatan complete. If it is resolved that Ejido S can challenge that act of the Ministry of Energy through the *amparo* proceeding, this Court must then be decided: (i) whether article 120 of the LIE is unconstitutional; and (ii) whether the resolution of the Ministry of Energy contains an adequate characterization of the social, environmental and cultural impacts of the project being evaluated.

**HOLDING:** The *amparo* was granted to Ejido S, essentially, for the following reasons. The rights to a healthy environment and other constitutionally and conventionally recognized rights in favor of indigenous peoples and communities were violated. One criterion to prove standing to file an *amparo* lawsuit whenever possible violations of the human right to a healthy environment are argued is the relationship of the person who uses or inhabits the area of influence of an ecosystem at risk with its environmental services. Regarding the article 120 of the LIE, it was said it is not unconstitutional because it establishes the obligation of the Ministry of Energy to act with due diligence to protect the rights of indigenous peoples and communities in the

evaluation and decision-making processes of energy projects. The authority is legally required to issue a resolution regarding a social impact assessment and make the respective recommendations, for which it must ensure that the indigenous peoples and communities located in the area of direct and indirect influence of the project are duly identified and consulted in advance, in a free and informed manner. Also, the identification of these indigenous communities is not exhausted with the resolution that considers the SIA as presented, but the authorities responsible for the consultation and authorizing the project have the duty to ensure that they are fully identified so may not be affected. On the other hand, the right to a healthy environment of the members of Ejido S was violated because the precautionary principle that governs environmental matters applies when there is uncertainty of the risk to the environment and it requires the State to take positive actions in the absence of information. So, the precautionary and *in dubio pro natura* principles and, therefore, the human right to enjoy a healthy environment of the members of Ejido S, were violated with the resolution of the SIA of Project C, because it was approved even knowing that the company B-Yucatán 1 had not identified the changes or environmental risks related to the "Yucatan Peninsula" aquifer. Regarding the indigenous communities' right to consultation is especially important in the context of sustainable development since economic development without a vision consistent with human rights can lead to the loss of our indigenous peoples and traditions. Consultation processes cannot be mere formalities; they must be effective and the indigenous communities must always be consulted by the authority prior to the authorization stage of any project.

**VOTE:** The Second Chamber decided this case unanimously by 5 votes of the justices Yasmín Esquivel Mossa (reserved her right to issue a concurrent opinion), Alberto Pérez Dayán (reserved his right to issue a concurrent opinion), Luis María Aguilar Morales (reserved his right to issue a concurrent opinion), and José Fernando Franco González Salas (voted with reservations).

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=264836>

## EXTRACT FROM THE AMPARO EN REVISION 953/2019

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 6, 2020, issued the following decision.

### BACKGROUND

- p.6 In December 2015, the company B-Yucatán 1 submitted to the Ministry of Energy (SENER) the Social Impact Assessment (SIA) to develop a wind and photovoltaic project (Project C), consisting of the construction of a wind farm with 125 wind turbines in a municipality of Yucatán. On October 26, 2016, SENER issued the technical opinion on the SIA and on October 31, 2016, the resolution by which this assessment was validated.
- p.1-4 Ejido S, whose members consider themselves to be indigenous Mayan, filed an *amparo* lawsuit against the technical opinion on the SIA (hereinafter the opinion) and the resolution on the SIA of Project C, considering that these acts violated their rights to an adequate environment, health, property, heritage, existing resources as well as the culture of the Mayan indigenous community and its members. The unconstitutionality of article 120 of the Electricity Industry Law (LIE) was also claimed. A district judge in Yucatan dismissed the *amparo* lawsuit on the grounds that Ejido S had no standing to file it. Ejido S then filed a *recurso de revisión*, asking this Court to assert jurisdiction, which was approved by its Second Chamber, in which the case was decided.

