

**REPORT No. 2/12<sup>1</sup>**  
CASE 12.094  
INDIGENOUS COMMUNITIES OF THE  
LHAKA HONHAT (*OUR LAND*) ASSOCIATION  
MERITS  
ARGENTINA  
January 26, 2012

**I. SUMMARY**

1. On August 4, 1998, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or the "IACHR") received a petition against the State of Argentina (hereinafter the "State" or the "State of Argentina") concerning the lack of guarantee of the territorial rights of the indigenous communities that inhabit Fiscal Lots 55 and 14 of the Department of Rivadavia, in the Province of Salta. The petition was presented by the Lhaka Honhat (*Our Land*) Association of Aboriginal Communities (hereinafter the "Lhaka Honhat Association", the "Association" or "Lhaka Honhat"), with the support of the *Centro de Estudios Legales y Sociales* (CELS) and the Center for Justice and International Law (CEJIL), in representation of the indigenous communities that form part of said Association, claiming the violation of numerous human rights enshrined in the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention").

2. After a lengthy and ultimately unsuccessful friendly settlement process conducted between 1999 and 2005, the IACHR approved Admissibility Report No. 78/06 on October 21, 2006, in which it declared the petition admissible with regard to the alleged violations of the rights established in Articles 8(1), 13, 23, 21 and 25 of the American Convention, in relation to the State obligations derived from Articles 1 and 2 of the Convention.

3. In the petition and in their observations on the merits, the petitioners allege that the State of Argentina violated, to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, the rights to territorial property, prior consultation and participatory environmental impact assessments with regard to the public works carried out in their territory, access to information, political rights, access to justice and judicial protection, life, physical integrity, health and subsistence, culture, residence, privacy and family life, protection of the family, and freedom of association.

4. On several occasions the State emphasized the importance of the issue and consistently expressed its commitment to achieve a resolution of the case. In that regard it provided various progress reports from both the Provincial and the National Government. However, at a public hearing held at the headquarters of the Commission on November 2, 2009, the Federal Government asked the Commission to issue the merits report on the case since a friendly settlement hadn't been achieved.

5. After factual and legal analyses, the Commission has concluded (a) that the State of Argentina violated the right to property of the indigenous communities that form part of the Lhaka Honhat Association, because the State failed to give the communities effective title to their ancestral territory; (b) their right to property was also violated insofar as the State failed to

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<sup>1</sup> Commissioner Felipe González did not take part in the deliberations or decision of this case, in accordance with the provisions of Article 17.2.b of the Commission's Rules of Procedure.

implement provincial decrees legally recognizing the right to a single shared title to territory for the communities of the Fiscal Lots; (c) the State violated petitioners right to due process, because the State did not afford them an effective procedure to acquire title to their ancestral territory. The Commission also concludes that (d) the State of Argentina violated the right to property of the petitioner indigenous communities, as well as their members' right of access to information, in having carried out public works and having granting a concession for oil and gas exploration in the indigenous ancestral territory without complying with the requirements set by inter-American law, namely, to conduct expropriation procedures, to ensure no impact on the survival of the indigenous communities, to conduct prior, free and informed consultations, to conduct prior social and environmental impact assessments, and to grant participation in the benefits derived from the works and the concession. Furthermore, (e) the State of Argentina violated the territorial rights of the petitioner indigenous communities, in having failed to exercise the required due diligence to control the deforestation of the ancestral territory by illegal loggers.

6. Consequently, the Commission establishes that for the foregoing reasons, the State of Argentina violated Articles 21, 13, 23, 8 and 25 of the American Convention, in relation to the obligations established in Articles 1.1 and 2 of the Convention; it declares that such violations have been partially repaired; and it issues recommendations to redress the violations and ensure non-repetition.

7. On the other hand, the Commission concludes that it has not been proven in the present case that the State of Argentina violated the right to participation regarding the claims of deliberate weakening of the Association by the State.

## **II. PROCEDURE BEFORE THE COMMISSION**

8. On August 4, 1998, the IACHR received the initial petition, presented by the "Lhaka Honhat" Association of Aboriginal Communities, with the support of the Centro de Estudios Legales y Sociales (CELS) and the Center for Justice and International Law (CEJIL), in representation of the indigenous communities that form part of the Association, against the Republic of Argentina. On December 29, 1998, the IACHR received additional information from the petitioners. On January 26, 1999, the IACHR transmitted the pertinent parts of the petition to the Government of Argentina, requesting it to submit information. On July 7, 1999, the IACHR received the State of Argentina's response to the petition. The text of the response, together with its supporting documentation, was communicated to the petitioners on July 29, 1999.

9. On October 21, 2006, the IACHR approved Admissibility Report No. 78/06, in which it declared the petition admissible as regards the alleged violations of the rights protected in Articles 8(1), 13 in connection with 23, 21 and 25 of the American Convention, in relation to the general obligations established in Articles 1 and 2 of said instrument.

10. The petitioners submitted their brief with observations on the merits on January 4<sup>th</sup>, 2007, and it was transmitted by the IACHR to the State through a note dated January 12, 2007.

11. The IACHR received an Amicus Curiae brief in the course of the present process, submitted by the Human Rights Clinic of the Masters Degree in Fundamental Rights of the Carlos III University of Madrid. It was received on July 3<sup>rd</sup>, 2007, and communicated to both parties by the IACHR on August 23, 2007.

12. After the admissibility report, several working meetings were held in Argentina between both parties. On March 11, 2008, a working meeting was held at the headquarters of the Commission with representatives of the State and the petitioners and on November 2, 2009, a

public hearing was held in which the Federal Government asked the Commission to issue the merits report<sup>2</sup>.

### III. POSITIONS OF THE PARTIES

#### A. Positions of the petitioners

##### **Arguments related to the territorial property of the indigenous peoples of Fiscal Lots 55 and 14 of the Salta Province**

13. The petitioners assert that because of their traditional society as hunter-gatherer nomads, who travel through their ancestral territory in accordance with culturally established patterns, the land has a fundamental importance for them, as an economic and cultural resource.<sup>3</sup> They explain that the economic life, the physical survival – life and health -- and the cultural identity of the indigenous communities of the Lhaka Honhat Association are inextricably bound to their ancestral territory; due to that unique relationship, international law grants special protection to indigenous peoples' ancestral lands. They invoke in this regard both the inter-American system's jurisprudence and the provisions of other international instruments and treaties, such as ILO Convention 169, as well as Article 75 – paragraph 17 of the Argentinean National Constitution.

14. The petitioners assert that different actions by the State constitute violations of Article 21 of the Convention: (a) "in having failed to delimit, demarcate and grant title to property of their traditional territory through a legal instrument that allows them to maintain their traditional use practices and their particular modes of relating to the land;"<sup>4</sup> (b) "in having carried out works, demarcations, measurements, and other activities that affected the integrity of the territory and the existence and value of the property that is in the area;"<sup>5</sup>; and (c) "in having consented to and tolerated the illegitimate actions of private parties, such as the tending of wire fences, logging, bovine cattle grazing and the like"<sup>6</sup>. In turn, failure to comply with the State duty to respect, protect and adopt the effective measures necessary to ensure effective enjoyment of the right to community property threatened the free development and the transmission of the communities' culture, and thus violates several other rights such as health, life, education and the physical integrity of their members.

15. The petitioners contend that "the indigenous communities of Lots 55 and 14 of the province of Salta initiated procedures to have the State delimit, demarcate and grant property title for their traditionally occupied lands in 1984. Since then and up to the present, they undertook numerous actions that led to the State's own recognition of its duty to give title to the lands to the communities. "[Nonetheless] the lands have not only not been titled yet to their name, but they

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<sup>2</sup> Minutes of the public hearing held on November 2, 2009 at the headquarters of the Commission with representatives of the State and the petitioners.

<sup>3</sup> In their own words, "[f]or us the land is more than an economic resource, it is an essential part of our identity as a different culture. We feel linked in an indissoluble manner to it, that is why we say: 'Ohapehen honhat lhwo' (we are the flower of the land). We are only asking for the property of the land where we have always lived. We demand respect, and to be given the possibility of living in peace in our land". Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>4</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>5</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>6</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

have not even been delimited or demarcated". According to petitioners, this implies that the communities have been unable to effectively enjoy their right to property, and "in addition, this omission, which is attributable to the State, creates a situation of legal uncertainty, because the communities are unable to know with precision what is the extent of their right to communal property and, therefore, gives way to a proliferation of acts that affect the free disposal, existence and value of the property located in the area where the indigenous develop their lives."<sup>7</sup> The petitioners also hold that "the domestic legislation of the Argentinean State, at both the federal and the provincial levels, recognizes the right of the indigenous communities of Lots 55 and 14 to the communal property of the lands. Even though the State recognized this right on numerous occasions, as of this date, it has not made it effective and it has even carried out several actions that constituted an open violation of such right. (...) In spite of these legal provisions, (...) the reality is that these normative recognitions do not translate into effective enjoyment of the rights by the indigenous communities."<sup>8</sup> In this regard they cite the provisions of the National and Provincial Constitutions, as well as legislation at both levels.

16. As for the failure to comply with the duty of effectively transferring land property through a legal modality that respects their way of life, they explain that since the beginning of their territorial claim, the indigenous communities have requested the State to grant a title to property in the name of all of the indigenous communities of Lots 55 and 14, given that this is the form of property that is compatible with their traditional means of subsistence, given that the indigenous communities of these Lots are nomadic and derive their livelihood from ancestral hunting, fishing and gathering practices. They will only be able to continue their traditional way of life if the unity and the integrity of the territory that they travel through is maintained.<sup>9</sup> The petitioners point out that "(i) the State has the legal obligation of protecting, with effective measures, the cultural identity of indigenous peoples, and for this purpose it must formalize indigenous property respecting the special relationship that these peoples have with the land and its resources, a fundamental element of their way of being, seeing and acting in the world; (ii) both the National and the Provincial States recognized on repeated occasions that the legal instrument which best protects the right to property of the communities of Lots 55 and 14 is one which allows for the preservation of the unity of the territory; (iii) it is the adequate form to preserve the ecological requirements of the environment."<sup>10</sup>

17. Petitioners assert that the State authorities at the national and provincial levels themselves recognized on several occasions that the right to property of the indigenous communities of Lots 14 and 55 is better protected with a legal instrument that allows them to maintain the unity of the territory; therefore, "the implementation of the right to property through a legal instrument that conserves the unity of the lands is a fair expectation created by the State itself. In some cases this expectation acquired the status of a legally recognized obligation in the domestic system. In others, it entailed the creation of bodies that were specialized in the matter, which justified the modality of a joint title to property for granting the lands to the communities."<sup>11</sup> In this sense, they consider that by virtue of general legal principles of estoppel and good faith,

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<sup>7</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>8</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>9</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>10</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>11</sup> Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

“these acknowledgments must be regarded as unilateral acts that imply declarations of intent which create obligations for the State that issued them, and rights in favor for those who invoke them. These are true acts that generate prerogatives in favor of third parties, who are thus in a position to demand that the author of the declaration behaves in the sense of the obligation that it has willfully assumed”<sup>12</sup>

18. Additionally, for the petitioners, the guarantee of a shared title to the unity of the territory “is the modality that best corresponds to the ecological requirements of the environment, and to the ecological sustainability that must guide any solution.”<sup>13</sup> On this point they explain that indigenous people have the right to demand that the State adopt the necessary measures to protect their habitat and the natural resources present therein, and to participate in their administration and conservation, a right which is made impossible to exercise by environmental degradation.

19. Finally, the petitioners consider that the State is responsible for violating the right to property, “in having consented to and tolerated the illegitimate actions of private parties such as the tending of wire fences, logging, cattle grazing and the like”.

**Arguments related to the lack of prior consultation and environmental impact assessment of the public works carried out in their territory; to the right of access to information; and to political rights**

20. Petitioners asserted in the initial petition that there was a risk of deep alterations in the territory caused by State undertakings, which were not subject to consultation and lacked an impact assessment: “the route of the roads will traverse almost all of the area inhabited by our communities. The projected urbanization, which includes the construction of hotels, tourist centers, houses and businesses, the arrival of a new population to provide the programmed services and consume them, the transit of vehicles along the new roads, the smoke, the noise, the habits and customs of people who are alien to the communities, among other innovations, will cause a radical change in the territory, which could well be described in its present state as a wild forested area, inhabited by wild animals and without important signs of urbanization.”<sup>14</sup> The petitioners point out that the communities that form part of the Association belong to hunter-gatherer indigenous peoples, economic activities that necessarily require an availability of fruits, fish and wild animals, and these resources are threatened by different factors associated to the public works program undertaken by the Government of Salta, which include the introduction of a population that is alien to the area, environmental alterations and changes in land use.

21. Petitioners consider that the project to construct an international bridge and its surrounding works, roads and buildings, undertaken by the Province of Salta, will modify their ancestral way of life, and “even though we do not oppose the introduction of improvements, we demand that they are made after having previously analyzed the socio-environmental impact that they will have on our communities, and taking into consideration the interests and opinion of those who have historically occupied this land.”<sup>15</sup> Consequently, they hold that “the works under construction can destroy our communities, if the necessary prior impact assessments are not

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<sup>12</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>13</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>14</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>15</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

conducted, thereby violating rights as fundamental as life, physical integrity and protection of the family, among many others.”<sup>16</sup>

22. The petitioners consider that the lack of consultation and environmental impact assessments violate, *inter alia*, the indigenous communities’ right of access to information, protected by Article 13 of the American Convention, which must be interpreted, as established in Article 29, in accordance with Articles 75 paragraph 17 of the Argentinean Constitution, and with Articles 2, 4, 5 and 7 of ILO Convention 169; and they conclude, on the grounds of that interpretation, that “the conduct assumed by the State in the sense of not producing information about the environmental and cultural impact of the undertaking, which is indispensable for us indigenous people to assume the defense of our interests and participate in that way in the decisions on the future of our property, entails a violation of Article 13 of the American Convention. The lack of consultation on the project, and failure to afford us adequate access to the public information related to the design and development of these public works was also a violation of Article 13.”<sup>17</sup> In particular, “the Government of Salta carried out a popular consultation referendum that does not constitute an adequate procedure of consultation with the indigenous communities (in the terms of ILO Convention 169), and not only failed to inform the communities in due manner, but took care of disseminating malicious information.”<sup>18</sup>

23. The petitioners also asserted that as a consequence of the facts set forth in the last paragraphs, the State violated the indigenous communities’ political rights, as guaranteed in Convention Article 23.

#### **Arguments on the consequences of public works carried out in indigenous land**

24. The petitioners consider it foreseeable that the public works undertaken in their territory, as well as the intrusions, deforestation and environmental degradation which have taken place without State control will entail a serious risk for the availability of food and the communities’ subsistence activities, bearing in mind the damage caused to the natural resources on which they depend, as well as the invasion of their hunting grounds and gathering areas. This poses a threat to the health, physical integrity and eventually the life of the indigenous population.<sup>19</sup>

25. They assert that States have the duty of taking positive actions to protect a minority’s identity and the rights of its members to enjoy and develop their culture together with the other members of their group. “These positive measures include conducting studies in order to assess the social, spiritual, cultural and environmental incidence that development activities may have upon indigenous peoples”<sup>20</sup>.

26. Petitioners claim that the Government of the Province of Salta and the Argentinean State undertook a public works plan without evaluating the effect that the alteration of the traditionally occupied lands would have upon the culture of the communities that live therein, in violation of the right to culture and to the preservation of the cultural identity of the affected peoples and their members. “The environmental degradation and the alteration of the hunting and gathering grounds in the communities’ ancestral territory prevent the effective use and enjoyment of

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<sup>16</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>17</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>18</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>19</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>20</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

their traditionally used lands, causing deep alterations of their way of life, because they modify their customs, their social and individual habits, their economic practices and their notions of the world and of their own life.”<sup>21</sup>

27. They argue that “the environmental transformation and degradation of the traditional territories, by the public works undertaken without an assessment of their consequences, as already mentioned, shall clearly affect the petitioner peoples’ possibility of continuing to inhabit the place where they have established, since remote times, their residence”. “In this sense, the environmental degradation and alteration of the hunting and gathering fields within the ancestral territory of the petitioner peoples (...) will prevent the traditional use and enjoyment of their place of residence, and shall provoke deep alterations in the way of life of each member of the communities and of our families. They will alter our customs, our social and individual habits and our economic practices.”<sup>22</sup>

### **Access to justice and judicial protection**

28. The petitioners argue that the State of Argentina violated the right to judicial protection with the guarantees of due process, established in Articles 8 and 25 of the American Convention in connection with Articles 1.1 and 2 of the Convention.

(a) First, the petitioners assert that they resorted to the domestic courts to demand socio-environmental impact assessments, by means of the *acción de amparo*, but their petition was rejected at all levels, including the Supreme Court of Justice. They argue that their right to judicial protection under Article 25 of the American Convention was violated, because the conduct of the proceedings was not respectful of the guarantees of Article 8 of the Convention, specifically because no decision *in the law* was adopted: “we are facing a judgment that fully ignores the original claim and solves the matter with arguments that have no relation with the submitted claim. (...) the petition presented to the courts obtained an arbitrary response, which in no way results from a reasoned conclusion on the application of the law.”<sup>23</sup>

(b) Second, they explain that in Argentina there does not exist an effective procedure to delimit, demarcate and grant title to property of indigenous lands.<sup>24</sup> In the case of the indigenous communities of Lots 14 and 55, the inexistence of a domestic procedure for the recognition, demarcation, delimitation and granting of title to property of indigenous lands has meant that twenty years after the claim was initiated, their claims have not received a response.

### **Right to freedom of association**

29. The petitioners argue that the State has acted to debilitate the organizational form freely chosen by the indigenous communities of Lots 55 and 14 to pursue their territorial claim, namely, the Lhaka Honhat Association; this allegedly took place through the recurrent acts of the Provincial Government aimed at promoting the separation of its constitutive communities and division among its members, all of which violates its freedom of association.<sup>25</sup>

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<sup>21</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>22</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>23</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>24</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>25</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

## B. Position of the State

30. In a communication dated October 4, 2001, the State indicated that since Argentina is a representative and federal government, the territories claimed by the petitioners are owned by the Province of Salta, not by the Federal Government. It explained that the ownership of the subsoil pertains to the Federal Government and therefore the Province of Salta can not make final decisions regarding oil exploration and exploitation. It further asserts that the present case is of coexistence of legal systems arising from different authorities. In the same communication, the National Government reported that the Province of Salta had committed to treat Lots 14 and 55 as one single land to adjudicate to both the indigenous communities and to non-indigenous population. It also committed not to undergo new works on those Lots without prior consultation with the indigenous communities.<sup>26</sup>

31. In several communications the State acknowledged that the indigenous communities that inhabit Lots 14 and 55 are entitled to ownership of their ancestral territory. Both National and Provincial Governments stated their commitment to formally award them said property.

32. In a hearing held at the IACHR headquarters on March 2, 2005, State representatives gave the Commission a copy of a letter sent from the Secretary of Government of the Province of Salta to the Ministry of Foreign Affairs, International Trade and Worship, indicating that the works on the Provincial Route N° 54 were limited to the stretch that links the towns of Santa Victoria Este and Mision La Paz, and those works had been agreed by both the indigeonous and non-indigenous residents of the affected land.<sup>27</sup>

33. At the same hearing the Commission received a copy of a letter from the Attorney General of the Province of Salta stating that environmental studies were conducted in the area and expressed the willingness of the Province to carry out other necessary investigations to determine the possible impact of the work, stating that those works are essential for improving the living conditions of the residents. He reiterated the commitment of the Government of the Province of Salta to convey ownership of the land to its occupants, creoles and a indigenous people, who have a long and unbroken history of peaceful coexistence of more than a hundred years.

34. On April 12, 2005, the Attorney General of the Province of Salta informed the National Government that because no answer was given to the proposal of distribution of land, the Provincial Executive had resolved to conduct a referendum regarding the measures to adopt on the land claimed by the Lhaka Honhat Association. In that sense, a referendum project was sent to the Legislative. According to the Province of Salta only after the referendum was held a new dialogue between the parties could begin. For the Province, the referendum was the only mechanism for granting effective participation of local people and is provided for in Article 6 of Convention N° 169 of the ILO which provides for "consultation with peoples concerned, through appropriate procedures".