### STUDY OF THE MERITS

#### I. Standing of ejido S to file an *amparo* lawsuit

- p.18 The members of Ejido S, in relation to their human right to a healthy environment, argued that they had standing to claim through the *amparo* lawsuit an impact on their natural resources, since SENER authorized a project without identifying impacts related to the bodies of water (cenotes) in the "Yucatan Peninsula" aquifer, which covers an area of 124,409 square kilometers and is a source of subsistence for their indigenous community. They also stated that the opinion on the SIA of Project C issued by SENER contravenes the rights of self-determination of indigenous communities, as well as the right to prior and informed consultation.

p.18-19 To analyze whether the dismissal declared by the district judge in Yucatan was correct because the members of Ejido S had no standing to file the *amparo* lawsuit, this Court considers it must address the special configuration of the right to a healthy environment and the special principles that govern it in order to determine the essential core of protection, the purposes it pursues and how it is inserted into the legal sphere of the person. This will make it possible to identify how this right may be violated. This decision of this Court is based on a precedent resolved by its First Chamber, the *Amparo in Revision 307/2016*, which reviewed the theoretical and legal framework of the human right to the environment.

### **A. Theoretical and legal framework of the human right to the environment**

- p.19 Various countries and international instruments have incorporated the right to live in a healthy environment as a genuine human right that entails the power of anyone to demand the effective protection of the environment in which they live. For example, in *Advisory Opinion 23/17*, the Inter-American Court of Human Rights established that the right to a healthy environment protects components such as forests, rivers, seas, and others, as legal interests in themselves.
- p.20 Considering this *Advisory Opinion*, in the *Amparo in Revision 307/2016*, this Court has established that the human right to the environment has a double dimension: I) ecocentric or objective dimension, and II) anthropocentric or subjective dimension. The first deals with the defense and restoration of nature and its resources regardless of their repercussions on the human being and the second conceives that the protection of this fundamental right constitutes a guarantee for the realization and validity of the other rights recognized in favor of the person. The violation of either of the two dimensions mentioned constitutes an impact on the human right to the environment.
- p.21 Likewise, this Court has declared that the right to a healthy environment has both individual and collective connotations. In its collective dimension it is a universal interest that is owed not only to present generations, but also to future ones. In its individual dimension, the violation of the right to a healthy environment can directly or indirectly affect people because of its connection with other rights such as health, personal integrity or life.

### **B. The human right to the environment in Mexico**

- p.21 In Mexico, the right to the environment is contemplated in article 4 of the Constitution, as well as article 1 of the Constitution and article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador", according to which "everyone has the right to live in a healthy environment and to have basic public services" and "states parties shall promote protection, preservation and improvement of the environment".
- p.22 For this Court, the legal interest protected by the human right to the environment is the "natural environment", understood as the environment in which the person operates, characterized by the set of ecosystems and natural resources that allow the integral development of their individuality. This implies that Mexico is obliged to guarantee both dimensions of this right.

### **C. Guiding principles**

- p.22 The specialized literature states that to give content to the right to environment, the guiding principles, which aid constitutional judges in their interpretative work, must be consulted. Although environmental law is based on various principles that are fundamental to guide the judicial work, for the issue to be resolved in this case, this Court addresses only the precautionary, *in dubio pro natura* and citizen participation principles.

#### **1. Precautionary principle**

- p.22 In the *Advisory Opinion 23/17*, the Inter-American Court said that the precautionary principle in environmental matters refers "to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment."
- Similarly, principle 15 of the United Nations Declaration on Environment and Development states that "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

p.23 Article 26, section III, of the General Law on Climate Change also contemplates the precautionary principle. Thus, the Mexican State recognizes its application and binding nature in environmental matters.

For this Court, precaution and prevention are the cornerstones of environmental law. When there are damages there is an obligation to make reparations, while when there is risk there is an obligation to prevent. In accordance with the precautionary principle in environmental matters, an *ex-ante* solution should be sought rather than opting for the remedy as an *ex-post* solution, which necessarily entails the obligation to implement an environmental impact assessment with respect to any activity, work or project that is likely to have a significant negative impact on the environment and which is subject to the decision of a competent national authority.

p.24 The precautionary principle has different scopes: it operates as an interpretative guideline when faced with the limitations of science to establish with absolute certainty the risks to nature and, in relation to public administration, it implies the duty to warn, regulate, control, monitor or restrict certain activities that are risky for the environment. In this regard, this principle may serve as a reason for decisions that would be considered contrary to the principle of legality or legal certainty. Finally, for legal operators, precaution requires incorporating the uncertain nature of scientific knowledge into their decisions.

p.24-25 A key concept in environmental matters and the precautionary principle is "environmental risk". An environmental impact statement is an environmental risk assessment based on which a work or project is accepted or rejected. Thus, for this Court, an environmental risk assessment is a *necessary* condition for the implementation of any project with an environmental impact and its absence constitutes in itself a violation of this principle and, therefore, of the human right to a healthy environment.

p.25 The Court notes that the assessment of environmental risks and impacts as a general rule are subject to scientific or technical uncertainty, since information on environmental risks or damages may be uncertain for various reasons, which requires a rethinking of the rules for weighing evidence.