35. On August 24, 2005, the Commission received information from the Attorney General of Salta regarding illegal intrusion and wood extraction denounced by the petitioners. The Province of Salta indicates that those events occur because it is a vast land (650,000 hectares),

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<sup>26</sup> State´s observations received by the IACHR on October 4, 2001.

<sup>27</sup> Communication of February 21, 2005, addressed to the Ministry of Foreign Affairs, International Trade and Worship from the Secretary of Government of the Province of Salta. Received by the Commission during a working meeting held on March 2, 2005.



owned by the Province and difficult to monitor.<sup>28</sup> On September 18, 2006, the Commission received a communication from the Attorney General sending copies of more than four hundred allotments of land to both indigenous people and creoles, in compliance with the referendum held in October 2005.<sup>29</sup>

36. On September 7, 2006, the National Government sent the Commission a draft of an alternative proposal to the proposal of the Province of Salta regarding the distribution of the land located on Lots 55 and 14. The proposal provides for the adjudication of land to indigenous communities under a single property title, free of livestock and fences. It also provides for compensation to the creole populations for losses due to their relocation.

37. On February 9, 2009, the State submitted a communication from the Secretary General of the Interior in which stated that since December 2007 he had conducted interviews with the parties in the case in order to achieve a real solution of the matter.

38. At a working meeting held in Buenos Aires on April 27, 2011 with Commissioner Luz Patricia Mejía, representatives of the Province of Salta reported that there have been advances in the distribution and titling of 400,000 hectares of land to indigenous communities. They added that in defining the beneficiaries, working visits were carried out in order to correctly map the claimed territory and workshops were attended by members of the indigenous communities and creoles. In that sense, they informed that all reports prepared in meetings and workshops had been endorsed by the leader of the Lhaka Honhat Association. The Human Rights Secretariat of the Province of Salta reported that the Province needs to relocate 230 creole families and for that, funding is required. On the other hand, they explained that the Mision La Paz International Bridge project that connects Brazil, Paraguay and Argentina was paralyzed and housing works were done, in accordance with the communities.<sup>30</sup>

39. In May 2011, the Provincial Government of Salta sent the IACHR a report on the progress of the process of regularization and adjudication of land in Lots 14 and 55, which included a list of the communities, distinguishing between that are associated with Lhaka Honhat and those that are not. The report informed that the Associated has 27 member communities, while 20 other indigenous communities that live on the Lots are not. The State sent copies of reports, minutes, maps, photos and other information. In communication of July 7, 2011, the State sent a report from the Ministry of Agriculture regarding the guidelines for the "Comprehensive Development- Inclusive of Lots 55 and 14 of the Rivadavia Department, Province of Salta"<sup>31</sup>. The information provided in both reports will be analyzed later in this decision.

#### IV. PROVEN FACTS

***The indigenous communities that form part of the Lhaka Honhat (Our Land) Association, their ancestral territory and their mode of subsistence***

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<sup>28</sup> Communication from the Attorney General of August 19, 2005, received at the Commission on August 24, 2005.

<sup>29</sup> Communication from the Attorney General received at the Commission on September 18, 2006.

<sup>30</sup> Minute of the working meeting held between representatives of the State and Commissioner Luz Patricia Mejía on April 27, 2011 in Buenos Aires, Argentina. The petitioners were invited to the meeting but previously informed that they would not be able to attend.

<sup>31</sup> Communication of the State, Note OEA 270 of July 7, 2011, received at the Commission on the same day.

40. The Wichi (Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) indigenous peoples inhabit the region of the Salta Chaco, in the province of Salta, of the Republic of Argentina.

41. Between thirty five and fifty indigenous communities, comprising families that belong to these five peoples, inhabit the Pilcomayo River area, in what today is the Department of Rivadavia, of the Province of Salta. These communities are specifically living in Fiscal Lots Nos. 14 and 55, which extend over approximately six hundred and forty thousand (640.000) hectares, in the part of the Argentinean territory that is adjacent to the international frontier with Paraguay and Bolivia.

42. The initial 1998 petition informed of the existence of 35 indigenous communities in these lots.<sup>32</sup> In October, 2007, petitioners reported the existence of 45 indigenous communities according to the INAI Database.<sup>33</sup> By February, 2009, the State authorities indicated the existence of 50 indigenous communities.<sup>34</sup> In May 2011, the Government informed about the existence of 47 indigenous communities.<sup>35</sup>

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<sup>32</sup> They specifically provided the precise geographical location of the hunting and gathering routes of twenty-one communities: of the Wichí people, the communities of (1) La Puntana, (2) Santa María, (3) La Curvita, (4) San Luis, (5) Cañaverl, (6) Pozo del Tigre – San Ignacio, (7) Misión la Paz Km. 1 and 2, (8) Las Vertientes, (9) Rancho del Ñato, (10) Pozo La China, (11) El Pin Pin, (12) Pozo El Toro, (13) Bella Vista, (14) Bajo Grande, (15) Pozo El Mulato, and (16) Alto La Sierra; of the Iyjwaja people, the communities of (17) La Bolsa, (18) La Gracia, (19) La Merced Vieja, and (20) La Merced Nueva; of the Komlek people, the community of (21) Monte Carmelo.

<sup>33</sup> At the moment of submitting their observations on the merits in 2007, petitioners included the following list of the indigenous communities of the area, taken from the "Database of the indigenous peoples of the Salta Chaco", by the INAI (National Institute of Indigenous Affairs) and ASOCIANA: (1) Alto de la Sierra; (2) Bajo Grande; (3) Bella Vista; (4) Cañaverl; (5) Carneada; (6) Desemboque; (7) Ebenezer; (8) El Cruce; (9) Kilómetro 1; (10) Kilómetro 2; (11) La Bolsa; (12) La Curvita; (13) La Esperanza; (14) La Estrella; (15) La Gracia; (16) La Merced Vieja; (17) La Merced Nueva; (18) La Paz; (19) La Puntana; (20) Las Vertientes; (21) Magdalena; (22) Mojarra; (23) Monte Carmelo; (24) Morón; (25) Nueva Vida; (26) Nueva Esperanza; (27) Padre Coll; (28) Pelicano; (29) Pim Pim; (30) Pozo El Bravo; (31) Pozo El Mulato; (32) Pozo El Tigre; (33) Pozo La China; (34) Pozo Los Ranchos; (35) Puesto Nuevo; (36) Puntana Chica; (37) Quebrachal 20101; (38) Quebrachal 20116; (39) Rancho El Ñato; (40) San Bernardo; (41) San Luis; (42) San Miguel; (43) Santa María; (44) Santa Victoria Este; (45) Vertientes.

<sup>34</sup> In October, 2007, the General Director of the General Inspection of Juridical Persons of the Province of Salta sent the Provincial Government a list of 50 indigenous communities that inhabit Fiscal Lots 55 and 14, namely: (1) Molathati; (2) La Merced Nueva; (3) Bella Vista; (4) Madre Esperanza; (5) Nueva Esperanza; (6) Monte Carmelo; (7) La Esperanza; (8) Misión La Gracia; (9) Santa Victoria 2; (10) Pozo El Toro; (11) Pozo La China; (12) Monte Verde; (13) Cañaverl II; (14) Roberto Romero; (15) Ebeneser; (16) Alto La Sierra; (17) Misión Algarrobal; (18) Misión San Luis; (19) Misión Las Juntas; (20) Inhate; (21) La Puntana I; (22) La Merced Vieja; (23) Rancho El Ñato; (24) Pozo El Tigre; (25) La Curvita; (26) Santa Victoria Este I; (27) Padre Coll; (28) Santa María; (29) Kilómetro 2; (30) Misión La Paz; (31) Pozo El Mulato; (32) Kilómetro 1; (33) Cañaverl I; (34) Bajo Grande; (35) La Bolsa; (36) El Cruce – Santa María; (37) Las Vertientes; (38) Las Vertientes II; (39) Pin – Pin; (40) San Ignacio; (41) San Bernardo; (42) San Miguel; (43) Pozo El Bravo; (44) Quebrachal I; (45) Quebrachal II; (46) Punta Chica; (47) Misión La Gracia; (48) San Lorenzo; (49) Las Mojarras; (50) Puesto Nuevo. List and remission note annexed to the communication of the Provincial Government of Salta to the Argentinean Ministry of Foreign Affairs, sent to the IACHR through note received on February 10th, 2009, and transmitted to the petitioners on February 26, 2009.

<sup>35</sup> On May 3, 2011, the Provincial Government of Salta sent the IACHR a Report on the Advances of the process of land adjudication in Fiscal Lots 14 and 55; there it included a list of 47 indigenous communities, indicating which ones were associated to Lhaka Honhat, and which ones were not. Thus, it was reported that the communities that form part of the Lhaka Honhat Association are 27: (1) La Merced Nueva; (2) Bella Vista; (3) Kom Lañoko – Misión Toba – Monte Carmelo; (4) Misión La Paz; (5) Misión La Gracia; (6) Santa Victoria 2; (7) Pozo El Toro; (8) Pozo La China; (9) Lantawos – Alto La Sierra; (10) Misión San Luis; (11) La Puntana I; (12) La Merced Vieja; (13) Las Juntas; (14) Rancho El Ñato; (15) Pozo El Tigre; (16) La Curvita; (17) Padre Coll; (18) Santa María; (19) Km 1; (20) Km 2; (21) Pozo El Mulato; (22) El Cañaverl 1; (23) La Bolsa; (24) El Cruce; (25) Las Vertientes; (26) Pin Pin; (27) El Cercado. On the other hand, the communities that do not form part of Lhaka Honhat are the following 20: (1) Molathati; (2) Madre Esperanza; (3) Nueva Esperanza – Lote Fiscal No. 55; (4) Ñande Yer; (5) La Esperanza; (6) Monte Verde; (7) El Cañaverl II; (8) Roberto Romero; (9) Ebeneser; (10) Misión Algarrobal – La Puntana; (11) Al Pu; (12) Inhate; (13) Sop A Kweni – Represa de las Víboras; (14) Misión Vieja – Santa María; (15) Pomis Jiwet (lugar de los tambores); (16) Santa Victoria I; (17) Misión La Paz – Chorote; (18) San Ignacio; (19) San Lorenzo; (20) La Estrella.

43. From the information provided to the IACHR from both parties, it has been established that the number of communities is variable given the constant dynamic of community fragmentation and fusion that is a distinctive trait of these nomadic, hunter-gatherer peoples.

44. The Great Chaco was shared since time immemorial by 16 indigenous peoples, composed of nomadic, hunter-gatherer families, numbers of which were nonetheless later reduced by the effects of contact, and settled in sedentary villages – or semi-sedentary ones -- by the evangelization process. Historical documents show that from the beginning of the 20<sup>th</sup> century, reference is made to the presence of the Wichí (Mataco), Iyjawaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) indigenous peoples in the area that is occupied today by Fiscal Lots 14 and 55.<sup>36</sup> The claim of ancestral presence in the area of Fiscal Lots 14 and 55 is also justified by the abundant traditional names given to this land in corresponding aboriginal languages.<sup>37</sup>

45. The indigenous communities that inhabit Fiscal Lots 14 and 55 subsist from hunting, gathering and fishing; they are nomadic, and they traverse their ancestral territory along clearly defined circuits in accordance with their cultural tradition and depending on the availability of subsistence resources at different times of the year.<sup>38</sup> Most of the communities of both Lots live in settlements but fully preserve their nomadic hunting and gathering circuits and mode of subsistence; in addition, approximately 5 communities lack permanent settlements and still practice a thoroughly nomadic form of life, for which reason they periodically move from one place to another.<sup>39</sup> Maps

<sup>36</sup> Specifically, they cite the written testimony of a colonizer arrived in the area in 1902, Domingo Astrada, who came with a group of cattle-raising families from Salta in search of good grazing fields, and provided precise details on the indigenous population of the area that today corresponds to Fiscal Lots 14 and 55: "In this campaign (to the Pilcomayo) I have established relations with 5000 indigenous... I spoke with 106 chiefs and their respective entourages from the tribes of the mataguayos, chorotes, tobas, mimocoes, chinupies and pilayas..." [Astrada, D.: "Expedición al Pilcomayo". Document provided by the petitioners together with their observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.] The petitioners also refer to the early anthropological reports of researcher Erland Nordenskiöld, dated 1902 and 1908, and confirmed by other specialized studies; including: LOZANO, P. (1874): "Descripción Corográfica del Gran Chaco Gualamba"; San Miguel de Tucumán: Universidad Nacional de Tucuman, 1941. KARSTEN, R. (1923): "The Toba Indians of the Bolivian Gran Chaco". Acta Academiae Aboensis IV, 1925. METRAUX, A. (1937): "Estudio de Etnografía Toba-Pilagá (Gran Chaco). Anthropos – Revue Internationale d'Ethnologie et Linguistique, T. 32, 1937. KERSTEN, L. (1968): "Las tribus indígenas del Gran Chaco hasta fines del siglo XVIII". Resistencia: Universidad Nacional del Nordeste, Facultad de Humanidades, 1968. FOCK, N. (1982): "History of Mataco Folk Literature and Research". En: WILBERT, J. y SIMONEAU, K. (eds.): "Folk Literature of the Mataco Indians", Los Angeles, University of California Press, 1982. Ethnological and historical referents cited in: CARRASCO, Morita and BRIONES, Claudia: "La Tierra que nos quitaron". Documento IWGIA No. 18, Buenos Aires, 1996, p. 195. Document provided as an annex of the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>37</sup> As recounted by the petitioners, "in 1991 the communities of Fiscal Lots 55 and 14 resorted to their memory – zealously guarded by the elders- in order to identify the dimensions of the physical space they traditionally occupy. The – then- 27 communities that participated in the elaboration of an ethnic map to justify their claim to a single title, indicated over one thousand locations with names in their corresponding languages (...) and, on the grounds of this information, it was possible to indicate the areas traveled by each communities, and the usage superimpositions between communities (...). This form of 'naming the land' is, as explained by a chief of the Toba people, the manner in which 'the grandparents' explain to the youth what these must know in order to become full members of the group. In giving significant names to the environment in which they live, the men and women of the communities transform the geographical space where they live into a 'culturally organized territory'." Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>38</sup> The initial petition includes the maps of the ancestral hunting and gathering routes of the following communities: of the Wichí people, the communities of (1) La Puntana, (2) Santa María, (3) La Curvita, (4) San Luis, (5) Cañaveral, (6) Pozo del Tigre – San Ignacio, (7) Misión la Paz Km. 1 and 2, (8) Las Vertientes, (9) Rancho del Ñato, (10) Pozo La China, (11) El Pin Pin, (12) Pozo El Toro, (13) Bella Vista, (14) Bajo Grande, (15) Pozo El Mulato, and (16) Alto La Sierra; of the Iyjawaja people, the communities of (17) La Bolsa, (18) La Gracia, (19) La Merced Vieja, and (20) La Merced Nueva; of the Komlek people, the community of (21) Monte Carmelo.

<sup>39</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

indicate the culturally defined hunting and gathering routes of the different communities that form part of the Lhaka Honhat Association. The IACHR notes that several of these circuits are superposed, overlapping and crossing each other.

46. The indigenous communities of Lots 14 and 55, who currently preserve their ancestral way of life as nomads, hunters and gatherers, as well as their ancestral cultural notions relating to the land and with nature thereby claim access to territorial property under the specific modality of a common, undivided title to property for all of the communities,<sup>40</sup> that is, to a territory which is physically continuous, without divisions or individual or community parceling<sup>41</sup>. The communities of the Lhaka Honhat Association oppose the parceling of the territory, or the adjudication of titles to land property to individual communities or families.<sup>42</sup>

***The non-indigenous or “creole” population of Fiscal Lots 14 and 55***

47. The territory of Fiscal Lots 14 and 55 is also occupied by families of non-indigenous settlers.<sup>43</sup> Given the difference between the hunter-gatherer, fishing and nomadic way of life of the indigenous communities, and the cattle-raising way of life of the creole population, that seriously degrades the natural habitat, conflicts and tensions over land use and access to natural resources have arisen between the two groups.<sup>44</sup> One main problem is that of the appropriation of lands and

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<sup>40</sup> In the petitioners' words, “[i]n the past, persons would move freely across a physical space without frontiers, exchanging goods and creating family ties and political alliances among the different groups. Nowadays, in spite of the environmental transformations and the cultural adaptations, the exchange of goods between persons is still alive. Given that any man or woman has the right to freely access the natural resources of the place where they are located, there is no notion of exclusive use, even though a family group can have a specific space within the total available space to carry out their cultivations.” Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>41</sup> As they explain in the initial petition, “we also need all of the land, joined together and without subdivisions or parcels, because amongst ourselves we are one large community. We are all related, we share the land. Thus, when we go to the forest to hunt and gather honey and fruits, we meet our neighbours, because our places of gathering are superimposed. Those who live on the margin of the river meet those who live on the streams; we have the same territory in common. It is thus the joint property of the lands which has historically been our claim, and not the individual property of some parcels by each family or community.” [Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999]

<sup>42</sup> Petition cited in: CARRASCO, Morita and BRIONES, Claudia: “La Tierra que nos quitaron”. Documento IWGIA No. 18, Buenos Aires, 1996, p. 195. Document submitted as annex of the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>43</sup> It is explained in the initial petition that “our lands are also inhabited by the creoles, non-indigenous population, since in 1902 a group of them requested permission from the National Government to establish a colony in the lands that extend to the South of the right margin of the Pilcomayo River. Our ancestors, with hospitality, treated them with kindness and respect, allowing them to build their houses there. However, conflicts began to emerge because the territories of each group were not clearly demarcated. Unfortunately, until the present day the struggle between creoles and indigenous is constant; the Government of the Province of Salta is responsible for this conflict, because it has failed to adopt the necessary measures to demarcate the territories that correspond to each group. On the other hand, the economic activities carried out by both groups are opposed. It is not possible for both groups to adequately use the same territory. The creoles are essentially cattle-raisers.” Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>44</sup> This situation is described as follows by an indigenous leader: “Regarding the settlers, whom we call creoles or *Chaqueños*: they currently tend their wire fences within the area and don't allow anyone in to hunt, fish, look for fruits. They expel our women who are seeking fruits of the forest. (...) We do not have money to purchase food in a shop. So if they do not allow us into the hunting area, we are done, there is no other livelihood. Deep down, they have their own way of life, they manage their affairs, and we also have a different way of life. (...) When we claim title to property of our lands we are not saying that they do not need the land. We are not saying that they do not have a right to the land, that we have all the rights – we are not saying that. We are saying that they need land too, but that they must be separate in order to appease our entire community. And so that they can also be in peace to develop their own way of life.” Testimony provided with the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

wire fences installed by the creoles, which prevent, restrict and undermine the indigenous' mobility.<sup>45</sup>

***The Lhaka Honhat (Our Land) Association of Aboriginal Communities***

48. In 1992, some of the communities that inhabit Lots 14 and 55 created the Lhaka Honhat (Our Land) Association of Aboriginal Communities, under the form of a civil law association.<sup>46</sup> The fundamental purpose for the creation of the Lhaka Honhat Association was that of obtaining a shared collective title to territorial property for all of the indigenous communities of Fiscal Lots 14 and 55.<sup>47</sup>

49. On December 21, 2000, the IACHR received a handwritten communication signed by thirty-five chiefs and representatives of communities who live in Fiscal Lots 55 and 14, in which they confirmed their will to continue to have the Lhaka Honhat Association represent them and counsel them in the framework of the proceedings before the IACHR.<sup>48</sup> In May 2011, the Provincial Government of Salta submitted a "Report on the advances in the process of land adjudication in Fiscal Lots 14 and 55" to the IACHR, where it included a list of indigenous communities, indicating which ones are associated to Lhaka Honhat and which ones are not; it was reported that as of that date, the Association had twenty-seven affiliated communities,<sup>49</sup> whereas another twenty indigenous communities of the lots are not associated thereto.<sup>50</sup>

***Situation of the indigenous communal property over the ancestral territory***

*First phase of the indigenous territorial claim: acquisition and formalization of successive commitments by the Provincial Government to grant a single title to property (1984-1998)*

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<sup>45</sup> See in this regard: CARRASCO, Morita and BRIONES, Claudia: "La Tierra que nos quitaron". Documento IWGIA No. 18, Buenos Aires, 1996, p. 224-225. Document provided as an annex to the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>46</sup> The petitioners state that "Lhaka Honhat was formally constituted as a non-profit civil association on September 17, 1992, as proven by Ministerial Resolution No. 449 of December 9, 1992, which approves its bylaws and grants it juridical personality. Lhaka Honhat was forced to assume a civil law organizational format, given that the legal system does not contemplate any other modality which is more adequate to the way of life of the indigenous communities." [Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007]

<sup>47</sup> Petitioners explain that said communities "recognize the Lhaka Honhat Association of Aboriginal Communities as their legitimate representative, which obtained its juridical personality in 1992 as a requirement to obtain title to property over their lands." [Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007]

<sup>48</sup> Communication sent by the petitioners to the IACHR, received on December 21, 2000, and transmitted to the State on December 26, 2000.