In the opinion of this Court, the precautionary principle may reverse the burden of proof born by the responsible agent, and provide judges with a tool for obtaining all the necessary evidence to identify the environmental risk or damage. This is reinforced by the provisions of article 8.3 subsection e) of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), which recognizes the obligation of States to have measures to facilitate the production of proof of environmental damage when appropriate and applicable, such as the reversal of the burden of proof and the dynamic burden of proof.

## **2. Principle *in dubio pro natura***

p.26 The principle *in dubio pro natura* is inextricably linked to the prevention and precautionary principles, because when in doubt about the certainty or scientific accuracy of environmental risks, the decision must favor nature. This means that if there is a collision between the right to enjoy a healthy environment and other interests, and the damage or risks cannot be elucidated due to lack of information, all necessary measures must be taken in favor of the environment.

## **3. Principle of citizen participation**

p.27 Principle 10 of the United Nations Declaration on Environment and Development (Rio Declaration) recognizes the principles of access to information and public participation in environmental matters.

p.27-28 The principle of citizen participation has also been developed more specifically in the Escazú Agreement, article 4.6, which states the duty of States parties to guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them. Article 8.2 of the same international instrument, on access to justice in environmental matters, regulates the obligation of States parties to ensure, in the framework of their domestic legislation, access to judicial and administrative mechanisms to challenge and appeal, with respect to substance and procedure, any decision, action or omission related to access to environmental information or public participation in decision-making processes regarding environmental matters, or any other decision, action or omission that affects or could affect the environment



adversely or violate laws and regulations related to the environment. This means that the enabling environment for citizen participation in the protection of the environment must also be guaranteed through forms of broad active legal standing, as also required by article 8.3 of the Escazú Agreement.

p.28 This Court insists that the authorities must, within the scope of their jurisdiction, encourage citizen participation, or ensure an enabling environment for the protection of the environment. This is so since the principle of citizen participation contains that of public initiative, which recognizes the proactive role of the State in the protection of the environment in the terms of our Constitution. Thus, the fulfilment of environmental purposes cannot depend solely on citizens.

#### **D. Standing in environmental matters**

p.30 In this decision, this Court advances the delineation of the concept of standing for the defense of the environment as a human right in light of articles 1 and 4 of the Constitution.

For this Court, the recognition of standing does not imply the generation of a protection of the common or simple interest, because it is not a question of protecting a generic interest of society, but of guaranteeing access to justice in the face of legally relevant and protected impacts. Therefore, whoever claims to have standing must be in an identifiable legal situation, arising from a specific relationship with the object of protection alleged, which allows the petitioner to assert a differentiated impact from the rest of the members of society.

p.30-31 Therefore, the Court considers that the standing to file an *amparo* lawsuit in environmental matters depends on the special situation that the person or community has with the ecosystem that is considered affected, particularly with its environmental services. The concept of environmental services is fundamental to guarantee the effective protection of the human right to the environment since these determine the benefits that the ecosystem gives to the human being. Environmental services are defined in Article 3, section XXXVI of the General Law of Ecological Balance and Environmental Protection, as the tangible and intangible benefits generated by ecosystems for the survival of the natural and biological system as a whole, and to provide benefits to human beings.

p.34 This Court notes that environmental services are defined and measured through scientific and technical evidence that, as is usual in this field, is neither exact nor unambivalent.

p.35 Thus, to analyze whether a person has standing to file *amparo* lawsuits in defense of the environment, environmental services must be evaluated according to the precautionary principle. This principle requires us to seek, in each case, the tools or methods necessary to understand the functioning of an ecosystem, as well as the environmental services it provides, with a view to guaranteeing its conservation in direct application of the principle *in dubio pro natura*.

p.36 It should also be borne in mind that each ecosystem has different areas of influence depending on the environmental services it provides, so the identification of this geographical space allows us to understand that any person who uses or inhabits the area of influence of an ecosystem is a beneficiary of its environmental services and, therefore, has standing to file an *amparo* lawsuit in his or her defense.