<sup>49</sup> Hence, it is reported that the communities that form part of the Lhaka Honhat Association are 27: (1) La Merced Nueva; (2) Bella Vista; (3) Kom Lañoko – Misión Toba – Monte Carmelo; (4) Misión La Paz; (5) Misión La Gracia; (6) Santa Victoria 2; (7) Pozo El Toro; (8) Pozo La China; (9) Lantawos – Alto La Sierra; (10) Misión San Luis; (11) La Puntana I; (12) La Merced Vieja; (13) Las Juntas; (14) Rancho El Ñato; (15) Pozo El Tigre; (16) La Curvita; (17) Padre Coll; (18) Santa María; (19) Km 1; (20) Km 2; (21) Pozo El Mulato; (22) El Cañaverl 1; (23) La Bolsa; (24) El Cruce; (25) Las Vertientes; (26) Pin Pin; (27) El Cercado.

<sup>50</sup> The communities that do not form part of the Association, as informed by the Government, are: (1) Molathati; (2) Madre Esperanza; (3) Nueva Esperanza – Lote Fiscal No. 55; (4) Ñande Yer; (5) La Esperanza; (6) Monte Verde; (7) El Cañaverl II; (8) Roberto Romero; (9) Ebeneser; (10) Misión Algarrobal – La Puntana; (11) Al Pu; (12) Inhate; (13) Sop A Kweni – Represa de las Víboras; (14) Misión Vieja – Santa María; (15) Pomis Jiwet (lugar de los tambores); (16) Santa Victoria I; (17) Misión La Paz – Chorote; (18) San Ignacio; (19) San Lorenzo; (20) La Estrella.

50. Despite different initiatives adopted since the beginning of the 20th Century to regularize the occupation and property claims to the lands of Fiscal Lots 14 and 55, such occupation has not been legalized as of the date of the present merits report, and those who live in the area, both indigenous and non-indigenous, lack formal titles to property over these lands, which – as Fiscal Lots - are the property of the Province of Salta.<sup>51</sup> Consequently, their inhabitants have the status of *de facto* occupiers, except for the isolated cases of some indigenous communities who received title to property over their corresponding lands during the 1970s, in the name of the community;<sup>52</sup> such is the case, for example, of Misión La Paz. At the moment of presenting the initial petition to the IACHR in 1998, the petitioners held that even though they were the inhabitants of the territory they have occupied since time immemorial, the State had not legally recognized them as communal owners of Lots 14 and 55, although they had undertaken numerous actions to obtain such recognition since the return of Argentina to democracy in 1983.

51. On June 26, 1984, the indigenous communities of Lots 55 and 14 sent the Governor of the Province of Salta a “Joint Declaration”, claiming the issuance of property title to the lands, and opposing the parceling of the territory.<sup>53</sup>

52. In 1986, Provincial Law No. 6373 on “Promotion and Development of the Aboriginal” in Salta was approved, Chapter III of which dealt with the granting of lands to the indigenous communities; later, in 1987, the provincial legislature passed Law 6.469 on “Regularization of the Situation of Occupation of Fiscal Lot 55”, regulated in detail through

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<sup>51</sup> As explained in a specialized historical study, “In 1902 the National Government founded the Buenaventura Colony, granting 625 hectare lots to the pioneers. However, these titles would last very little. Between the years 1904-1907 the national government granted other parcels of the same size to those settlers and others who had already established themselves in the Lot. In 1905 the Government of Salta expressed its concern to the National Government about the fact that the lots adjudicated as national fiscal lands could belong to the provincial jurisdiction. Therefore, and given the lack of definition of precise limits between the Province of Salta and the National Territory of Formosa, a commission was designated to draw the dividing line among the two. In 1909, Engineer Barilari and Mr. Garbiel Puló carried out the demarcation of the limits; with which the provisional titles granted by the Nation lost all validity (...). Since then until the approval of Article 75, paragraph 17 of the National Constitution, which recognizes to the indigenous the ‘communal possession and property of the lands that they traditionally occupy’, the creoles and the indigenous became the ‘occupiers’ of the fiscal lands (...). Throughout successive stages, the local governments would attempt to regularize the situation of occupation. Those affected, on the other hand, would fight to obtain recognition of their Rights. // In 1919, an officer from the National Directorate of Lands and Colonies anticipated the decadence of the colonization, and required the adoption of urgent measures to regularize the legal situation. In 1960 and 1964 Senator Raúl Fiore Moulés presented a bill which later became Law 3844, which mandated the sale of the lots to the descendants of the original settlers, and the reservation of tracts of land to ‘create colonies for the education and adaptation of the indigenous’ (Art. 4). This legislation was not implemented. Finally, in 1967 the limit between the provinces of Salta and Formosa, established by the Barilari line, was finally approved.” CARRASCO, Morita and BRIONES, Claudia: “La Tierra que nos quitaron”. Documento IWGIA No. 18, Buenos Aires, 1996, p. 204-205. Document provided as an annex to the petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>52</sup> The historical study provided by the petitioners indicates that “The dictatorial governments of 1971-1972 carried out a land cession policy, granting usage permits to some indigenous communities. These cessions, far from recognizing the existence of aboriginal rights, crystallized a notion of donation or gift, excluding any connotation of legal entitlement (...). All of these cessions stemmed from Decree 2293 of April 12, 1971, on the creation of ‘Provincial Indigenous Reservations’. The lands were granted at the name of the ‘Aboriginal Community’ represented by any indigenous person whose representativeness was not confirmed anywhere and without a legal instrument that secured legality to the community, which in most of the cases lacked juridical personality (...). The communities of Santa María and Misión La Paz, of Fiscal Lot 55, are included within this category [Law 4086/67, of indigenous land colonization, which establishes a reservation in favor of the Community of Misión La Paz]. The communities of La Puntana, La Curvita and Monte Carmelo are settled in a measured parcel of 7.500 hectares, whose plan was never approved even though it dates from the seventies.” CARRASCO, Morita and BRIONES, Claudia: “La Tierra que nos quitaron”. Documento IWGIA No. 18, Buenos Aires, 1996, p. 204-205. Document provided as an annex to the petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>53</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999. Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

Provincial Decree 1467/90. In 1989, Provincial Law 6570/89 was approved, on “Regularization and Organization of Fiscal Lands”. This legislative framework allowed for the adjudication of the collective property of the land to the indigenous communities who inhabited the area.

53. In 1991, with the support of different organizations, the chiefs of the indigenous communities of Fiscal Lots 14 and 55 undertook the task of gathering all of the documentation required by Law 6.469 to claim the formal adjudication of territorial property, including population censi, histories of their occupation, maps of the settlements and areas of economic use; consequently, different maps were drawn, indicating in detail the cultural routes through which each community traveled throughout the territory.<sup>54</sup>

54. On July 28, 1991, 27 communities of Fiscal Lot 55 submitted to the Government of the Province of Salta an administrative claim of legalization of the property title to the land; therein they exposed the results of their documentation task, namely, the different maps with the names of the territory in indigenous languages, pointing out their places of residence, their nomadic circuits through the land, and the culturally significant places, insisting on the need to grant a single, unparcelled territory.<sup>55</sup>

55. After a few months of study of the proposal by the Government, on December 5, 1991, an Agreement (*Acta de Acuerdo*) was signed between the representatives of the indigenous communities and the General Director of Fiscal Lands Adjudications of the Province of Salta. This Agreement was ratified in its entirety by a Decree issued by the Governor of the Province of Salta, Decree No. 2609 of 1991. The text of this Decree, into which the text of the Agreement was incorporated, is the following:

“Decree No. 2609/91 – Agreement between creoles and aboriginals.  
Ministry of Economy.

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<sup>54</sup> CARRASCO, Morita and BRIONES, Claudia: “La Tierra que nos quitaron”. Documento IWGIA No. 18, Buenos Aires, 1996, p. 204-205. Document provided as an annex to the petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>55</sup> Aboriginal Community of Fiscal Lot 55 – Request for title to property of the land. Cited in the initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999. The document with the request, in which the demand for recognition is justified with a description of its historical, anthropological and legal background, is headed with the following request: “OUR DEMAND. We, the members of the aboriginal community of Fiscal Lot 55, ask the Government for the title to property of our land. We know that, according to the law, we have a right to the title because it is the land of our ancestors, who lived here many centuries before the first creoles arrived from the South, in 1902-1903. // Our democratic Government has to recognize the historical right that we have to the land. We are the natives of Argentina. // We are the legitimate owners of the land, but we see that the creoles want to deprive us of our land. The creoles have already pushed us too far away, and we demand justice. We ask the Government to return our lands, out of respect for our history and our humanity. // Our descendants are increasing. We demand the title to property so that our children and grandchildren can live and grow up in peace in the land of their grandparents. In addition, we want our land to grow again, in the best possible way. // The provision of the lands that we need must be communal, and in an extension large enough to allow for the development of our life and that of our descendants. Fiscal Lot 55 is in fact insufficient for our needs. Those of us who live near the limit, always have to go to Fiscal Lot 14. // The land that we occupy, the title to property of which we demand from the Government, includes the entire Fiscal Lot 55, plus some hectares of adjacent part of Fiscal Lot 14. // Under no circumstance shall we accept subdivisions or parcels, because we live as one single community with nature. We are cultivators, fishermen, hunters, gatherers and artisans. We need a large space, not only to cultivate the land, but also to extract from the forest both our food, fruits, honey and wild animals, and the plant elements that we use for crafts and for our domestic use. // All of us, the 4500 aboriginal inhabitants of Fiscal Lot 55, are united. As we say about our request for land: ‘When one cicada sings, all of the cicadas make a choir’. As a single community we demand from our Government a single communal title for all of the land that we need.” [Joint Declaration, cited in: CARRASCO, Morita and BRIONES, Claudia: “La Tierra que nos quitaron”. Documento IWGIA No. 18, Buenos Aires, 1996, p. 204-205. Document provided as an annex to the petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.]

HAVING SEEN the Agreement subscribed by the General Direction of Fiscal Lands Adjudications with the members of the Wichí (mataco), Iyojwaja (chorote), Niwacke (chulupi), Komlek (toba), Capy'y (Tapiete) aboriginal communities that inhabit the territory of Fiscal Lots 55 and 14, on December 5, 1991, at the locality of San Luis – Department of rivadavia, in the framework of Laws 6469, 6570, 6373 and Decrees 845/90 and 1467/90; and,

CONSIDERING:

That it is urgent and necessary to adopt sufficient measures to preserve the aptness of the lands and the integrity of the natural resources of Fiscal Lots 55 and 14 until the full completion of all of the actions appurtenant to their regularization in the terms of Laws 6570 and 6469;

That the social and ecological reality of Fiscal Lots 55 and 14 makes it necessary to consider both as a single territory and with a common destination, so that it is possible to adjudicate aboriginal communities and each creole family with the necessary space for their survival, development and welfare;

That it is possible to attend the aboriginal communities' desire to have a single surface without internal subdivisions through a single title to property and with a size that is sufficient to develop their traditional ways of life, the fundamental features of which are described in the study submitted by the communities themselves on July 28, 1991;

That the terms of the agreement represent a significant advance in the joint pursuit of solutions that can allow for the implementation of Laws 6469 and 6570 in a framework of justice and tranquility for the aboriginal communities and creole families that inhabit the region;

Therefore, the Governor of the Province of Salta DECREES:

Article 1. This decree hereby ratifies the Agreement signed by the General Directorate of Fiscal Lands Adjudication with the members of the Wichi (Mataco), Iyojwaja (Chorote); Niwacke (Chulupi), Komlek (Toba), Capy'y (Tapiete) aboriginal communities that inhabit the territory of fiscal lots 55 and 14 on December 5, 1991, at the locality of San Luis – Department of Rivadavia, the original and copy of which form part of the present instrument.

Article 2. The present decree shall be ratified by the Ministry of Economy and signed by the General Secretary of the Governor's Office.

Article 3. This Decree is to be communicated, published in the Oficial Gazette and placed in the record file.

AGREEMENT

At the locale of San Luis – Department of Rivadavia – Fiscal Lot No. 55, the General Director of Fiscal Lands Adjudication of the Province, doctor Amando Jorge Arias, and the members of the Wichi (Mataco), Iyojwaja (Chorote); Niwacke (Chulupi), Komlek (Toba), Capy'y (Tapiete) communities that inhabit the territory of Fiscal Lots No. 55 and 14, came together for the purpose of agreeing, in the framework of Laws No. 6570, 6469, 6373 and their Regulatory Decrees No. 845/90 and 1467/90 and National Law No. 14.942, the basic preconditions for the Legal Regularization of Property of the spaces occupied by the Aboriginal Communities, for which purpose they have Agreed the following conditions for adjudication:

1. The Government of the Province agrees to adjudicate, through the General Directorate of Fiscal Lands Adjudication, a surface without subdivisions and through a Single Title to Property to the aforementioned Aboriginal Communities, of a size sufficient for the development of their traditional ways of life, in accordance with the studies that were submitted to the Government of the Province by the communities themselves on July 28, 1991.

2. The Government of the Province is hereby bound to suspend, until the moment of provision of the Final Titles to the Aboriginal and Creole communities of Fiscal Lots No. 55 and 14, the issuance of authorizations, such as the adoption of any act that implies granting concessions for forestry exploitations or agricultural/cattle raising exploitations in the entire territory of the aforementioned Fiscal Lots.



3. The Government of the Province agrees to unify Fiscal Lots 55 and 14, and give them the same destination for the purposes stated in item 1 of the present Agreement, in order to secure to all of the Aboriginal Communities and each creole family that inhabits these fiscal lots, the necessary space for their survival and development.

4. The members of the communities of La Puntana, La Curvita and Montecarmelo hereby agree to unify the registration titles of the lands they inhabit and possess, thus facilitating the Regularization of Fiscal Lots 55 and 14 for the communities, in accordance with the terms of the present Agreement. [signatures follow] (...)."

56. After a change in the provincial Government, the new Government ratified the provisions of Decree 2609/91 through a Decree of November 6, 1992, which further validated the Agreement and expressed the Government's will to adjudicate the lands in accordance with what had been agreed therein. By that time, indigenous communities had obtained recognition of the juridical personality of the Lhaka Honhat Association of Aboriginal Communities, and continued in such capacity to claim joint title to Lots 14 and 55 for all of the communities.

57. On January 13, 1993, the Governor of Salta promulgated Decree No. 18, creating a Honorary Advisory Commission to study and formulate recommendations on the adequate methodology to materialize the delivery of the lands to the indigenous communities; the Commission also had to establish mechanisms for the preservation of the environment of the area, taking into account the socio-cultural traits and the forms of production of their inhabitants. According to Article 9 of the Decree, the Commission had 90 days from the moment of its creation to comply with the task that was entrusted to it. The Commission presented its conclusions two years later, in April, 1995. It recommended that the communities be granted two thirds of the total extension of 640.000 hectares, and that one third be granted to the creole population; that the adjudication of the lands to both the creoles and the indigenous was an urgent and necessary task, that had to be carried out in accordance with specific procedures; that the indigenous claim had to be resolved respecting the gathering circuits of the communities that had settlements in both Lots; and that the property had to be communal, without subdivisions, and under a single title. As recounted by the petitioners, "even though this proposal offered a smaller surface than the one claimed by the indigenous communities, it was nonetheless accepted."<sup>56</sup> The report presented by the Honorary Advisory Commission, together with its recommendations, was approved by Decree No. 3097/95 of the Provincial Government of Salta.

58. In Decree 3097/95, the Provincial Government mandated, in Article 4: "Until such moment as the above-referred bill (aimed at recognizing the communal property of the land to its inhabitants) is sanctioned and/or promulgated, Fiscal Lots 55 and 14 of the Department of Rivadavia are hereby declared areas of environmental preservation and restoration, hereby providing that any exploitation and/or production that is not a direct consequence of their occupants' subsistence needs is prohibited."

59. At the same time that the Honorary Advisory Commission was functioning, the Provincial Government of Salta carried out a public tender for the construction of the international bridge over the Pilcomayo River, Misión La Paz – Pozo Hondo<sup>57</sup>, to which reference will be made below. Despite the simultaneous nature of these two procedures, the indigenous communities were not informed or notified of the project for carrying out these public works, nor about the existence of the public tender process.

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<sup>56</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>57</sup> Additional information presented by the petitioners to the IACHR on December 29, 1998 and transmitted to the State on January 26, 1999.

60. In April 1996, the Lhaka Honhat Association signed an Agreement with the provincial authorities, which created a Coordinating Unit in charge of advancing towards a plan for the legal regularization of the population settlements in Fiscal Lots 55 and 14.<sup>58</sup>

61. Between August 25 and September 16, 1996, the indigenous held a peaceful occupation of the international bridge. The stated objective of this occupation was to demand the recognition of the indigenous communities' right to possession and property of the lands that they traditionally inhabited.<sup>59</sup> As a consequence of this occupation, the Governor of Salta personally went to the place and negotiated with the communities, after which he signed an Agreement in which he promised to issue, within 30 days, a decree that guaranteed the final adjudication of said lands, establishing its guidelines and parameters, and mandating an equitable distribution between the indigenous and creole populations.<sup>60</sup> In the Agreement, the chiefs also demanded that their representation during the adjudication process be carried out by the Lhaka Honhat Association of Aboriginal Communities; and it was agreed that all urbanization works and works of access to the bridge had to be agreed upon with the affected indigenous communities.<sup>61</sup> Between the years 1996 and 1998, the indigenous communities of Lots 55 and 14, through the Lhaka Honhat Association, submitted a high number of communications, letters and requests to different authorities of the Provincial Government of Salta, seeking the materialization of the promises of formalizing the communal property of their ancestral territory.

62. When the petition was submitted to the IACHR in 1998, the Government's promises and Decrees regarding the adjudication of the ancestral lands were still unfulfilled.<sup>62</sup> Consequently, in the initial 1998 petition to the IACHR, the petitioners asserted that "for over one decade now, we have persistently fought to obtain recognition of the title that places us as owners in a communal manner of Fiscal Lots 14 and 55. This communal demand is just and legitimate. In this sense, we have carried out countless actions since our country returned to democracy in 1983, obtaining in response promises that to this day continue to be only that: promises."<sup>63</sup>

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<sup>58</sup> Cited in the Public Ombudsman's Resolution of August 11, 1999. Documents submitted to the IACHR by the Public Ombudsman, received on January 19, 2001, and transmitted to the State by the IACHR through note of February 16, 2001.

<sup>59</sup> The Joint Declaration of the leaders of the indigenous communities who carried out the protest on the international bridge states, in pertinent part: "For the title to our lands: Occupation of the international bridge over the Pilcomayo (La Paz). // For several years now we have demanded from the Government of Salta that it grant us title to property of the lands where we have always lived. We sent letters. Meetings are held, new laws and decrees issued, and more studies conducted. This is now the fourth Government that passes. But we do not obtain an answer. The years go by and our lands are impoverished, because the outsiders who have come to occupy them do not know how to look after them. The years go by, and we become poorer. // (...) we have asked the Authorities to guarantee us the title to property of our lands before they carry out those large projects where we live. They are fiscal lands, and the legislation recognizes our right to their possession and property. They speak of Mercosur, but for us the land is safer. Given the lack of a response and the upcoming inauguration of the bridge, the 35 communities of our Association have decided to peacefully occupy, on August 25, the lands on the sides of the bridge. We are going to stay here until the Government of Salta gives us a concrete answer to our demand. (...)" Declaration cited in: CARRASCO, Morita and BRIONES, Claudia: "La Tierra que nos quitaron". Documento IWGIA No. 18, Buenos Aires, 1996, p. 204-205. Document provided as an annex to the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>60</sup> Cited in the Public Ombudsman's Resolution of August 11, 1999. Documents sent to the IACHR by the Public Ombudsman, received on January 19, 2001, and transmitted to the State by the IACHR through note of February 16, 2001.