In the opinion of this Court, the area of influence or “adjacent environment” is a conceptual tool that helps legal operators define standing in the environmental *amparo* proceedings, since the main stakeholders in defending a certain ecosystem are not only those who live territorially near where it is located but also those who use the area of influence that is positively impacted by the environmental services provided by the ecosystem. The definition of the area of influence of each ecosystem should be resolved on a case-by-case basis, as it will depend on the type of ecosystem and the environmental services it provides.

p.36-37 This Court proposes building a methodology that serves as a tool for legal operators to decide if a natural person has standing to file an *amparo* lawsuit to protect the right to a healthy environment.

The questions that legal operators must ask to determine the above are the following: (1) What type of ecosystem is to be protected? (2) What environmental services does the affected ecosystem provide? (3) What is the area of influence or adjacent environment of the ecosystem? and (4) Does the person who files the environmental *amparo* lawsuit inhabit or use the area of influence that is positively impacted by the environmental services provided by the ecosystem?

## E. Standing in this case

- p.37 What type of ecosystem is to be protected? In this case, the ecosystem that the Ejido S wants to protect is a coastal ecosystem, composed of different biological systems, including the cenotes, which are located in the coastal zone and can include marine, aquatic or terrestrial portions.
- p.38 What environmental services does the affected ecosystem provide? In general, coastal/marine ecosystems moderate the impacts of storms, provide habitats for wildlife, maintain diversity, dilute or treat waste, provide ports or transportation routes, provide habitats and employment for humans and provide aesthetic enjoyment and entertainment opportunities.
- p.39 One of the most important environmental services provided by cenotes is that they are a source of groundwater and water can be obtained from wells or artificial openings. In addition, the physical properties of the limestone rock that allow the formation of the cenotes determine the existence of an unbounded aquifer, which intercommunicates all the existing bodies of water in the region. Additionally, the Yucatan Peninsula aquifer has many groundwater abstractions, since this is the only source of supply for all uses in the region.
- p.40 What is the area of influence or adjacent environment of the "Yucatan Peninsula" aquifer? This Court concludes that the area of influence of the coastal aquifer ecosystem called the "Yucatan Peninsula" that Ejido S seeks to defend covers at least an area of 124,409 square kilometers, comprising the entire state of Yucatan and almost all the states of Campeche and Quintana Roo.
- p.41 Does the person who files the environmental *amparo* lawsuit inhabit or use the area of influence that is positively impacted by the environmental services provided by the ecosystem? If the area of influence that is positively impacted by the environmental services provided by the ecosystem of the "Yucatan Peninsula" aquifer covers the entire state of Yucatan and the affected parties demonstrated they live in a municipality in that state, it is clear that they benefit from the environmental services provided by the mentioned ecosystem.

For these reasons, the Second Chamber of this Court finds that the members of Ejido S have standing to file the *amparo* lawsuit against the resolution issued by SENER in relation to the SIA of Project C.

## II. Analysis of the grounds of violation

- p.43 Having resolved the questions on the validity of this *amparo* lawsuit, this Court studies the grounds of complaint raised by Ejido S in relation to two issues: a) the unconstitutionality of article 120 of the LIE and b) the improper characterization of the social, environmental and cultural impacts of Project C.

### A. Constitutionality of article 120 of the LIE

- p.43 Ejido S argued that article 120 of the LIE is unconstitutional because it transfers to third parties the State's obligation to identify and characterize indigenous peoples and communities in relation to actions and projects that may affect their rights.

For this Court, article 120 of the LIE is not unconstitutional because ultimately, it is the authority itself that must act with due diligence when assessing, modifying or approving the identification or characterization by the promoters of an energy project of the indigenous communities that could be affected.

- p.46 For this Court, the legal obligation to issue a resolution regarding the SIA, and, where appropriate, to make the respective recommendations, means that the authority is ultimately responsible for ensuring and verifying that the indigenous peoples and communities that are located in the area of direct and indirect influence of the project are duly identified and therefore consulted in advance in a free and informed manner.