<sup>61</sup> Declaration of the indigenous leaders on the occasion of the protest on the international bridge. Cited in: CARRASCO, Morita and BRIONES, Claudia: "La Tierra que nos quitaron". Documento IWGIA No. 18, Buenos Aires, 1996, p. 204-205. Document provided as an annex to the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>62</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>63</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

63. The Public Ombudsman of the Republic of Argentina sent to the IACHR, in January 2001, copies of some administrative dossiers of the procedures conducted by his office, which include copies of eighteen communications sent between 1996 and 1998 to the Governor of the Province of Salta, to the Director of the National Institute of Indigenous Affairs, the Minister of Government or the President of the Republic, among other high public officials.<sup>64</sup>

*Second phase of the indigenous territorial claim: the Provincial Government's will to parcel Fiscal Lots 55 and 14, and the indigenous opposition (1999-2005), in parallel with the negotiations before the IACHR.*

64. In August 1998, the petition was presented to the IACHR. Between 1999 and 2005, representatives of the petitioners, the National Government and the Provincial Government took an active part in friendly settlement efforts before the IACHR. During this process, the authorities of the National and Provincial Government adopted a series of parallel decisions that affected the territorial rights of the indigenous communities that inhabit the Fiscal Lots.

65. On November 2, 1999, the General Secretariat of the Salta Governor's Office issued Resolution 423/99, in which it ordered the publication of edicts for 15 days in the Official Gazette and the El Tribuno Newspaper, summoning all those asserting rights over any piece of land within Fiscal Lot 55, because certain adjudications of said lands to their registered inhabitants were going to be made.<sup>65</sup> On November 8, 1999, the Government of the Province of Salta published such Edict.

66. After the publication of the Edict, on November 24, 1999, the representatives of the Lhaka Honhat Association wrote to the Government of the Province of Salta – General Secretariat of the Governor's Office about the ongoing procedure before the IACHR, and noting that the Edict could trigger the international responsibility of the State of Argentina, in case irreparable harm was caused to the territory that was the object of the controversy<sup>66</sup>.

67. The representatives of the Lhaka Honhat Association filed an administrative request for revocation of Resolution 423/99, which ordered the publication of the edicts, on the grounds of invalidity.<sup>67</sup> This request was rejected on December 20, 1999, through Resolution No. 500/99 of the General Secretariat of the Governor's Office, notified to the petitioners on December 27<sup>th</sup>. They filed an appeal (*recurso jerárquico*) on December 30 before the Governor of the Province of Salta,<sup>68</sup> which had not been decided as of June 7, 2000.<sup>69</sup>

68. By means of Decree No. 461 of December 24, 1999, the Executive Power of the Province of Salta – General Secretariat of the Governor's Office adjudicated the property of lots within Fiscal Lot 55 to some individuals and indigenous communities living therein: (a) the communal property of different parcels of Lot 55 was granted to the indigenous communities of Molathati (1.003 hectares – Article 1), Madre Esperanza (781 hectares – Article 2), La Merced

<sup>64</sup> Documents sent to the IACHR by the Public Ombudsman, received on January 19, 2001, and transmitted to the State by the IACHR through note of February 16, 2001.

<sup>65</sup> The petitioners provided a copy of this Resolution to the IACHR through note of July 17, 2000, transmitted to the State on August 2, 2000.

<sup>66</sup> The petitioners provided a copy of this letter to the IACHR, through notes received on January 10, 2000 – transmitted to the State on February 18, 2000- and July 17, 2000 –transmitted to the State on August 2, 2000-.

<sup>67</sup> The petitioners provided a copy of this request to the IACHR through note received on July 17, 2000, and transmitted to the State by the IACHR on August 2, 2000.

<sup>68</sup> The petitioners provided a copy of this request to the IACHR through note received on July 17, 2000, and transmitted to the State by the IACHR on August 2, 2000.

<sup>69</sup> Petitioners' communication received on June 7, 2000, transmitted to the State by the IACHR on June 8, 2000.

Nueva (295 hectares – Article 5), Nueva Esperanza (47 hectares – Article 7) and Bella Vista (1.682 hectares – Article 8); and (b) individual property of different parcels of Lot 55 was granted to Messrs. Delfín Balderrama (1.014 hectares – Article 3), Raul Jorge Lucio Rojas (758 hectares – Article 4), and Claro Normando Rojas (22 hectares – Article 6).<sup>70</sup>

69. On March 8, 2000, the representatives of the Lhaka Honhat Association filed an *amparo* lawsuit against Decree No. 461/99, requesting that its effects be suspended and that it be declared unconstitutional, together with Resolution 423/99, which preceded it.<sup>71</sup> This *amparo* action was rejected by the provincial court, a decision eventually overturned by the Supreme Court of Justice of the Nation, in its judgment of June 15, 2004,<sup>72</sup> in which it declared that the provincial judgment had failed to take into account fundamental factual and legal considerations. For this reason it ordered the return of the file to the original court and the adoption of a new decision. On May 8, 2007, the Superior Tribunal of Justice of the Province of Salta decided to eliminate the effects of both Resolution 423/99 and Decree 461/99 of the Secretariat of the Governor's Office, holding that they had not been duly notified.<sup>73</sup>

70. In a meeting held between the parties on December 15, 2000, the Government of the Province of Salta presented a proposal for the adjudication of the lands of Lot 55, which consisted of the adjudication of fractions to each one of the communities, subject to each community obtaining legal personality.<sup>74</sup> This proposal was objected on several grounds by the Association, through a letter delivered on February 6, 2001.<sup>75</sup>

71. The Government of Salta later reaffirmed its position of adjudicating community or family parcels of land, in a report presented to the communities and their representatives, and submitted to the IACHR in August 2001<sup>76</sup>.

72. On February 22, 2001, the Provincial Government of Salta – Executive Power – Secretariat of the Governor's Office, issued Decree No. 339/01, taking into account "the meetings that have been held with representatives of the aboriginal and creole inhabitants of Fiscal Lots Nos. 55 and 14 of the Department of Rivadavia", and considering that "it is necessary to complete the cartography of Fiscal Lots Nos. 55 and 14, so as to precisely reflect the locations of the different aboriginal communities and creole families that reside in the lands of the aforementioned lots, identifying each family and each community", it was decided to create, within the ambit of the General Secretariat of the Governor's Office, a Commission composed of technical representatives

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<sup>70</sup> Decree No. 461 of December 23, 1999, of the Executive Power of the Province of Salta – General Secretariat of the Governor's Office, provided by the petitioners to the IACHR on March 16, 2000, and later resubmitted through note received on July 17, 2000, transmitted to the State by the IACHR on August 2, 2000.

<sup>71</sup> The petitioners submitted a copy of this *amparo* lawsuit to the IACHR through a note received on July 17, 2000, and transmitted to the State by the IACHR on August 2, 2000.

<sup>72</sup> Supreme Court of Justice of the Argentine Nation, "Asociación de Comunidades Aborígenes Lhaka Honhat c/Poder Ejecutivo de la Provincia de Salta", *Recurso de Hecho*, A.182.XXXVII. Provided by the petitioners with their observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>73</sup> Judgment of the Higher Court of Justice of Salta dated May 8, 2007, provided by the petitioners to the IACHR through note of June 8, 2007, transmitted to the State on June 15, 2007.

<sup>74</sup> Communication by the petitioners to the IACHR dated July 19, 2001, received by the IACHR on July 19, 2001, and transmitted to the State on August 31, 2001.

<sup>75</sup> Communication by the petitioners to the IACHR dated July 19, 2001, received by the IACHR on July 19, 2001, and transmitted to the State on August 31, 2001.

<sup>76</sup> Report by the Province of Salta – Executive Power to the IACHR, August 29, 2001, transmitted to the IACHR by the State through note received on September 19, 2001, and communicated to the petitioners on October 12, 2001.

of the provincial government, of the aboriginal communities and the creole families who resided in both Fiscal Lots, for the purpose of carrying out such mapping and completion of the existing cartography. In this Decree, a delegation was made to the General Secretariat of the Governor's Office of the power to supervise the Commission's mandate, and determine the terms and procedures for the conduction of the corresponding tasks.<sup>77</sup>

73. On July 19, 2001, the petitioners reported to the IACHR that in the constitution of the Commission created by Decree No. 339/01, the representativeness of the Lhaka Honhat Association was ignored, and its effective participation blocked, because it had not been given timely notification of its first session, on April 23, 2001.

74. On July 19, 2001, the petitioners also informed the IACHR about the continuing process of parceling the territory by the Government of Salta, in spite of the commitments of the State, and also in the framework of what they described as a strategy aimed at undermining the representativity of the Lhaka Honhat Association and promoting the separation of its members.<sup>78</sup>

75. On September 11, 2001, the General Coordinator of the Lhaka Honhat Association of Aboriginal Communities sent a communication to the IACHR, expressing the communities' discomfort at the presence and activities of persons who presented themselves as envoys of the provincial government of Salta, who were carrying out measurements within the Fiscal Lots.<sup>79</sup> Along with this communication, the IACHR received copies of different minutes of the meetings held by the members of the communities of Chowhay (Alto de la Sierra), La Puntana Chica, Quebracha, Horocha (Rancho Ñato) and La Puntana, in which they manifested their opposition to the presence and measurement activities carried out by these persons.

76. On November 5, 2001, a meeting was held in Santa Victoria Este between the indigenous and creole families that inhabit Fiscal Lots 14 and 55, which included the presence of several chiefs affiliated to the Lhaka Honhat Association. As a consequence of the meeting they agreed to petition the authorities of the provincial government, inter alia, to suspend the parceling of their lands, to apply Decree 339 of February 22, 2001, to stop the tending of new fences, and to halt commercial forestry exploitation.<sup>80</sup>

77. In a communication dated December 26, 2001, received by the IACHR in March, 2002, the Lhaka Honhat Association reported that there was consensus among the creole and indigenous families of the area on their rejection of the Provincial Government's parceling policy.<sup>81</sup>

78. On January 17, 2002, the petitioners reported again to the IACHR that the Provincial Government of Salta was continuing its strategy of fragmenting the Fiscal Lots into parcels, and in connection with that, it was inducing the chiefs of the communities to abandon the Lhaka Honhat Association and their claim to a single title to property.

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<sup>77</sup> Decree 339 of 2001 of the Provincial Government of Salta, provided by the State through note of March 6, 2001.

<sup>78</sup> Communication by the petitioners to the IACHR dated July 19, 2001, received by the IACHR on July 19, 2001, and transmitted to the State on August 31, 2001.

<sup>79</sup> Communication provided as an annex of the petitioners' brief to the IACHR, received on November 14, 2001, and transmitted to the State on January 3, 2002.

<sup>80</sup> Communication provided as an annex of the petitioners' brief to the IACHR, received on November 14, 2001, and transmitted to the State on January 3, 2002.

<sup>81</sup> Communication by the Lhaka Honhat Association to the IACHR, December 26, 2001, transmitted to the State on March 21, 2002.

79. In a communication dated December 26, 2001, received in March 2002, the Lhaka Honhat Association claimed that the officials of the Provincial Government of Salta had refused to recognize the communities' representation by the Association, a position which had led them to distort their territorial claims in the sense that, according to the Government, the indigenous were claiming a single title to the entire extension of Fiscal Lots 55 and 14 excluding the creole inhabitants, which did not correspond to the communities' real claims.<sup>82</sup> The terms of this communication were later rejected by the representatives of the National and Provincial Government, who reiterated the need to advance in the negotiations through a meeting with the presence of all of the interested parties.<sup>83</sup>

80. In the same communication of December 26, 2001, the representatives of the Lhaka Honhat Association stated that the Commission created in Decree 339/01 of the Government of Salta had not met, or at least their technical representative had not been summoned to any meeting. Consequently, they had undertaken their own independent process of surveying the population and mapping the Lots, which had already produced important data on the indigenous presence and occupation of the territory.<sup>84</sup> In that regard, the petitioners presented to the IACHR, on August 5<sup>th</sup>, 2002, a copy of an "Advance Report" of the study conducted by ASOCIANA (*Social Support of the Anglican Church of North Argentina*), entitled "Cartographic study of the occupation and use of lands among the indigenous communities of Fiscal Lots 14 and 55, in the Municipality of Santa Victoria Este, Department of Rivadavia, Province of Salta, Argentina."<sup>85</sup>

81. On July 8, 2002, the petitioners reported to the IACHR that the Government of Salta had continued to send engineers to the area in dispute, to carry out measurements and offers of parcels to the communities and the creole families.<sup>86</sup> A few days later, the petitioners reported that on July 3<sup>rd</sup>, 23 creole delegates representing the different zones of Lots 55 and 14 had met with the Lhaka Honhat Association and its advisors, after which they sent a communication to the Government of the Province of Salta concerning the measurements and possible granting of titles to property, insisting that there was no agreement for them to proceed, consequently they considered them to be illegal. They requested "1. The halting of any procedure to measure or grant title to the lands which is not carried out in the framework of the law, that is, with the agreement of all of the inhabitants. 2. We reiterate the proposal of November 28, 2001, and request the acceptance of the surveys made by the aboriginal and creoles, with the help of their advisors ASOCIANA and Fundapaz, in the aforementioned Lots."<sup>87</sup>

82. On August 5, 2004, the petitioners reported to the IACHR that, in spite of the different commitments assumed by the Provincial Government, measurement and demarcation works had continued to be carried out in the lands of both fiscal lots, by staff hired by the provincial authorities.<sup>88</sup>

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<sup>82</sup> Communication by the State to the IACHR received on May 3, 2002, transmitted to the petitioners on July 16, 2002.

<sup>83</sup> Communication by the State to the IACHR received on May 3, 2002, transmitted to the petitioners on July 16, 2002.

<sup>84</sup> Communication sent by the Lhaka Honhat Association to the IACHR on December 26, 2001, transmitted to the State on March 21, 2002.

<sup>85</sup> Report submitted by the petitioners to the IACHR on August 5, 2002, and later transmitted to the State on October 21, 2002.

<sup>86</sup> Communication by the petitioners to the IACHR, received on July 8, 2002, and transmitted to the State on July 26, 2002.

<sup>87</sup> Letter attached to the petitioners' communication to the IACHR, received on July 26, 2002, and transmitted to the State on July 26, 2002.

<sup>88</sup> Communication by the petitioners to the IACHR, received on August 5, 2004.

*Attempts at reaching a friendly settlement of the case before the IACHR (2000-2005)*

83. After the initial petition was transmitted to it by the IACHR, the National Government offered its mediation between the petitioner communities and the Provincial Government of Salta, in pursuit of a solution.<sup>89</sup> On August 18, 1999, the petitioners responded to this offer by the State, accepting to initiate a mediation process, but conditioning such initiation to the suspension of the contested public works and other connected requirements.<sup>90</sup> The IACHR communicated this brief to the State on August 24, 1999. The following October 1<sup>st</sup>, the IACHR held a working meeting during its 104<sup>th</sup> ordinary period of sessions.

84. Subsequently until the year 2005, a long and complex process of negotiation took place between the Lhaka Honhat Association, the Provincial Government and the National Government. Numerous working meetings and hearings were held at the IACHR, as well as meetings between the parties reported afterwards to the IACHR. The IACHR held hearings on this case, as well as working meetings with the parties, during the following periods of sessions: 104 (October 1, 1999), 108 (October 12, 2000), 110 (March 1, 2001), 113 (November 15, 2001), 117 (February 28, 2003), 119 (March 5, 2004), 121 (October 26, 2004), 122 (March 2, 2005), 123 (October 17, 2005), 131 (March 11, 2008) and 137 (November 2, 2009). The IACHR was also represented in working meetings between the parties held in the cities of Buenos Aires and Salta on November 1<sup>st</sup>, 2000, August 5, 2002, August 28, 2003, December 7, 2006, and April 27, 2011. The petitioners did not attend this last working meeting.

*Third phase of the indigenous territorial claim: the conduct of a popular consultation.*

85. On July 14, 2005, after the breakdown of the friendly settlement process, the Senate and Chamber of Deputies of the Province of Salta approved Law No. 7352, in which they called for a referendum in the department of Rivadavia in order to define the transfer of the lands to the inhabitants of Fiscal Lots 14 and 55.<sup>91</sup>

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<sup>89</sup> Thus, in a report presented on July 7, 1999, the State of Argentina, in response to the initial petition, indicated that the National Institute of Indigenous Affairs had offered its mediation.

<sup>90</sup> In the petitioners' words, "This party accepts to initiate a process of mediation between the petitioners and the State, under the conduction of the INAI, in order to achieve –as held by the State- compliance with the constitutional imperative of recognizing the communal possession and property of the lands occupied by the indigenous communities. // However, the Lhaka Honhat Association considers that, in order for such mediation to attain its proposed objective, and for the agreement to become effective, it is necessary for the Government to formally commit itself to abstain from modifying the factual situation that exists at the outset of the mediation. That is to say, that the Government assume a prior commitment, as a condition for the initiation of the mediation: the interruption of the public works that gave rise to the present case. (...) In the same sense the petitioners consider it indispensable for the initiation of the mediation that the Government abstains from providing any new houses, whether it is within the territory that is the subject-matter of the negotiation, or to the persons who are represented by the petitioner Association. As proven in Annex 3, the Government of the Province of Salta has projected to provide houses to persons who belong to the indigenous communities, which runs counter to the purpose of the mediation that is to be initiated, namely, the recognition of the communal possession and property of the lands. // On the other hand, this party considers it vitally important, for the initiation of the mediation, for the State to inform the petitioners with precision which are the Works that are currently being executed, given that –as proven by the above-referred annexes (news articles)- the petitioners have found out about the existence of a project to build a gas pipeline within the geographical scope of the mediation." In this same brief, the petitioners requested the IACHR to participate through a representative in the negotiation process; they also requested precautionary measures, in the sense of not carrying out any further construction works in the territory that would be the subject-matter of the mediation, and that no individual houses were provided to the members of the communities represented by the Association.

<sup>91</sup> The text of the Law is as follows: "Article 1. The electorate of the Department of Rivadavia is hereby summoned, in the terms of Article 60 of the Provincial Constitution, to manifest themselves answering yes or no, on whether it is their will for the lands that appertain to Fiscal Lots 55 and 14 to be transferred to their current occupiers, both aboriginal and creole, executing the necessary infrastructure works. // Art. 2. The consultation to which the present law refers, shall be carried out at the same time as the elections for national and provincial legislators, to be held on October 23, 2005. // Art. 3. The Referendum summoned by the present law, shall comply with the legal provisions applied to the election

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86. In a communication to the IACHR received on July 22, 2005, the petitioners stated that the popular consultation had been ordered to include third parties who were alien to the conflict.

87. On August 11, 2005, the Lhaka Honhat Association filed a lawsuit (*acción declarativa de certeza*) before the Supreme Court of Justice of the Argentinean Nation against the law on the referendum, seeking a declaration of unconstitutionality. Through judgment of September 27, 2005, the Supreme Court of Justice rejected the lawsuit, considering that it had no jurisdiction to rule on acts of the provincial legal system.

88. On August 23, 2005, the National Government submitted a report to the IACHR explaining that the Provincial Government's decision had posed obstacles to the protracted friendly settlement process, for which reason the national authorities had attempted to persuade the provincial authorities to reconsider their position.

89. On August 23, 2005, the IACHR received a report by the State Attorney for the Province of Salta with observations on different aspects of the case. The Provincial Government held that there was no threat to the indigenous rights, but on the contrary, the Provincial Government sought to adopt measures to make them effective, allowing them access to the land and participation in the scheduled referendum; in fact, it argued that the referendum was a valid modality to enable the informed participation of indigenous peoples as a form of consultation under ILO Convention 169, so this was a democratic solution to the problem.<sup>92</sup> The Provincial Government also underscored the socio-economic importance of the infrastructure works to be undertaken, for the welfare of the population of Fiscal Lots 14 and 55.

90. The IACHR communicated the National and Provincial Governments' responses, through note of September 15, 2005. On September 30<sup>th</sup>, the observations of the petitioners in reply to those State responses were received. They explained that the Provincial Government had undertaken a number of actions aimed at undermining the representativity of the Lhaka Honhat Association and promote the disaffiliation of its members, with the aim of promoting the referendum.<sup>93</sup>

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of provincial legislators. // Art. 4. The Executive Power must disseminate the present law in the languages of the different communities. // Art. 5. Notification shall be given to the Executive Power."

<sup>92</sup> In the Provincial Government's words, "it is not true that the rights of indigenous peoples established in Article 75, par. 17 of the National Constitution, Art. 15 of the Provincial Constitution or the American Convention on Human Rights are being violated. // A simple reading of the provisions cited by the claimant, proves that the Provincial Government is not violating them, but doing what is necessary to enforce them, with the modality established in Article 15, par. 11 of the Provincial Constitution, which orders, in relation to fiscal lands, to find consensual solutions with the indigenous and non-indigenous inhabitants, generating mechanisms for those inhabitants' effective participation. The referendum is precisely 'the mechanism' for effective participation. The members of the Lhaka Honhat Association will be able to participate intervening in the campaign prior to the referendum, and thereafter voting in it. This consultation mechanism is, in addition, established in ILO Convention 169. (...) The popular consultation established by Law No. 7352 of the Province of Salta does not violate any provision of ILO Convention 169; on the contrary, it executes them. (...) It is false that Provincial Law 7352, which summons a referendum in order to define the policy of adjudication of the lands of Fiscal Lots 55 and 14 to its indigenous and creole inhabitants, is contrary to the National Constitution and International Agreements. // Law No. 7352 of the Province of Salta sought to obtain, for the land adjudication decisions, the direct and unmediated endorsement of the people who inhabit the area. (...) It is unquestionable that the summoning of a referendum is the most democratic and transparent means for the land adjudication to consult the real will and the authentic interests of the inhabitants, which would otherwise run the risk of being frustrated as a result of closed-door negotiations, with the interventions of lawyers and public officials, and of entities whose true representativeness should be ratified in the ballot boxes. (...) In any case, nothing prevents the members of Lhaka Honhat from concurring to the referendum and there expressing their opinion."

<sup>93</sup> The petitioners explained that "during the last months, the Provincial Government has undertaken an aggressive defamation campaign to destabilize Lhaka Honhat and in favor of the referendum. // Among other things, the Provincial  
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91. On September 21, 2005, the National Government submitted to the IACHR a document entitled "Joint Declaration of the National Government authorities that participate in the Broadened Board of the friendly settlement process of petition 12.094 of the IACHR Registry", in which the representatives of the Ministry of Foreign Affairs, the Ministry of Justice and the National Institute of Indigenous Affairs expressed their concern at the stagnation of the friendly settlement process since the referendum had been organized, requested the Governor of the Province to suspend such initiative for the purpose of facilitating a resolution of the problem, urged the Lhaka Honhat Association to expressly pose its observations on the land adjudication proposal presented by the Provincial Government on March 2, 2005, and requested the IACHR to help through the designation of an observer or expert.

92. On October 7, 2005, the IACHR transmitted the petitioners' observations received on September 30th to the State, and requested from it specific information on (1) whether the indigenous communities had been consulted about the referendum and its possible implications, (2) what the impact of the referendum would be upon the case that was being processed by the inter-American system, and (3) the situation in the area and the commitments adopted by the Government in the different minutes of meetings signed by the parties to the friendly settlement process. On October 12, 2005, the IACHR received a communication signed by the Secretary General of the Salta Governor's Office, in which he reported that:

"... the referéndum was decided by the Legislature of the Province of Salta, for the precise purpose of consulting the indigenous and the non-indigenous inhabitants about the measures that could affect them. Thus we complied with the provision of Article 15 paragraph 2 of the Constitution of the Province of Salta, which states literally: 'The Provincial Government shall generate mechanisms that will make it possible, for both the indigenous and the non-indigenous, with their effective participation, to agree on solutions to matters related to the fiscal lands, respecting third parties' rights.'  
In addition to this, meetings have been held in practically all of the communities, clarifying the meaning of the referendum and distributing explanatory leaflets in Spanish and in the Wichí, Chulupí and Chorote languages."

93. Mr. Indalecio Calermo, who presented himself as "General Chief of the Wichi Race and General Coordinator of the Wichi ethnicity in the Province of Salta", presented an amparo lawsuit against the Lhaka Honhat Association, requesting that the judge order the defendant to abstain from any act tending to prevent the participation of the communities of Lots 14 and 55 in the referendum. This lawsuit was accepted by the Court, which ordered the Association to abstain

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Government, without saying so expressly, promoted an amparo lawsuit before the provincial courts, through a chief of a community that is not part of the conflict of Lots 55 and 14 (well known for his political affinity to the Government). The judicial resolution, which granted the lawsuit, ordered Lhaka Honhat to abstain 'from carrying out acts tending to undermine in any way the right to vote in the referendum summoned for October 23, 2005'. The IACHR must take note of the seriousness of this matter, because the illegitimate action that Lhaka Honhat supposedly carried out was to present a petition to the IACHR. (...) On the other hand, the provincial government published, in the local *El Tribuno* newspaper (owned by the brother of the Governor Juan Carlos Romero), several press notes with the same objective. In addition, representatives of the Provincial Executive are permanently traveling to the conflict area and hold political meetings in favor of the referendum, where the Lhaka Honhat Association and its technical and legal advisors are violently insulted. They also make constant interventions through the radio stations of the area, where they attack the Association and its representatives, advisors and the IACHR, *inter alia*". They also reported that the provincial government was distributing written flyers in the area, in a dialect of the Wichí language which is incomprehensible for the inhabitants of the area themselves. In the petitioners' opinion, these are "acts promoted by the province of Salta to divide the indigenous communities and disregard their legitimately designated authorities. (...) the provincial government is one step away from achieving its objective of breaking down the organizational structure through which the indigenous communities decided to be represented (in exercise of specific rights expressly recognized them by human rights treaties)."

“from carrying out actions tending to undermine in any way the right to vote in the referendum summoned for October 23, 2005.”<sup>94</sup>

94. On October 8, 2005, the chiefs of the communities that form the Lhaka Honhat Association signed a public declaration, in which they stated: “In the community of San Luis, having met on the 8<sup>th</sup> of October 2005, the chiefs, leaders and delegates of the communities of Lots 55 and 14 of the province of Salta, ratify our unanimous will to request the Governor of the Province of Salta to suspend the referendum slated for October 23<sup>rd</sup>, because it imperils our constitutional rights to land.” In addition, the chiefs annexed to their declaration a document entitled “Petition”, in which they summarized their position on the main points of the controversy.

95. On October 23, 2005, the Provincial Government held the referendum. The majority voted Yes. The provincial Government stated, in different public notes, that an affirmative response by 98% of the voters had been obtained;<sup>95</sup> this result was broken down in a public report, in which it was explained that 5049 votes had been counted in favor of Yes, 131 in favor of No, 3978 blank votes, and 34 invalid votes.<sup>96</sup>

96. The Lhaka Honhat Association, in turn, contested this 98% result, considering that only 31% of the total number of voters registered in the electoral census had actually voted, and asserting that the Government of Salta had carried out manipulations and presented the information in a misleading manner.<sup>97</sup>

*Fourth phase of the indigenous territorial claim: new dialogue between the parties, adjustment of the Provincial Government’s proposal (2005-2007).*

97. On September 9, 2005, in response to the National Government’s “Joint Declaration” document transmitted by the IACHR, the petitioners made observations on the land adjudication proposal presented by the Province of Salta, reiterating their demands for a single title in the name of all of the indigenous communities, the relocation of the creole population, and that any development or infrastructure projects be carried consistent with the rights to prior consultation and informed consent. They also restated their demand that wire fences be prohibited in the indigenous areas.

98. On October 11, 2005, the Provincial Government of Salta submitted a document to the IACHR in which it broadened and modified the proposal presented on March 2, 2005, stating that this had been done in response to the different observations submitted by the petitioners on September 9, 2005. The introduction of these modifications was preceded by new meetings and dialogues between the parties, specifically a meeting held on October 11 between representatives of the National and Provincial Governments, and representatives of the petitioners. This dialogue allowed the identification of points where the parties disagreed, as summarized by the Provincial Government in its note of October 11:

“In the course of the meeting, the nine objections posed by the CELS lawyers in their brief of September 9<sup>th</sup> were addressed. Useful points of coincidence were reached with regard to

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<sup>94</sup> Communication by the petitioners to the IACHR, received on September 30, 2005.

<sup>95</sup> See, inter alia: Note published on the website of the Secretariat of Press and Diffusion of the Government of Salta, November 7, 2005; Note published in the newspaper El Tribuno on October 28, 2005. Documents submitted to the IACHR with the petitioners’ note received on November 11, 2005, transmitted to the State on January 31, 2006.

<sup>96</sup> Document submitted to the IACHR with the petitioners’ note received on November 11, 2005, transmitted to the State on January 31, 2006.

<sup>97</sup> Petitioners’ note received on November 11, 2005, transmitted to the State on January 31, 2006.

most of the objected items, and said agreements, incorporated into the original text of 28/II/05, constitute our improvement to the proposal for the adjudication of lands which is set forth in the annex to the present document.

Notwithstanding the above, there was no agreement on the modality of the title to property to be granted over the lands that are to be adjudicated to the indigenous communities. Upset by this circumstance, the CELS lawyer and the representative of Lhaka Honhat refused to sign the minutes of the meeting and left the gathering, which had lasted almost six hours.

The issue that emerged with regard to the title was as follows: the Province of Salta, in accordance with the provisions of its constitution, offers to adjudicate lands through titles at the names of the communities. These title can, eventually, be common for all of the communities who desire to have a joint title; and separate for those communities that wish to have an individual title. In addition to this, individual titles will be granted to the creoles who meet all of the requirements of the Province's proposal.

The CELS lawyer requires, on the other hand, the granting of a single title in forced community, even for those indigenous entities that do not wish to receive a title under such conditions.

It is useful to take into account, as a context, that one of the milestones of this friendly settlement process was the recognition, by Lhaka Honhat, of the existence of other indigenous sector who were not represented by Lhaka Honhat. For this reason, in the Broadened Board, other indigenous representatives different from the petitioners participate.

The Government of the Province of Salta is aware that the Proposal for land adjudication must encompass and harmonize the interests of all of the inhabitants of these lots, property of the Province, for which reason it cannot accept Lhaka Honhat's claim, in the sense of making an imposed coercion, to the detriment of the sector that are not represented by that organization, which would become virtual hostages of Lhaka Honhat. This would entail a violation of fundamental human rights, the protection and defense of which is the very reason for the existence of the Inter-American Commission on Human Rights. (...)"

In the Annex to this communication, the Provincial Government set out in detail the modifications it had introduced to its proposal of March 2, 2005:

**"Broadening of the proposal for land adjudication submitted by the Province of Salta, Republic of Argentina, on March 2, 2005.**

Items 1, 2 and 8: The Province incorporates the following paragraph, referring to the general criteria of the proposal:

'The guiding criterion for this Proposal is the right of the indigenous communities to traditional use of the land, without detriment to the other rights recognized by this Proposal.'

Item 3: Solution in case of lack of agreement by the parties regarding land transfers.

'In case that no agreement is reached by the parties, the Broadened Board shall be the decision-making organ with the power to solve the situation of conflict. For these purposes, it may, inter alia, adopt decisions aimed at establishing incentives in cases where relocations are necessary.'

Item 4: Infrastructure. The Ministry of Federal Planning, through Engineer Laurito, assumed the commitment of carrying out the necessary works, and consulting the location of the roads in the framework of the Broadened Board, so as to prevent the indigenous communities from isolation.

Item 5: Communal Title. The Province agrees to grant a Joint Communal Title to all of the communities that so request, in accordance with the modality of adjudication which has already been implemented in the case of Fiscal Lot 4.

Item 6: Relocation of creole inhabitants and of cattle. The Broadened Board may establish areas where cattle-raising exploitations will not be allowed.

Item 7: Prohibition of wire fence tending. The prohibition of tending wire fences along the banks of the Pilcomayo River shall apply to all of the population equally.

Item 9: Executing Unit. The Executing Unit shall include a representative of the Ministry of Infrastructure and Federal Planning of the National State, clarifying that the Executing Unit shall only be empowered to determine, in the field, the criteria included in the Proposal, as

well as the decisions adopted by the Broadened Board. Such Unit shall lack any other decision-making powers.

*The 'Items' referred to in the foregoing broadening of the proposal correspond to those included in the enunciation of objections formulated by Lhaka Honhat and CELS in their note of September 9, 2005, to the Ministry of Foreign Affairs."*

99. On March 14, 2006, a new meeting was held between the Secretary General of the Governor's Office of the Province of Salta, and the General Coordinator of the Lhaka Honhat Association, during which, the following agreements were reached:

"- The lands that are to be transferred to the indigenous communities, must respect their traditional areas of occupation, which has already been identified, is part of the document with the proposal of the provincial government, and is grounded on the legislation on indigenous rights in force (National and Provincial Constitution Art. 75 par. 17, ILO Convention 169).

- The surface of land to be granted to the indigenous communities must be of a minimum of 400.000 hectares, of exclusive indigenous property, and must be included within the traditional indigenous area of occupation of the lots, mentioned in the preceding paragraph.

- The modality of the title or titles must be in accordance with the traditional usage, recognizing the shared use of a same area that the different communities practice. This is the reason for which Lhaka Honhat has pursued the notion of a single title, with variants that respect the traditional form of its traditional use, and the close bonds that exist between the different communities and groups.

- The execution of infrastructure works in the area must be made in accordance with the land distribution plan and the future development of its inhabitants. Prior to their implementation, adequate consultations must be made with the inhabitants, in order to achieve the corresponding agreements on the proposed measures.

- A survey of the indigenous communities that inhabit Lots 55 and 14 must be conducted, whether or not they have juridical personality, including a population census and a reference to the representative or chief of each community.

- The indigenous communities that are represented in the Lhaka Honhat Association shall duly register their juridical personalities with the General Inspector of Juridical Persons of the Province of Salta."<sup>98</sup>

*Acts to implement the proposal of the Provincial Government of Salta, undertaken after the referendum of October, 2005.*

100. On May 11, 2006, the different chiefs of the communities affiliated to Lhaka Honhat sent a communication to Commissioner Florentín Melendez, of the IACHR, concerning a meeting of the Lhaka Honhat Council of Chiefs which addressed the land issue and complained of violations of indigenous rights by the Government of the Province. "<sup>99</sup>.

101. On July 18, 2006, the IACHR received another communication sent by the representatives and chiefs that form part of the Lhaka Honhat Association, in which they reported:

"As you surely know, after the referendum the government of Salta has started to work on the ground in order to implement its plan for land adjudication. The officers of the Provincial Executing Unit have been, for some months now, attending enquiries by the creoles and receiving their requests for lands. Our communities are very confused and concerned.

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<sup>98</sup> Minutes attached to the note of the Provincial Government of Salta to the Ministry of Foreign Affairs of Argentina, sent to the IACHR through note received on February 10, 2009, and communicated to the petitioners on February 26, 2009.

<sup>99</sup> Communication by the Council of Chiefs of the Lhaka Honhat Association, sent to the IACHR through petitioners' note of June 1, 2006, transmitted to the State on August 16, 2006.

We know that the Argentinean State has produced a proposal, which had already been sent to the IACHR. On our side we have analyzed this proposal in our Assembly of Chiefs in the month of May, and we consider that it respects our rights as indigenous peoples. We agree with this proposal, but we have not yet been informed by the national authorities whether this is the final proposal, and whether it will be accepted by the Government of Salta.

Therefore the communities are afflicted, because they do not know who is in charge of defending their rights, and insofar as there is no clarity, conflicts will continue to occur. (...)"<sup>100</sup>

102. On September 18, 2006, the IACHR received a report from the State Attorney of the Province of Salta, in which he provided information on the activities carried out to execute the Province's proposal for land adjudication. The National Government later sent identical information to the IACHR, through a note of October 24, 2006. The Provincial Government reported:

"ACTIVITY REPORT OF THE PROVINCIAL EXECUTING UNIT – LOTS 55 AND 14

The Government of the Province of Salta issued Decree No. 939/05, in which it created the Provincial Executing Unit, application authority in charge of executing the Friendly Settlement Proposal presented by the Province of Salta in the framework of Case 12094/99 before the Inter-American Commission on Human Rights of the OAS.

On 19/4/06, the Ministry of Production and Employment issued Resolution No. 65/06, in which it determined the composition of the Provincial Executing Unit, including representatives of each one of the competent provincial authorities, and also established the functions and missions of the PEU. On the other hand it establishes the requirements that the Creole population must meet to prove their occupation of the lands, inviting them to present their requests with the required information by 17/7/06.

The Government publicized the aforementioned resolution in FM Radio stations of the region that reached all of the Lots 55 and 14, and it also set up an office with PEU staff, with the technical means required to disseminate, explain and receive the pertinent requests. Such staff has visited all of the places where its presence has been requested.

The deadline for presenting requests was thereafter extended until 22/9/06 by Resolution No. 173/06 of the Ministry of Production and Employment.

Each one of the requests was certified by the Justices of the Peace of the Municipality of Santa Victoria Este.

The results of the petitions presented by the inhabitants as of this date are the following:

TOTAL NUMBER OF REQUESTS	451
Aboriginal Communities	24
Creoles	427

Taking as a referente the data of the Surrey made in 1984 and 1993 (CFI Report and former Ministry of Social Welfare of the Province of Salta), in Fiscal Lots 55 and 14 there are 471 creole posts and 36 aboriginal communities, therefore:

On the grounds of this data, the total percentage of implementation would be 88.95%. For aboriginal communities it is a 66.66% (24/36), and for the creoles it is of 90.65% (427/471), assuming that all of the petitions are valid.

The next steps to be adopted by the PEU once the deadline for reception of requests has expired, shall be the following:

- Analysis of each one of the received requests, establishing in each case whether they comply with the requirements to prove their rights.
- Periodically report the advances in this process to all of the interested parties.
- Agreements between the parties (that submitted requests complying with all of the requirements).
- Cartographic identification of the location of creole families, areas of traditional use of each community, and areas of superposition of creoles and aboriginal communities.

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<sup>100</sup> Communication received on July 18, 2006, transmitted to the State on August 16, 2006.

- Any other action tending to materialize the Province's proposal, focusing on the objective of consolidating agreements between the parties."

103. The Provincial Government attached to this report copies of several relevant documents. In particular, it provided copies of the request for land regularization forms presented by the inhabitants of Fiscal Lots 55 and 14. The IACHR notes that two different forms were distributed – one for the creole population and another for the indigenous population. A total of 147 copies of forms were provided to the IACHR, of which 14 were presented by indigenous communities.<sup>101</sup>

104. In a note received on September 7, 2006, the National Government submitted to the IACHR a draft alternative proposal for the distribution of the fiscal lands of Lots 14 and 55. The National State's alternative proposal reflects the manner in which the federal governmental authorities visualized and described the existing conflict between the Lhaka Honhat Association and the provincial authorities; likewise, it includes historic, socioeconomic and contextual information which is relevant for an adequate comprehension of the situation. This alternative proposal was not, however, implemented nor adopted formally by the parties

105. In a communication received on September 15, 2006, the petitioners denounced the actions of implementation of the Salta Government's proposal as being "designed to finalize breaking and dividing the indigenous organization." In addition, the communication complained of "the absolute discretionality and arbitrariness with which the transfer of lands is being manipulated by the provincial government..."<sup>102</sup>

106. On October 21, 2006, the IACHR approved Admissibility Report No. 78/06, in which it declared the petition admissible as regards the alleged violations of the rights protected by Articles 8(1), 13 in connection with 23, 21 and 25 of the American Convention, as related to the general obligations established in Articles 1 and 2 of said instrument. At the moment of making a preliminary characterization of the facts reported by the petitioners, and the object of the process, the IACHR included the topic of access to the ancestral territory; consequently, the IACHR referred to the "petitioners' complaints about the failure of the Province of Salta to implement a policy to demarcate and award title to lands in a legal form that respects the communities' way of life". It was also in relation to this territorial issue that the IACHR analyzed the admissibility requirements of the petition.