Additionally, for this Court, the identification of these indigenous communities is not exhausted by the resolution declaring the SIA presented. After that, the authorities responsible for the consultation and authorizing the project have the duty to ensure that the indigenous peoples and communities that may be affected by the development of the respective energy project are fully identified and, on that basis, to ensure that they can be consulted about the consequences it could have on their communities, way of life, environment or health.

p.48 This Court also specifies that the interpretation of article 120 of the LIE must be framed within the obligations of the State regarding the special protection owed to indigenous persons and communities under its jurisdiction, consisting of guaranteeing the full exercise of their rights, especially with respect to the enjoyment of their property rights in order to ensure their physical and cultural survival.

In this regard, the State duty of guaranteeing the "survival" of such people must be understood as the capacity of indigenous peoples and communities to "preserve, protect and guarantee the special relationship that they have with their land", in such a way that they can "continue to live their traditional way of life and that their cultural identity, social structure, economic system, distinctive customs, beliefs and traditions are respected, guaranteed and protected."

### **B. Improper identification of social impacts**

p.49 This Court now analyzes Ejido S's argument that its right to a healthy environment for its development and well-being was violated with the authorization by SENER of a project in which the possible impacts related to the bodies of water of the "Yucatan Peninsula" aquifer were not identified, thereby failing to comply with its obligation to guarantee respect for that right, as established in article 4 of the Constitution.

p.50 This Court declares that the argument put forward by the Ejido S is well founded since even though SENER stated that the SIA opinion did not authorize the realization of any wind energy project, in accordance with the precautionary principle this should not be understood as an impediment to deciding that its fundamental right to a healthy environment was violated.

p.51 This is so because the precautionary principle that governs environmental matters operates because of the uncertainty of the risk to the environment and requires that there be positive actions of the State in the absence of information. For this reason, in environmental matters, it is not required that visible and verifiable damage to nature has already been caused to consider that the right to a healthy environment has been violated. Violations of the precautionary principle and the right to a healthy environment may result from failure of the authority to obtain sufficient information —whether it comes from the company or is obtained

*motu proprio*— to enable it to take necessary action to determine whether the project is viable or to provide for appropriate mitigation measures.

This Court also notes that Chapter II of Title Four of the LIE, which addresses issues related to social impact and sustainable development, establishes that infrastructure projects in the public and private sectors must comply with the principles of sustainability and respect for the human rights of the communities and peoples of the regions in which they are to be developed. This Court thus concludes that the provisions contained in article 120 of the LIE for the identification, characterization, prediction and assessment of social impacts must include the environmental impacts of projects.

p.54 For this Court, SENER violated the precautionary and *in dubio pro natura* principles and, therefore, the human right of Ejido S's members to enjoy a healthy environment, with the ruling on the SIA of Project C, because it approved it even knowing that the company B-Yucatán 1 had not identified the changes or environmental risks related to the "Yucatan Peninsula" aquifer.

p.55 This Court understands that even though the information presented in the SIA is not definitive because it does not constitute the authorization to carry out a project, the *amparo* must be granted to Ejido S because the special configuration of the right to the environment and the particularity of the principles that govern it allow people to resort to the *amparo* lawsuit at any time when they consider there is a risk of irreparable impact on an ecosystem that provides environmental services of which they are beneficiaries.

In conclusion, this Court declares the arguments of Ejido S to be well founded regarding the violation of their right to a healthy environment, and therefore the resolution on the SIA of Project C must be invalidated, since SENER did not demand or ensure that there was complete information that analyzed the environmental risk and determinations could be reached aimed at protecting the environment.

### **1. Theoretical and legal framework of the right to consultation of indigenous communities and peoples**

p.56-57 The members of Ejido S argued that Project C affects their rights as an indigenous community, including that of prior consultation, because broadly speaking, the SIA approved

by SENER lacks an adequate characterization of the areas of influence that will be affected, there are no properly measured and mitigated impacts, indigenous communities in project C's area of influence were not adequately identified, and the compensation and shared benefits to which indigenous communities are entitled are not contemplated.

p.57-59 This Court, through case law, have recognized that the right to consultation of indigenous communities and peoples arises from an interpretation of article 2 of the Constitution and the Indigenous and Tribal Peoples Convention (Convention 169). This right consists of the obligation of the State to consult indigenous peoples and communities before adopting an action or measure likely to affect their rights and interests. Likewise, there is consensus that for the consultation to comply with the national and international standard it must be prior, free, informed, culturally appropriate, given through its representatives or traditional authorities, and in good faith.