*Fifth phase of the indigenous territorial claim: the Agreement of October, 2007, and the subsequent acts and negotiations aimed at its implementation.*

107. On October 17, 2007, an Agreement was formally signed between the parties, with representation of the National and Provincial Governments, the Lhaka Honhat Association, the Organization of Creole Families and the CELS, in the following terms:

"The present agreement is executed between the PROVINCE OF SALTA, represented in this act by the Secretary of the Governor's Office, Dr. Raúl Romeo Medina, by the Minister of

<sup>101</sup> These indigenous communities were: (i) Las Mojarras, represented by Mr. José García, (ii) Bella Vista, represented by Mr. Galiano Basilio, (iii) El Pin Pin, represented by Mr. Pascual Pastor, chief, (iv) Pozo La China, represented by Mr. Juan Negro, (v) Pozo El Toro, represented by Mr. Brígido Pastor, chief, and Eduardo Pastor, (vi) Pozo El Bravo, represented by Mr. Carlos Jaime, (vii) Pozo El Toro, represented by Mr. David Pastor, (viii) Madre Esperanza, represented by Mr. Mario Raúl Menéndez, (ix) Molathati 3, represented by Mr. Juan Nicacio Miranda, (x) Nueva Esperanza, represented by Mr. Humberto Chene, cacique, (xi) San Luis, represented by Mr. Andrés Amaya, cacique, (xii) Alto La Sierra, represented by the Wichí Association "Inhate", and by its chief, David Maza, (xiii) Monte Carmelo, represented by Mr. Francisco Gómez. And (xiv) La Merced Vieja, represented by Mr. Luis Lescano, chief.

<sup>102</sup> Communication by the petitioners to the IACHR, received on September 15, 2006, and transmitted to the State on September 29, 2006.

Production and Employment, Engineer Sergio Darío Camacho, by the National Senator Dr. Sonia Margarita Escudero, and the LHAKA HONHAT ASSOCIATION OF ABORIGINAL COMMUNITIES, represented in this act by its General Coordinator Mr. Francisco José Pérez, and by its Treasurer Mr. Rogelio Segundo, with Juridical Personality No. 449/92, the ORGANIZATION OF CREOLE FAMILIES, represented in this act by Messrs. Arturo Barrozo, Esmérito Arenas, hereinafter the Parties.

The present agreement is also subscribed, in their capacity as advisors to the petitioners, by the FUNDACION PARA EL DESARROLLO EN JUSTICIA Y PAZ (FUNDAPAZ), represented by its Director, Engineer Gabriel Seghezzo, Engineer Alvaro Penza and Dr. Jorge Tejerina; the ACOMPAÑAMIENTO SOCIAL DE LA IGLESIA ANGLICANA DEL NORTE ARGENTINO (ASOCIANA), represented by Engineer Ana Alvarez, and Mr. José Canteros, and the CENTRO DE ESTUDIOS LEGALES Y SOCIALES (CELS), represented by Anthropologist Morita Carrasco and Dr. Diego Morales.

#### PRELIMINARY CONSIDERATIONS:

The present agreement is signed based on the claims of Lhaka Honhat (530.000 hectares of indigenous traditional occupation) and of the OFC (the entire occupied lands), where both parties have agreed to reduce their original claims in the framework of this Agreement.

After countless efforts by both of the Parties who sign the present Agreement in order to reach a common understanding that attends the concerns and interests of all of the inhabitants of the area, it is purported to materialize the mandate of Article 15 of the Constitution of the Province of Salta, as well as duly comply with the provisions of the National Constitution, Art. 75 par. 17, ILO Convention 169, and respect all of the constitutional norms and rights that appertain to the creole families.

The present document recognizes, as its background, the Agreement signed by Lhaka Honhat and the Government of the Province of Salta on 14/03/06, the Minutes of the Session of the Lhaka Honhat Council of Chiefs of 10/05/06, the Agreements signed by Lhaka Honhat and the Organization of Creole Families on 01/06/07 and 24/08/07, which were presented to the Government of the Province of Salta.

That by virtue of the above, it is considered appropriate to subscribe the present Agreement, delimiting the reciprocal commitments aimed at the achievement of the common objective, subject to the following clauses and conditions:

**CLAUSE ONE:** The parties recognize a common interest on a specific objective, which is that of mutually cooperating to define and coordinate the necessary actions that will make it possible to achieve the final transfer of the ownership of the lands to their legitimate possessors, which are the indigenous communities and the creole families that inhabit Lots 14 and 55 of the Province of Salta.

**CLAUSE TWO:** The distribution shall be made in accordance with what was duly agreed as criteria for the adjudication of fiscal lots 55 and 14, resulting in:

- 400.000 hectares for the indigenous communities, respecting their areas of traditional occupation, guaranteeing the continuity of their lands, access to the river and the natural resources of the forest, which does not mean fractions communicated by roads.
- 243.000 hectares for the creole families, guaranteeing the rights of those who have inhabited their lots for over twenty years, in accordance with the requirements, guidelines, evaluations and parameters established by the activities of the Provincial Executing Unit in the framework of Resolutions No. 65/06 and 804/07 of the Ministry of Production and Employment.

The area outside of the indigenous communities' traditional occupation, as identified in the map that is annexed hereto (covering 113.000 hectares) shall be transferred to creole families; the remaining 130.000 hectares, within the area of traditional indigenous occupation, which are superposed to the occupation of creole families, shall be defined through dialogue and the agreements that are achieved on the ground between both populations.

In case of lack of agreement, the parties shall be invited to submit the issue to an arbitral tribunal composed of three independent experts. The parties shall agree upon the procedure and the designation guidelines. In case that they do not submit the issue to an arbitral process, they shall resort to the corresponding jurisdictional decision.

The transfers of creole families with rights must be on principle voluntary. In order to incentivate them, the following conditions must be fulfilled:

- a) To carry out, in the place to which they are to be transferred, all of the improvements that the families currently enjoy.
- b) To cover the costs of transportation and compensate the losses incurred in as a consequence of the removal (cattle, etc.).
- c) To guarantee in the place of relocation easy access to public utilities (water for human consumption and production, roads, education, health, etc.).
- d) Promote the relocations through additional incentives (pasture, fences, technical assistance, etc.).
- e) To define maximum limits for access to these benefits, in order to accelerate the creole families' decision-making.

It must be clarified that the Provincial State must make proportionate reservations of land as required for institutional uses and the necessary infrastructure works. No infrastructure works shall be carried out in the communities' area of occupation without a prior, free and informed consultation. No partial transfers of titles shall be made.

CLAUSE THREE: The parties agree on the methodology to identify the respective portions of land that correspond to the indigenous communities and the creole families, based on the following points:

- a) To identify, through a final Ministerial resolution, the package of dossiers of the creole families who have acquired rights.
- b) To publicize the periods during which the families who have not presented their requests can still do it in order to prove their rights.
- c) To map the families that have not yet been mapped.
- d) To include in the map the location of all of the posts of the creole families with rights.
- e) To jointly identify and agree upon possible areas within the communities' areas of traditional use which can be destined for the creole families and their relocation.
- f) To identify the creole families who are going to be relocated within the free area of traditional occupation.

CLAUSE FOUR: Given that it is indispensable to protect the natural resources of Lots 55 and 14 in order to secure the viability and enforcement of this agreement, the parties commit themselves to avoid any type of wood logging and forest exploitation in any of the two Lots. The Government shall establish in the area control posts which can guarantee compliance with the legislation in force. Any confiscated timber that results from official control operations, shall be placed under the responsibility of an official national or provincial body, and eventually subjected to the land regularization process.

CLAUSE FIVE: The present agreement does not affect the continuity of the contentious process before the Inter-American Commission on Human Rights, case No. 12.094.<sup>103</sup>

108. The petitioners have not mentioned nor contested this agreement in their subsequent communications to the IACHR.

109. On October 4, 2007, the Ministry of Production and Employment of the Province of Salta adopted Resolution No. 804/07, in which it made the final count of the different requests for land adjudication presented both by creole families and by several indigenous communities of Lots 14 and 55, in the framework of the process of implementation of the Provincial Government of Salta's proposal of March 2005, and in application of Provincial Decree 939/05 and Ministerial Resolution 65/06. In this resolution, it is stated that 430 requests by creole inhabitants were received, as well as 27 requests by indigenous communities.

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<sup>103</sup> Minutes attached to the note from the Provincial Government of Salta to the Ministry of Foreign Affairs of Argentina, sent to the IACHR through note received on February 10, 2009, transmitted to the petitioners on February 26, 2009.



110. Annex VI of Resolution 804/07 included a list of the 27 communities that presented requests for land grants to the Provincial Government, namely: (1) San Luis; (2) Nueva Esperanza; (3) La Merced Vieja; (4) Rancho El Ñato; (5) San Lorenzo; (6) La Merced Nueva; (7) Santa Victoria Este 2; (8) Madre Esperanza; (9) Molathati 3; (10) Las Mojarras; (11) Pozo El Bravo; (12) Bella Vista; (13) Pozo El Toro; (14) El Pin-Pin; (15) Pozo La China; (16) La Puntana; (17) Monte Carmelo; (18) La Bolsa; (19) San Miguel; (20) Esperanza; (21) San Ignacio; (22) Misión La Gracia; (23) Monte Verde; (24) Cañaverl II; (25) Pomis Jiwet; (26) Lantawos – Alto La Sierra; (27) Inhate – Alto La Sierra<sup>104</sup>.

111. On October 23, 2007, the Provincial Government of Salta adopted Decree 2786/07, in which it formally validated the Agreement of October 17, 2007, and transferred the property of Fiscal Lots 14 and 55, in general terms, to its inhabitants. The pertinent parts of this Decree are the following:

“[The Government of Salta decides:]

Article 1.- To approve the Agreement dated October 17, 2007, achieved in relation to Fiscal Lots 14 and 55 of the Department of Rivadavia, between the Province of Salta, on the one hand, and the Lhaka Honhat Association of Aboriginal Communities and the Organization of Creole Families, on the other, which forms part of the present Decree as Annex I.

Article 2.- To assign the entire area of Fiscal Lots 14 and 55, which are to be adjudicated with all of the guarantees that emanate from the Provincial and National Constitutions, to the Indigenous Communities and the Creole Families that inhabit them, in the proportions and modalities established in the Agreement, namely:

- Four hundred thousand hectares (400.000 Has) for the indigenous communities (Wichí, Chorote, Chulupí, Tapiete and Toba of Lots 55 and 14 of the Province of Salta), who are identified in Annex II to the present Decree; and
- Two hundred and forty three hectares (243.000 Has.) for the creole families, guaranteeing the rights of those who have inhabited the lots for over twenty years, in accordance with the requirements, guidelines, evaluations and parameters established by the actions of the Provincial Executing Unit in the framework of Resolutions 65/06 and 804/07 of the Ministry of Production and Employment, copies of which are attached as Annex III and Annex IV of the present instrument.

Article 3.- Decides that, in compliance with the contents of the Agreement approved by Article 1 of this Decree, the distribution mandated in Article 2 shall be carried out in the accordance with the guidelines established therein; and also decides that the Provincial State shall make, in a proportional manner, all the reservations of land that are necessary for institutional usages and for the requisite infrastructure works.

Article 4.- Decides that, once the field works established in the Agreement and all the necessary measures have been concluded, the General Directorate of Immovable Property shall intervene in order to carry out the operations of subdivision, separation and others that may be required for the specific achievement of the objective enunciated in Article 1 of the aforementioned Agreement; in turn, the corresponding public deeds shall be granted free of cost to the beneficiaries, through the Government Notary.”<sup>105</sup>

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<sup>104</sup> Resolution attached to the communication of the Provincial Government of Salta to the Ministry of Foreign Affairs of Argentina, sent to the IACHR through note received on February 10, 2009, transmitted to the petitioners on February 26, 2009.

<sup>105</sup> Decree annexed to the communication by the Provincial Government of Salta to the Ministry of Foreign Affairs of Argentina, sent to the IACHR through note received on February 10, 2009, transmitted to the petitioners on February 26, 2009.

112. On October 28, 2008, the Provincial Government of Salta adopted Decree No. 4705/08, in which it created a technical team to advance in the transfer of lands in accordance with the Province's proposal of March, 2005. As explained by the Secretary General of the Governor's Office and the State Attorney for the Province in a communication sent to the IACHR by the National Government on February 10, 2009, that decree "established the new technical team that forms part of the Provincial Executing Unit, which is in charge of executing –in what concerns the Province of Salta- the agreements of 17-10-2007;"<sup>106</sup>

113. In the petitioners' view, Decree 4705/08 violates the indigenous communities' rights, insofar as it does not allow for their participation or that of their advisors, it recognizes the Provincial Executing Unit (PEU) as the authority in charge of applying the Proposal, it subjects the transfer of the lands to agreements between the parties, without providing solutions for the cases in which such agreements are not achieved, and does not refer to the transfer of the lands in the modality of a single title.<sup>107</sup> On April 7, 2009, the Provincial Executing Unit sent the Lhaka Honhat Association a communication summoning its affiliated indigenous communities to a meeting on April 28, explaining that "the objective of the meeting is for the Indigenous Communities to express, through their traditional authorities and with full respect for their forms of organization, the manner in which they wish to implement the transfer of the lands that they occupy in Fiscal Lots 55 and 14."<sup>108</sup>

114. On April 16, 2009, the representatives of the indigenous communities affiliated to the Lhaka Honhat Association responded this summons by the PEU, through a letter that was also forwarded to the IACHR, expressing its view that "the strategies for land distribution, titles to property or modes of transfer – which are the subjects of the meetings programmed and summoned by the technical team - are not viable, insofar as they detract from the demarcation and titling guidelines established by the standards set by the Inter-American Court of Human Rights' jurisprudence." At the same time Lhaka Honhat expressed its openness to dialogue in order to explore all possible routes to reach a just solution that recognized its rights.<sup>109</sup>

115. In relation to the same summons letter, the representatives of the petitioners argued that the PEU was inviting the communities to express their position on the form of adjudication of the lands, "when it has not even established the area that the State has recognized;"<sup>110</sup> and that "at the same time that the PEU was inviting the indigenous communities to the April 28 meeting, it was summoning the creole families who inhabit the area for April 29 and 30, in order to 'advance in the presentation of the certificates required for granting the public deeds', arguing that they would thus be able to receive the lands they inhabit, which correspond to the indigenous ancestral territory that is the subject-matter of the claim."<sup>111</sup> For this reason they requested, once again, that the IACHR adopt a merits report in the present case.

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<sup>106</sup> Communication by the Provincial Government of Salta to the Ministry of Foreign Affairs of Argentina, sent to the IACHR through note received on February 10, 2009, transmitted to the petitioners on February 26, 2009.

<sup>107</sup> Communications from the petitioners to the IACHR received on October 20 and November 14, 2008, transmitted to the State through note of February 2, 2009.

<sup>108</sup> Letter attached to the communication by the petitioners to the IACHR received on May 13, 2009, and transmitted to the State by the IACHR on May 20, 2009.

<sup>109</sup> Letter attached to the communication by the petitioners to the IACHR received on May 13, 2009, and transmitted to the State by the IACHR on May 20, 2009.

<sup>110</sup> Letter attached to the communication by the petitioners to the IACHR received on May 13, 2009, and transmitted to the State by the IACHR on May 20, 2009.

<sup>111</sup> Communication by the petitioners to the IACHR received on May 13, 2009, and transmitted to the State by the IACHR on May 20, 2009.

*Report on the land regularization process, submitted by the Province of Salta in May, 2011.*

116. On May 3, 2011, the State sent the IACHR a detailed report, drafted by the Provincial Executing Unit, on the "Process of land regularization in Fiscal Lots 55 and 14", between October 2008 and April 2011. The contents of this report are of critical importance in understanding the current posture of the case.

(a) First, the Provincial Government describes the legal provisions on the grounds of which the Provincial Executing Unit was established (Resolutions 65/06 and 804/07, and Decrees 2786/06 and 4705/08), and it explains that "the advances made in the land regularization process of Fiscal Lots 55 and 14, and in relation to the technical-environmental and methodological requirements to obtain the Agreements between the Parties (on the final location of the territories claimed by each sector), led the members of the PEU, together with the local organizations, to undertake tasks related to structural matters, for the purpose of satisfying the basic necessities of the creole families who will voluntarily relocate because they are occupying territories of traditional indigenous use, thus generating, from the provincial State, the legal and political tools for a comprehensive urban-rural planning for Fiscal Lots 55 and 14. // For these reasons, it was deemed necessary for the general coordination of the PEU to be headed, during this new stage, by the Ministry of Government, Security and Human Rights, which was decided in Decree 3.345/10, approved on August 17, 2010."

(b) Second, the Provincial Government explains that the PEU meets periodically, and that its work seeks to promote the active participation of the indigenous and creole population of the Fiscal Lots, including the Lhaka Honhat Association.<sup>112</sup> The Provincial Government provided the Minutes of the participatory meetings held until that date in the framework of this process, and summarized their most salient results and the agreements reached therein, as described hereunder.

(c) Third, the Provincial Government summarizes the "advances, agreements and achievements obtained" between 2008 and 2011.

(i) For the year 2008:

"- Decree 4705/08 was drafted and approved (...).

- The Ministry of Environment and Sustainable Development of the Province was entrusted with the task of coordinating the land regularization process, and of being the administrative legal headquarters of the process.

- The work strategies were established, as well as the schedule of activities for 2009.

- The first meeting was held in the city of Salta, between the members of the new PEU and the representatives of the local organizations that represent the creole families and the indigenous communities of Lots 14 and 55 [Pilcomayo Cooperative, Real Frontera Board of Neighbors, Civil Association No. 82 (indigenous community), Organization of Creole Families (OFC) and Lhaka Honhat Indigenous Association], with the presence of their advisors, the Fundapaz and Asociana NGOs.

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<sup>112</sup> According to the Provincial Government, "The participation of the local population –indigenous and creoles- in the adoption of decisions is the fundamental basis of the work that the PEU carries out for the regularization of the lands. All activities that are carried out are negotiated, debated and agreed with the Base Organizations. Social actors' perception of the territorial conflict, the possible solutions and the routes to be followed, are the fundamental input for the advancement of the land regularization process carried out by the current government. The PEU maintains (in addition to the meetings and workshops on the ground) a fluid telephone and virtual contact with the Organizations and their supporting institutions – namely: the Lhaka Honhat Indigenous Association, the Organization of Creole Families, the Real Frontera Board of Neighbours, the Pilcomayo Cooperative, the Indigenous Communities and Creole Families who are not represented by said institutions, Asociana, Fundapaz. // Except for the periods during which, for climate reasons (end of December until end of March) the technical team cannot go into the field, every 15 or 30 days Informative Meetings or Participatory Workshops are held in the area, coordinated by the PEU with representatives of the Indigenous Communities and the Creole Families, with the presence of second-degree organizations and supporting institutions."

- Reports were presented on the status of the process of analyzing the dossiers submitted by the Creole Families, so as to distinguish the cases where verifications will be made on the ground, from those that correspond to requests that had observations because they failed to prove the twenty-year occupation requirements.
- It was agreed, with the indigenous and creole organizations, to open a new stage of presentation of requests, for those creole families who had not yet submitted their dossiers, setting April 30, 2009, as the closing date for this purpose.
- Through a consensual agreement between the Provincial State (through the PEU) and the base organizations of the area, the guidelines for joint work and the schedule of activities for 2009 were established."

(ii) For the year 2009:

"- A final list was made of the creole dossiers that need to be verified on the ground, which have incomplete documentation, or have content mistakes.

- The creole inhabitants who have not submitted the requests with the corresponding documentation were notified through the local police, informing them of the requirements, schedules and places of presentation.

- It was agreed to hold a meeting with the indigenous communities on April 28 in Aguaray and with the creole families on April 30 in Santa Victoria Este.

- On April 28, 2009, the first meeting of indigenous communities was held in the Aguaray Municipal Complex, with the purpose of generating a space for the indigenous communities to express, through their representatives, the manner in which they wish to have the title to the lands that they traditionally occupy transferred to them, and to indicate their needs and perceptions on the land regularization process, so as to advance in a joint manner towards the final resolution of the property conflict. Approximately ninety representatives of indigenous communities that inhabit Lots 55 and 14 participated. Representatives of State authorities and NGOs that support indigenous communities were also present. On account of the petition presented by the Lhaka Honhat Association through CELS before the Inter-American Court of Human Rights (sic), the following authorities were also invited to the meeting: Ministry of Foreign Affairs, National Human Rights, IPPIS, INADI, INAI, CPI, Directorate of Juridical Personalities, Government Notary Public and State Attorney for the Province. (...)

The different speakers conveyed their communities' and/or organizations' wishes, and they was repetitively expressed their will to continue with the land regularization process that was being developed, emphasizing the need to keep good coexistence with the creole neighbours in order to reach agreements between the parties and thus expedite the advance of the process. They also requested that the agreements reached up to this date be respected, emphasizing the 243 thousand hectares assigned to creole families and the 400 thousand hectares assigned to indigenous communities. It became evident that some communities claim a single title at the name of all of the communities, others claim titles per community, and others for groups of communities.