p.60 Consultation with indigenous communities and peoples is particularly important in the context of the sustainable development of States, since economic development without a vision consistent with human rights can entail, among other things, the loss of our indigenous peoples and traditions. It is in this sense, as stated in article 7 of Convention 169, that the affected peoples and communities have "the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use".

p.61-62 It is essential that consultation processes be effective and not become mere formalities for the company or the authority, so the communities can in fact influence the project, public policy, legislation or decision that is being consulted. Therefore, in such processes both parties must work in good faith to reach a consensus; in this sense, neither party has the right to unilaterally impose its will.

## **2. Procedure for the approval of an Electric Energy project**

p.67 The LIE and its Regulations establish three requirements for a company such as the promoter of Project C to generate electricity from wind: that it has authorization or permission from the Energy Regulatory Commission (CRE); that it has a positive SENER resolution on the SIA presented; and that it has reached an agreement or has the consent of the affected

indigenous communities, derived from the respective consultation process. What is not clear from the LIE and its Regulation is how these three requirements are concatenated.

p.69 In this case, the members of Ejido S consider that SENER's ruling on the SIA has the nature of a final decision authorizing the realization of Project C.

### **3. The technical opinion and approval of the Social Impact Assessment is preliminary in nature**

p.69-70 As the LIE and its Regulations do not define the temporal concatenation of the three requirements that must be met by those who wish to operate as power generators, it is difficult for this Court to elucidate whether the Resolution of the SIA challenged by Ejido S has a definitive or preliminary nature. By "*definitive*" the Court understands that the information could not be modified or corrected at a later stage of the procedure to obtain permits or authorizations to develop projects in the electricity industry. On the other hand, "*preliminary*" means that the information contained in the SIA could be modified or corrected at later stages.

p.71-72 This Court considers that the only viable interpretation is that indigenous communities must always be consulted prior to the authorization stage by the CRE. For this Court to maintain otherwise would imply agreeing that the consultations of the electric energy projects do not need to meet the requirement of being prior, since they would not occur at the first planning stages.

p.72 This Court concludes that, through an interpretation consistent with the right to consultation with indigenous communities, the first requirement that must be met by anyone interested in obtaining a permit or authorization to generate electricity is the approval of the SIA by SENER referred to in article 120 of the LIE. Secondly, once such approval has been acquired and if potentially affected indigenous communities have been identified, SENER must ensure that the indigenous communities that may be affected by the project are consulted with. And finally, once an agreement or a consensus has been reached with the indigenous communities, the interested company may request permission or authorization from the CRE.



p.73 As a result of the above, this Court considers that both the opinion and the resolution of the SIA are preliminary in nature; therefore, they should not yet affect the rights of the indigenous communities and peoples that they argue.

The right to consultation must be meaningful and not a simple "informative consultation", but a real negotiation where information is exchanged and where the affected indigenous communities are heard regarding their concerns and the impact that the project will generate on their rights.

p.77 The authorities responsible for the consultation and authorizing the project have a duty to ensure that there is complete and timely information on the impact of the project on the affected communities and on the environment. In addition, they have to give that information to the communities from the beginning of the consultation processes and give them sufficient time and tools.

Therefore, if once the consultation stage has begun, this information is not provided or there is no real procedure for exchanging it among the company, the authority and the affected communities, in accordance with the standards that this Court has set, the affected parties may resort to the *amparo* lawsuit to claim the violation of their right to consultation. However, the Court concludes that so far there has been no impact on the right to consultation or the other rights that communities have as indigenous communities, since the information contained in the challenged acts can still be modified when the consultation stage that the responsible authority must provide begins.

## DECISION

p.78-79 The decision appealed is overruled and Ejido S is granted the *amparo* against SENER's resolution on the SIA of project C, for the following purposes: (I) SENER must cancel the mentioned resolution and issue another one in which it reiterates the issues that were not subject to constitutional protection; (II) taking into account the content and obligations imposed by the right to a healthy environment developed in this decision, the energy company is required to identify and present the information concerning the changes or environmental risks related to the bodies of water (cenotes) of the groundwater of the "Yucatan Peninsula" aquifer; (III) once this is done, SENER must assess in light of the rights



involved whether the SIA of Project C is considered in compliance.