- On April 29 and 30, the PEU held work sessions and meetings with the creoles in Santa Victoria Este, to receive their new requests. 98 new creole requests for land transfers were received. (...)

- A meeting was held between the three creole organizations and the PEU, where they ratified the agreements set forth in Resolution 65/06 and Decree 2786/07 on compliance with the requirements for access to property titles by the creole inhabitants, and on the number of hectares that correspond to indigenous communities (400 thousand) and to creole inhabitants (243 thousand).

- It was agreed to begin the task of defining the Criteria for Distribution of Lands in order to transfer the lands to the creole families who prove their right, and the need was stated to achieve broad participation and commitments of the inhabitants so as to advance in this process. (...)

- Resolution 340/09 was drafted and approved, establishing the final list of creole inhabitants who comply and do not comply with the requirements established in Resolution 65/06.

- The PEU drafted the Criteria for Land Distribution for the Creole Inhabitants of Fiscal Lots 55 and 14, in accordance with the three proposals submitted by the three creole organizations of the area: Real Frontera Board of Neighbours, Organization of Creole Families, Pilcomayo Cooperative. These criteria, which were elaborated by the Provincial Executing Unit based on

the combination of the three proposals, were presented and discussed on the ground with the local representatives. The final criteria were approved by consensus, resulting in 8 hectares per cow or its equivalent, with a maximum of 900 hectares for those families who have more than 100 cows or equivalents, and a minimum of 20 hectares for the families that have no cattle. (...)

- With this information, the calculations and lists were made of the extent of land that corresponds to each creole family that complies with the requirements, according to the vaccination records of 2006, and the agreed-upon distribution criteria.

- It was planned to initiate the process of Agreements between the Parties in the North Zone of the Lots, taking into account that it is the Zone where dialogue has progressed the most, which will be used as a pilot experience so as to adjust the working methodology in the participatory workshops."

(iii) Between the years 2009 and 2011, "Agreements between the Parties" were sought – that is, agreements between the indigenous communities and the creole families with regard to the territorial adjudication. It is explained in the report:

"The Agreements were initiated on October 15, 2009, and as of this date this work is underway. These Agreements –as agreed to by the assembly- began in what was defined as North Zone – Zone I. In order to carry out this task, the objectives and working methodology were jointly defined (PEU – Organizations), based essentially on Participatory Techniques which were adjusted in accordance with the particular situation of the zones where work is being carried out. Such Techniques consist of:

1. Definition of the area: It is established in Workshops where the Indigenous and Creole Organizations that inhabit the area, the supporting institutions and the representatives of the PEU take part. The area may be modified (reduced or extended) according to the participants' criteria and to technical aspects that are discussed during the workshops.

2. Identification of stakeholders: With the information provided by the local organizations, the supporting institutions and the data generated by the PEU, all of the indigenous communities and creole families that are located within the area under discussion are identified and mapped.

3. Participatory Workshops for the adjustment of the indigenous-creole territory: The participation of the local population in the adoption of decisions for the agreements between parties are the fundamental basis of the work carried out by the PEU. These workshops are summoned through the local radio stations and the organizations of the area. They are held approximately every 15 days in the field, and include the participation of representatives of the indigenous communities and the creole families, representatives of second-degree organizations that represent each sector, supporting institutions and members of the PEU.

3.1. At the start of the meetings for the agreements between parties, in the participatory workshops, a brief description of the advances of the process is made, recalling the most important events, and the necessary information is provided to the participants.

3.2. First the work is divided between two groups, that correspond to each sector (indigenous and creole). These work with satellite images, identifying the territories inhabited and used by each one (families and communities), with the support of members of the PEU technical team.

3.3. Once the group work is finalized, a plenary meeting is held where each group presents its results and explains the work it has done on the images. With this, a 'Territorial Superposition Map' is made, on the grounds of which the dialogues are undertaken, aimed at reaching the agreements between the parties.

3.4. Once the Territorial Superposition Map is defined, the participants go to work in their communities and/or organizations based on the results of the workshop, so as to present their communal proposals in the next meeting, where the dialogues are continued in order to obtain a first version of a map, with a delimitation between the indigenous and creole territories.

3.5. Once this delimitation is made, a technical team from the PEU, together with representatives of each sector, travels throughout the territory mapping the agreement that has been reached, and sketching a 'Geo-referential Map of Agreements between the Parties', which constitutes the input for future measurements.

4. Participatory workshops for the adjustment of the territory between creole neighbours: once the limit between both social sectors has been demarcated, a stage of agreements between creole families is begun, in order to locate –in their territory- the parcels with the

number of hectares that corresponds to each one. For this purpose it is necessary for each family to identify the improvements it has made in its lot, and to negotiate and agree with the neighbouring family the location of the lot. (...)"

As a result of this methodology, the Provincial Government reported the following "Advances and Agreements" per zone as of May, 2011:

**"Zone I:** This zone covers an area of approximately 40.000 ha, inhabited by 5 indigenous communities (La Puntana, La Puntana Chica, Monte Carmelo, La Curvita and Santa María Sector Norte) and 22 creole families. The following achievements were made during the five Participatory Workshops: obtaining the territorial superposition map, reaching an agreement on the division of the territory on the grounds of the physical boundary set by Cañada Magdalena, mapping the indigenous-creole agreement, obtaining the consent to relocation of 8 creole families, and liberating the territory claimed by the communities from creole occupation. This agreement is currently finalized and mapped. The Minutes of the Agreement were signed by the indigenous communities and creole inhabitants of the area. Fieldwork was conducted in order to map (geo-referentiate) the agreement between creole neighbours. The final base map of the agreement between all of the parties of the Zone was made and delivered.

**Zone II:** The next zone to be defined was Misión La Paz – Las Vertientes, which includes 9 indigenous communities (Misión La Paz, Km 1, Km 2, La Bolsa, Las Vertientes, El Sauce, La Paz Chica, Misión Anselmo, San Emilio) and 65 creole families. As of this date, seven Participatory Workshops have been held, in which it was agreed that within this zone there may be spaces left open for the creole posts that are located within the indigenous claim area and who do not have the will to relocate and have reached agreements with the neighbouring communities, upon the condition that the continuity of the indigenous territory is respected and guaranteed. The map of superposition of indigenous-creole territory was obtained. 30 creole families who are willing to relocate were identified, and they expressed their wish to migrate to the zone of Puesto El Rosado. Zone II –Misión La Paz – Las Vertientes- was divided into three sets of dialogues:

1. Sector of Misión La Paz, La Bolsa, La Paz Chica, Km. I, Km. II and La Estrella, who shall dialogue with the families located to the Routh of Rout 86 until before the Los Mogotes post.
2. Creole sector, delimited by the Hogar Viejo post, south of Divisadero, including the Sachapera, Tres Marías, Campo Largo and Amberes up until General Urquiza. This Group shall have the objective of defining the northern limit that will divide the creole and indigenous sectors of this zone.
3. Creole group of the Barilari line, which has the objective of determining, on the ground and through a geo-referentiation, the delimitation of the posts.

The PEU is currently serving as a mediator between one creole family and the Chief of the Community of La Bolsa, in order to close the agreement.

**Zone III:** It was decided to create a Zone denominated '113 thousand hectares', as the third zone for agreements between the parties. There is no indigenous claim over this zone. Four Participatory Workshops were held, identifying the families that inhabit therein, the surface of land they occupy in accordance with the established criteria, obtaining a free area of approximately 80 thousand hectares to locate the families that will be moved from other areas claimed by the communities. Members of the Organization of Creole Families (OFC) requested the PEU to introduce an exception to the prohibition of tending fences in Fiscal Lots 55 and 14, for this zone of 113 thousand hectares that are free from claims to traditional occupation by the indigenous communities. It was agreed by consensus that in the 113 thousand hectares zone, fences of no more than 100 hectares of land may be tended, only for productive purposes (introduction and/or conservation of pasture, and animal contention). This was endorsed by the Lhaka Honhat Indigenous Association and is on the record.

**Zone IV:** The first Participatory Workshop was held in the zone called 'Santa María', with the objective of initiating the Agreements between the Parties.

Three zones have yet to be opened: Alto La Sierra, Rancho El Ñato, and Pueblo de Santa Victoria Este; this task has been programmed for the present year.

There are currently 20 indigenous communities, their second-level organizations, 186 creole families and their organizations, which have been duly informed, are in the process of negotiations and actively participating, covering a working surface of 263 thousand hectares.

We shall continue to work with the same methodology until the entire territory has been covered. It is calculated that 50% of the 462 creole families that comply with the requirements shall be relocated in the areas that are free from indigenous occupation and claims, most of them in Fiscal Lot 14.”

(iv) The Provincial Government describes the process of preparing the relocation of the creole families, pointing out that “by virtue of the advances in the agreements between the parties and the needs of the process of voluntary relocation of creole families who are settled within the Territory of Traditional Use of the indigenous communities, a budget with the corresponding needs and costs was submitted to the Provincial Executing Unit by the base organizations –both creole and indigenous- and their supporting institutions.” The attached budget is signed by: Francisco Perez – Lhaka Honhat Association; Rogelio Segundo – Lhaka Honhat Association; Domingo Pérez – Indigenous Community; Arturo Barrozo – Organization of Creole Families; Esmérito Arenas – Organization of Creole Families; Dante Albornoz – Organization of Creole Families; Saturnino Ceballos – Real Frontera Board of Neighbours. The PEU also reports that it has started to look for financing, which “would be destined to carry out the perimetral measurement of both lots, the measurements of the indigenous territory and the individual ones of the creole families; to public and land infrastructure works such as roads, electricity, water wells, etc.”.

(v) The Provincial Government further explains that as a consequence of the different meetings held with the national and provincial authorities in pursuit of financing, and taking into account the needs of the land regularization process, “the needs were prioritized and the thematic axes were organized into three stages: 1. Measurements and granting of title to property; 2. Macro-level and land infrastructure for the Relocations of Creole Families; 3. The elaboration and implementation of a Comprehensive Development Plan for Lots 55 and 14, which includes both social sectors – the creole and the indigenous ones.”

(vi) The Provincial Government points out the participation of the Lhaka Honhat Association in this process:

“Lhaka Honhat, through its representative Francisco Pérez, has expressed that it supports the process and accompanies the creole organizations in their petitions, as well as the measures that tend to guarantee the enjoyment of the rights for which they have been fighting for many years, but he clarifies that the signature of this Agreement does not imply quitting or desisting from the claims and petitions they have presented to the IACHR, nor to the procedure that is currently underway before this international body, numbered 12094, initiated to achieve the effective protection of their indigenous rights, linked to their traditional territories, natural resources and culture, inter alia. The signature of this Agreement may not be interpreted either as a re-opening of the friendly settlement process, which was closed before the IACHR.”

(d) Finally, as complementary information, the State reports that “the territory of Fiscal Lots 55 and 14 has the necessary protection granted by the Law on Territorial Organization of Native Forests of the Province of Salta (Law 7543) and its Regulatory Decree, under Conservation Categories I and II (Red and Yellow).”

117. The Provincial State provided, together with its report, a set of Minutes of Meetings, some of them notarized and others handwritten, which record the development of several meetings held between the representatives of the Government, of the indigenous communities of the Fiscal Lots, of the Lhaka Honhat Association and of the creole families, as well as their advisors, between April 2009 and September 2010. In sum, these records demonstrate that the representatives of the Lhaka Honhat Association took an active part in the meetings and in the process, encouraging all of the parties to reach a common solution and constantly reiterating their claim to a single property title to the lands. They also prove that several indigenous communities of the area, also participating in the process, do not form part of the Lhaka Honhat Association, and expressly claim a separate property title.

118. On April 27, 2011, Commissioner Luz Patricia Mejía presided over a working meeting in Buenos Aires on this case, in the course of her visit to Argentina. The petitioners were timely invited to this meeting, but they declined to attend<sup>113</sup>.

119. Despite the absence of the petitioners, the working meeting was held with the presence of State representatives from the national and provincial levels. In the course of the meeting, the State described the different advances and explained in detail its report of May 3, 2011.

120. On June 8, 2011, the IACHR transmitted the report presented by the Provincial Government of Salta on May 3, 2011, to the petitioners. The petitioners response to said report, received on July 13 by the IACHR, called once more for a merits report and noted

“without attempting to carry out a complete examination of the data provided by the Province, for the sole purpose of proving that there are still no guarantees that indigenous rights will be respected, the Salta Government’s report mentions that ‘50% of the 462 creole families that comply with the requirements, shall be relocated in the areas that are free from indigenous occupation and claim’. That is, there are no securities that the remaining 50% of creole families will be relocated. Moreover, the information provided by the province suggests that those who do not wish to relocate will be allowed to remain in indigenous territory. In addition, the provincial government has approached the implementation of its land allocation proposal from the standpoint of the creole rights. All of the legal provisions which have been issued and applied up to the present refer to the creole families, and consolidate the notion that these families will remain in the indigenous lands. [The information submitted does not report any strategy that tends to seek fiscal lands outside of Lots 55 and 14, or alternative solutions to be offered to the creole families so that they have the option of relocating outside of indigenous territory]. Finally, and as a confirmation of the paradigm with which the Provincial State is addressing this project, the Government of the Province conditions the transfer, delimitation, demarcation and titling of the indigenous lands to the existence of an agreement between the parties, that is to say between the indigenous communities and creole families. [PEU. Report. From page 9 onwards the Province of Salta explains the process by which it has subjected to the will of the creole families the process of land transfer and titling]. In this regard, the IAHR Court has expressed, on repeated occasions, that a procedure which does not take into account indigenous peoples’ specificities and subjects the transfer of lands to the will of one of the parties, is not effective.”

The petitioners annexed to this communication the minutes of the meeting held in the Community of San Luis by the chiefs of the communities that form part of the Lhaka Honhat Association on June 13, 2011, in which they made specific

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<sup>113</sup> The petitioners explained their motives in the following terms: “Insofar as the friendly settlement process is broken, from the technical-legal standpoint, there is currently no area in which a working meeting could have a purpose compatible with the procedural status of the case. // Second, during the hearing held in October 2009 at the IACHR headquarters, it was the National State itself who recognized the many damages produced by the passage of time –eleven years since the petition by then, and almost thirteen by now-, and consequently requested the IACHR, out of its own accord, to issue the merits report. (...) Eighteen months have now elapsed since then, and we are still waiting for that pronouncement. // Third, it is important to underline that over the past years, the Government of Salta has promoted diverse meetings of different nature, with indigenous communities and creole families. Some representatives of Lhaka Honhat have participated in these spaces in order to learn about the Province’s strategies, so as to foresee their effects, and especially to have an incidence upon decisions which can definitely affect their future. However, on several occasions, Lhaka Honhat expressed that its participation was not tantamount to returning to a friendly settlement process in the international case. (...) // The truth is that until such time as a decision by the inter-American human rights system has been adopted, the indigenous communities will have no specific guarantee that they will be granted a title that respects their form of relating to the land, that the creole families will be relocated, or that they will be consulted each time that the State or private groups attempt to implement, within indigenous territory, measures that can alter their way of life. (...)”



recommendations to the Inter-American Commission for the contents of a merits report.

***The construction of the international bridge between Misión La Paz and Pozo Hondo, and the surrounding public works***

121. In 1995, in the framework of a project for the development and integration of the Chaco region into MERCOSUR, the construction of an international bridge over the Pilcomayo River, connecting Misión La Paz (Argentina) with Pozo Hondo (Paraguay), began. "In addition, projects are already in place for the corresponding roads that will complete the inter-oceanic (Atlantic-Pacific) corridor, and a vast urbanization plan for the region which includes a border control center, a customs and migration post, a health center, school, housing and businesses, service station, restaurants, exchange bureaus, as revealed by the urbanization plan issued by the Ministry of Economy – General Directorate of Architecture of the Province of Salta."<sup>114</sup> These projects, both the roads and the urbanization works, would traverse the entire lands inhabited by the indigenous communities.

122. An "Urbanization Plan" of Misión La Paz, produced by the General Directorate of Architecture of the Salta Ministry of Economy in August, 1994, has indications of construction projects for a frontier control post, a square, a Police casino, official housing for State workers, a health center, a school, businesses, a service station, a restaurant and an exchange bureau.

123. Different State acts produced in the course of the public tender process for the construction of the international bridge correspond to administrative dossier No. 33-0155.886/94, of the Secretariat of Public Works and Services of the Province of Salta.<sup>115</sup>

124. The public tender process was conducted at the same time that the Provincial Government had established an Honorary Advisory Commission mandated with the adoption of an Opinion on the indigenous communities' lands situation.

125. According to the evidence, the projected work had no environmental impact assessment performed and the indigenous communities that inhabit the area were not consulted in advance. In addition, the authorities omitted conducting any subsequent consultation with the indigenous communities, who are directly affected by the construction of these works."<sup>116</sup>

126. The implementation of this State project in indigenous territory allegedly would irreversibly modify the characteristics of the region, which in 1998, when the petition was filed, had a low population density and scarce urbanization. "Should the projected works be carried out, we the indigenous peoples that inhabit the region will be displaced from the territories we occupy since

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<sup>114</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>115</sup> Specifically, copies of the following documents were provided: (a) Copy of the call to public tender for the execution of the International Bridge Misión La Paz – Río Hondo – Public Tender No. 07/94, published on September 20, 1994, in Official Bulletin No. 14.507 of the Government of the Province of Salta by the Ministry of Economy – Secretariat of Public Works and Services – Transit directorate. (b) Copy of Resolution No. 211-D, approved on September 22, 1994 by the Ministry of Economy of the Province of Salta – Secretariat of Public Works and Services, which decided to approve the technical dossier made by the Salta Transit Directorate for the execution of the work. (c) Copy of Decree No. 2581 of December 2, 1994, of the Ministry of Economy of the Province of Salta – Secretariat of Public Works and Services, through which the public tender process was approved, the construction of the work was adjudicated to the company Giacomo Fazio S.A., and the Salta Transit Directorate was enabled to sign the respective contract.

<sup>116</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

time immemorial, thus threatening our subsistence base, cutting off the hunting and gathering circuit areas that extend from the Pilcomayo river to the forest.”<sup>117</sup>

127. In the brief submitted on July 7, 1999 by the State of Argentina recognized the impact that the works would produce upon the indigenous communities, in the following terms: “the INAI considers that the construction of the International Bridge over the River Pilcomayo, Misión La Paz (Argentina) – Pozo Hondo (Paraguay), as well as other diverse roads and buildings, will significantly modify the way of life of the indigenous communities, and that it would have been appropriate to hold consultations, as well as a report on those works’ environmental impact. // For such reason the National Institute of Indigenous Affairs has offered its willingness to apply all of the available mechanisms for complying with the constitutional mandate of recognizing the communal possession and property of the lands occupied by the indigenous (Article 17, paragraph 17 of the National Constitution) and to develop mediation processes between the parties.”

128. On September 11, 1995, the attorney for the Lhaka Honhat Association filed an *amparo* lawsuit against the Province of Salta before the Provincial Court of Justice, asking it to order the immediate suspension of the construction works of the Misión La Paz – Pozo Hondo Bridge, as well as of any urbanization or road building work, or act of alteration of the indigenous reservation of Misión La Paz and/or of fiscal lots Nos. 55 and 14. As a precautionary measure, they requested an injunction to halt the construction works. This request was based on the fact that the construction of the international bridge and the surrounding urbanization had been undertaken without consulting the indigenous peoples, and without carrying out a prior environmental impact assessment, which violated the applicable constitutional and international legal provisions. The Court of Justice of Salta denied the requested injunction on November 8, 1995. Thereafter, the same Court of Justice of Salta rejected the *amparo* lawsuit on April 29, 1996. On May 14, 1996, the representatives of the Lhaka Honhat Association presented an extraordinary federal appeal, which was rejected. On February 27, 1997, the representatives of the Association presented a *queja* appeal before the Supreme Court of Justice of the Nation against the rejection of the extraordinary federal appeal. This *queja* appeal was denied by the Supreme Court on December 10, 1997.

129. As this judicial process was being conducted, the Government of the Province of Salta continued and finalized the construction of the bridge. By the date of presentation of the petition to the IACHR in 1998, the construction of the planned roads and urbanization works was imminent.

130. Petitioners reported that on May 21, 1998, “personnel of the Public Works Directorate of the Province of Salta, under the supervision of an architect, arrived in Misión La Paz with the purpose of carrying out measurements related to the future urbanization plan.”<sup>118</sup> Consequently they presented a petition to the Governor of the Province of Salta on July 1, 1998, asking him to inform them about this, given that the facts would reveal an intention to continue with the works in the ancestral territory without evaluating their social and environmental impact.

131. The evidence indicates that the entire process of public tender, contracting and construction of the questioned public works was developed by the Provincial Government of Salta without the intervention but with the endorsement of the National Government.

132. In January 2000, the petitioners submitted photographs of houses and other buildings of different sizes, which they reported were to be used for a National Police post. The

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<sup>117</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

<sup>118</sup> Initial petition, received by the IACHR on August 4, 1998, and transmitted to the State on January 26, 1999.

petitioners also informed the IACHR about “the local Government’s announcement of giving houses to the members of one of the communities represented by the Association, in an attempt at undermining the unity with which the communities have managed to pursue their claim.”<sup>119</sup>

133. On September 25, 2000, the petitioners informed that Resolution 138 issued on April 6, 2000, by the Secretariat of Public Works and Services of the Province of Salta, approved the rescheduling and the technical documentation of the construction works for the Border Post Misión La Paz – Departamento Rivadavia.”<sup>120</sup>

134. At the working meeting held on April 27, 2011 in Buenos Aires with Commissioner Luz Patricia Mejía, the representatives of the Province of Salta informed that the Misión La Paz International Bridge Project that connected Brazil, Paraguay and Argentina was stopped and housing works were done, in agreement with the communities.<sup>121</sup>

***Construction and broadening of public roads in the area in dispute***

135. On September 25, 2000, the IACHR received a copy of the Federal Infrastructure Plan 2000-2005 of the Ministry of Infrastructure and Housing, which included the four above-referred segments of National Route No. 86: Limit with Formosa – Misión La Paz; Misión La Paz – KM 84; KM 84 – Tonono; Tonono – Tartagal. Several segments of National Route 86 would cross the petitioner communities’ territory, in regard to which, according to petitioners, “no consultation had been planned, nor is consideration being given to the possibility of alternative locations, no environmental impact assessment has been carried out, and what is most fundamental, the communities have not even been informed of the specific existence of this plan.”<sup>122</sup>

136. On July 19, 2001, this Route was reprioritized by means of a Decree.<sup>123</sup> As a consequence of the issuance of this decree, on May 3, 2001, an Announcement of Summoning for Public Tender was published in newspaper Página/12, which included National Route 86; the conditions for awarding the contract were placed at the disposal of all interested parties at the National Transit Directorate.

137. By July 19, 2001, the State had started, at the initiative of the Province of Salta, the repair of a road that communicates Santa Victoria Este with La Paz, “without any type of prior notice.”<sup>124</sup>

138. On February 5, 2005, the chiefs of the communities that form part of the Lhaka Honhat Association reported on the execution of works to broaden Provincial Route No. 54 in their

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<sup>119</sup> Brief by the petitioners received on January 6, 2000, transmitted to the State by the IACHR on February 18, 2000.

<sup>120</sup> Communication by the petitioners received on September 25, 2000, and transmitted to the State by the IACHR on September 25, 2000.

<sup>121</sup> Minutes of the working meeting held between State representatives and Commissioner Luz Patricia Mejía on April 27, 2011 in Buenos Aires, Argentina. Petitioners were timely invited to the meeting but declined.

<sup>122</sup> Communication by the petitioners received on September 25, 2000, and transmitted to the State by the IACHR on September 25, 2000.

<sup>123</sup> Communication by the petitioners to the IACHR of July 19, 2001, received by the IACHR on July 19, 2001 and transmitted to the State on August 31, 2001.

<sup>124</sup> Communication by the petitioners to the IACHR of July 19, 2001, received by the IACHR on July 19, 2001 and transmitted to the State on August 31, 2001.

territory, without them having been consulted.<sup>125</sup> They also reported that “both sides of the route were deforested, cutting native species that are traditionally used and possessed by our communities (National Constitution Art. 75 par. 17, and Art. 15, ILO Convention 169).”<sup>126</sup> The petitioners’ representatives provided copies of several photos depicting heavy machinery carrying out works on a road.<sup>127</sup>

139. The Provincial Government of Salta responded to these last claims through a communication sent on February 21, 2005, to the Ministry of Foreign Affairs, and copied to the IACHR Executive Secretariat, wherein it explained that Provincial Route No. 54 was not a new road, but one being improved to avoid flooding, for which the adjacent communities had been consulted. The works were deemed necessary to maintain the continuous access of the communities to health and education services. Moreover, the General Transit Directorate had been instructed “to limit its works to the levels of elementary conservation and maintenance of the Route, and to abstain from carrying out works that affect the surrounding plant cover.”<sup>128</sup>

### ***Deforestation of the area***

140. According to the evidence submitted, deforestation activities were being carried out in the ancestral territory of the indigenous communities, in express violation of the prohibition established in Decree 2609 of 1991 of the Provincial Government.

141. The purpose of the deforestation was to provide firewood for the brick factories that were to supply the demand caused by the public works undertaken by the Provincial Government. The petitioners submitted the testimony of Anthropologist Morita Carrasco,<sup>129</sup> as well as of pictures of an artisanal brick production, and of some piles of wooden posts.

142. On August 5, 2002, during a working meeting held in Salta, the President of the National Institute of Indigenous Affairs gave the IACHR representatives a copy of a report on the “Environmental Deterioration of Fiscal Lots 55 and 14 of the Salta Chaco”, conducted in May 2001 under the direction of the National Parks Administration. After detailed observations, this study

<sup>125</sup> They explained that the Provincial Transit Directorate had, for some time now, been carrying out rectification, improvement and broadening works in that Provincial Route, in the area between Santa Victoria Este and Misión La Paz; and they informed that “we have learned informally that these tasks are preparations for patching works of Route 54, in the stretch between these two places.” Communication by the petitioners received on February 8, 2005, and transmitted to the State by the IACHR on February 16, 2005.

<sup>126</sup> Communication by the petitioners received on February 8, 2005, and transmitted to the State by the IACHR on February 16, 2005.

<sup>127</sup> Communication by the petitioners received on February 8, 2005, and transmitted to the State by the IACHR on February 16, 2005.

<sup>128</sup> Communication by the Secretary General of the Governor’s Office of the Province of Salta to the Ministry of Foreign Affairs, February 21, 2005, copied to the IACHR.

<sup>129</sup> “The bricks for the Police post works come from a clearing owned by Mr. Loche in the same area of Misión La Paz. All of the works for the Border Post, Morillos and even the Paraguay band come from here. And the firewood is extracted from the same area, everything is now being cleared. Some boys go there to work and we see the machinery and that brick factory. Sometimes two batches of 50.000 bricks are burnt twice a week. We have calculated: every 1000 bricks require 10 cubic meters of wood, for 3 days. Each burning is the equivalent of 1 km of wood. And this is done twice a week”. // Another person added: ‘In my area (Km. 1) the same is happening, they go with chainsaws and devastate everything, cutting even the smaller trees’. (...) After this meeting, in the month of April Anthropologist Morita Carrasco, as may be read in her testimonial declaration, made a visit to Fiscal Lot 55 in the Department of Rivadavia of the Province of Salta to carry out a photographic survey of the destruction of the environment, and she was able to confirm the foregoing testimonies, taking pictures of the brick factory, the devastated areas of the forest, and piles of wood that are legally protected such as palo santo, and others such as palo Amarillo which are to be used to build river defenses (...).” Communication by the petitioners received on September 25, 2000, and transmitted to the State by the IACHR on September 25, 2000.

concludes: "Environmental deterioration has been very large, and persists. The main agent is cattle-raising, with continuous overgrazing, and in second place 'mining' forest extraction. These activities were promoted by the National State and the Provincial State. Therefore the aboriginal claim to reparation of this historical damage by such authorities is pertinent."

143. On February 8, 2005, the petitioners reported that the logging and deforestation of the area continued. The Provincial Government of Salta responded to these claims in a communication sent on February 21, 2005 to the Ministry of Foreign Affairs, and copied to the Executive Secretariat of the IACHR, in which it explained that an agreement with the National Police was ready for signature, for the implementation of constant police patrolling of Fiscal Lots 14 and 55, in order to prevent logging activities.<sup>130</sup>

144. In December 2006, some members of the Lhaka Honhat Association made a field verification of the continuity of illegal logging and the establishment of new cattle-raising posts within the area of traditional indigenous occupation of Fiscal Lots 14 and 55. In their report they concluded that "in the last years, illegal extraction of wood from Fiscal Lots 14 and 55 has increased. The trucks and tractors come in weekly in pursuit of wood loads, and when they leave there is no type of control by the competent authorities. Afterwards in order to circulate they use authorized permits for forestry exploitation, issued for properties that are far away from where they logged the wood." This report was accompanied by several photos of piles of wood posts, ready to be transported, or of trucks loaded with illegally cut wood, taken in December 2006 at different points of the Fiscal Lots; and it denounced the inaction of the competent State authorities to control this irregular extraction.

#### ***Tending of fences in the territory by the non-indigenous population***

145. Since the start of their territorial claims, and consistently throughout the proceedings before the IACHR, the petitioners have reported the tending of wire fences within the territory of Fiscal Lots 14 and 55 by the creole inhabitants, viewing them as illegal appropriations of the lands which suppress indigenous mobility and obstruct their hunting and gathering activities.

146. On January 17, 2002, petitioners reported to the IACHR that in spite of the Salta Government's commitment of December 15, 2000, to stop the tending of wire fences by the creole or other inhabitants of the area, the fences were still being installed.<sup>131</sup>

147. In the course of the friendly settlement process before the IACHR, the Government of Salta – Minister of Production and Employment adopted Resolution No. 295 of August 2, 2002, prohibiting the tending of any new fences until a resolution of the case had been reached. After that, the Commission has not received any conclusive information on whether or not the tending of fences has been in fact suspended.

#### ***Oil exploration activities***

148. On July 19, 2001, the petitioners informed the IACHR that "without any prior State notice and in an absolutely unexpected manner, the General Fuel Company (*Compañía General de Combustibles – CGC*) began to conduct hydrocarbon exploration activities, in the framework of

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<sup>130</sup> Communication by the Secretary General of the Governor's Office of the Province of Salta to the Ministry of Foreign Affairs, February 21, 2005, copied to the IACHR.

<sup>131</sup> Communication by the petitioners to the IACHR, received on January 17, 2002. Reiterated in the communication by the Lhaka Honhat Association to the IACHR of December 26, 2001, transmitted to the State on March 21, 2002.

“Seismic Prospection 2D Program’, in Fiscal Lots 14 and 55 (Department of Rivadavia, Province of Salta). The Company’s activities are a product of the concession granted by the National State – Secretariat of Energy and Mining of the Nation, Ministry of Economy.” These prospecting activities were initiated without consulting with the indigenous communities.

149. The representatives of the Lhaka Honhat Association resorted unsuccessfully to different State authorities in order to halt these prospecting activities. On March 22, 2001, they sent a letter to the Ministry of Foreign Affairs, copied to the Government of Salta; in response, Foreign Affairs sent notes to the National Institute of Indigenous Affairs, requesting information on the facts, and to the Ministry of Economy. The representatives of the Association also resorted to the Secretariat of Energy and Mining of the Nation, requesting a hearing to address the matter; “finally a meeting was held with the Sub-Secretary of Fuel, in which although a certain interest in solving the matter transpired, no real and precise commitment was assumed to reverse the situation.”<sup>132</sup>

150. In a note dated October 4, 2001, the National Government stated before the IACHR that “the Federal Government – through the governmental agency with jurisdiction in the matter - has convoked working meetings with the entrepreneurs who obtained – through a public tender - the concession of the oil exploitation and exploration activities in the area affected by the claim, in order for them, prior to conducting the activities necessary to fulfill their purpose, to invite the communities to dialogue so as to secure them the conservation of their territories.”<sup>133</sup>

## **V. LEGAL ANALYSIS**

### **A. Preliminary issues**

#### **1. The indigenous communities who are the alleged victims of the present report**

151. The IACHR notes that the number of indigenous communities that inhabit Fiscal Lots 55 and 14 has varied in the course of the present proceedings. The initial petition of 1998 referred to 35 indigenous communities, while in October 2007 the petitioners pointed to a total of 45 communities; in turn, the State, in February 2009, referred to 50 communities, and in May 2011 it informed about 47 communities.

152. The petitioners provided a clear anthropological explanation of this numerical variation,<sup>134</sup> given the nomadic, hunter-gatherer way of life of the indigenous peoples of the Salta Chaco. They have a significant fluidity in the composition of the communities and in their places of settlement, in the course of which it is frequent for some groups to separate themselves (transitorily or permanently) from the larger communities to which they are ascribed, establishing their own independent settlements, or to the same extent, some groups that were previously separated come together in one settlement to establish a new community. This “fission-fusion” dynamic, which is a distinctive trait of the Wichí, Chorote, Toba, Chulupí and Tapiete indigenous peoples, corresponds to the socio-cultural characteristics described by specialized ethnological literature, in general, for nomadic societies whose mode of subsistence is based on hunting, fishing and gathering. This

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<sup>132</sup> Communication by the petitioners to the IACHR of July 19, 2001, received by the IACHR on July 19, 2001, and transmitted to the State on August 31, 2001.

<sup>133</sup> Communication by the State to the IACHR, received on October 4, 2001, and communicated to the petitioners on October 12, 2001.

<sup>134</sup> Petitioners’ observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

distinctive feature of these indigenous peoples is found by the IACHR to be a proven fact which the State has not questioned.

153. The IACHR also notes that the precise counting, identification and mapping of the indigenous communities of the area are processes which are unfolding still, and which have been part of the territorial claim process from the beginning. Both the Lhaka Honhat Association and the organizations that support it, as well as the Provincial Government, have undertaken during the past several years different "survey" initiatives, censi and cartographies of the indigenous settlements of Fiscal Lots 55 and 14,<sup>135</sup> which would appear not to have been completely finalized. Regardless of the ongoing character of these counts, the indigenous communities of the area are determinable, and the State has not called this identifiable character into question.

154. Within the group of the indigenous communities of Fiscal Lots 14 and 55, for the purposes of the present decision, the alleged victims are the ones that are associated, through their corresponding traditional authorities, with the Lhaka Honhat Association.

155. The IACHR notes that, according to information provided by the State, the Lhaka Honhat Association is currently composed of twenty-seven affiliate communities, namely: (1) La Merced Nueva; (2) Bella Vista; (3) Kom Lañoko – Misión Toba – Monte Carmelo; (4) Misión La Paz; (5) Misión La Gracia; (6) Santa Victoria 2; (7) Pozo El Toro; (8) Pozo La China; (9) Lantawos – Alto La Sierra; (10) Misión San Luis; (11) La Puntana I; (12) La Merced Vieja; (13) Las Juntas; (14) Rancho El Ñato; (15) Pozo El Tigre; (16) La Curvita; (17) Padre Coll; (18) Santa María; (19) Km 1; (20) Km 2; (21) Pozo El Mulato; (22) El Cañaveral 1; (23) La Bolsa; (24) El Cruce; (25) Las Vertientes; (26) Pin Pin; and (27) El Cercado. Another twenty indigenous communities of the area are not affiliated to this organization. It is these twenty-seven specific communities which shall be considered to be the alleged victims of the present decision; the IACHR understands that the members of each one of them are determinable, and that they are in the process of being counted and identified in a precise manner.

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<sup>135</sup> Thus, it is proven in the case file that (i) between 1989 and 1991, the indigenous communities of Fiscal Lot 55 carried out a census and counting initiative in order to submit their first formal claim to title to property to the Government; (ii) in 2001, the Provincial Government of Salta adopted Decree 339/01, creating a technical commission in charge of carrying out a precise mapping of the location of the indigenous and creole communities that resided in Fiscal Lots 55 and 14; (iii) at the end of 2001, pointing to the delays in the implementation of Decree 339/01, the Lhaka Honhat Association, with the support of the organizations ASOCIANA, IWGIA and others, undertook a new mapping process, and reports on its advances were submitted to the IACHR; (iv) during the different meetings held in the course of the friendly settlement process during 2001, the parties reported to the IACHR that the National Government, through the INAI, had also carried out its own process of survey and mapping of the indigenous communities, which would be completed through the process derived from Decree 339/01 of the Provincial Government; (v) in the working meeting held on October 4, 2002, between the parties, in the framework of the friendly settlement process, the petitioners and their advisors together with the National and Provincial Government agreed to establish a technical team, in charge of elaborating a socio-demographical map which could harmonize the information that both parties had, to be later submitted for discussion; (vi) in different subsequent meetings of the friendly settlement process during 2002, 2003 and 2004, reciprocal commitments were assumed in the sense of providing the population and cartographic information to the members of the technical team, in order to produce a unified socio-demographic map of the Fiscal Lots; (vii) the results of the mapping exercise up until March 2005 were incorporated into the proposal of the Provincial Government of Salta for the formal adjudication of the lands; (viii) in the agreement reached on March 14, 2006, between the General Secretary of the Salta Governor's Office and the General Coordinator of the Lhaka Honhat Association, it was stipulated that a survey of the indigenous communities that inhabit Lots 55 and 14 had to be made; (ix) in the agreements signed by the parties since 2005, as well as in the Decrees adopted by the Provincial Government of Salta during this period, it is stipulated that the identification and mapping of the areas where the indigenous and creole settlements are superimposed must be carried out; and (x) part of the methodology which has been followed during the last stage of the process, since 2009, consists of dividing the lands that are to be adjudicated in Lots 14 and 55 into Zones, and for each zone, carrying out a process of participatory identification and geo-referenciation of the location of the corresponding indigenous communities.

## 2. Ancestral indigenous presence in the area.

156. In its decisions respecting indigenous peoples, the Inter-American Court has examined evidence of the historical occupation and use of the claimed lands and resources by members of the community;<sup>136</sup> the development of traditional subsistence, ritual or healing practices; the naming of the land in the community's language;<sup>137</sup> technical studies and documentation; as well as specialized opinions on the aptness of the claimed territory for the continuity of the community's way of life.<sup>138</sup>

157. In light of the criteria established in the inter-American jurisprudence, the IACHR considers that the petitioners have proven that Fiscal Lots 14 and 55 of the Province of Salta correspond to the ancestral territory of the Chaco indigenous peoples to which the Lhaka Honhat communities belong. In effect: (i) convincing historical documentation and ethnological literature from the beginning of the 20<sup>th</sup> century was provided, describing the presence of the Wichi (Mataco), Iyjawaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) indigenous peoples in the area;<sup>139</sup> (ii) it has been proven that the indigenous communities of the area continue to live in accordance with their cultural tradition, as hunter-gatherer and fishing nomads, in a territory which is geographically and environmentally apt for the development of their way of life; and (iii) it has been documented that over one thousand places in the area have been named in the native languages of these peoples.<sup>140</sup>

<sup>136</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 94-95.

<sup>137</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 50.4. I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 101.

<sup>138</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 93.

<sup>139</sup> Specifically, they cite the written testimony of a colonizer arrived in the area in 1902, Domingo Astrada, who came with a group of cattle-raising families from Salta in search of good grazing fields, and provided precise details on the indigenous population of the area that today corresponds to Fiscal Lots 14 and 55: "In this campaign (to the Pilcomayo) I have established relations with 5000 indigenous... I spoke with 106 chiefs and their respective entourages from the tribes of the mataguayos, chorotes, tobas, mimocaes, chinupies and pilayas..." [Astrada, D.: "Expedición al Pilcomayo". Document provided by the petitioners together with their observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.] The petitioners also refer to the early anthropological reports of researcher Erland Nordenskiöld, dated 1902 and 1908, and confirmed by other specialized studies; including: LOZANO, P. (1874): "Descripción Corográfica del Gran Chaco Gualamba"; San Miguel de Tucumán: Universidad Nacional de Tucuman, 1941. KARSTEN, R. (1923): "The Toba Indians of the Bolivian Gran Chaco". Acta Academiae Aboensis IV, 1925. METRAUX, A. (1937): "Estudio de Etnografía Toba-Pilagá (Gran Chaco). Anthropos - Revue Internationale d'Ethnologie et Linguistique, T. 32, 1937. KERSTEN, L. (1968): "Las tribus indígenas del Gran Chaco hasta fines del siglo XVIII". Resistencia: Universidad Nacional del Nordeste, Facultad de Humanidades, 1968. FOCK, N. (1982): "History of Mataco Folk Literature and Research". En: WILBERT, J. y SIMONEAU, K. (eds.): "Folk Literature of the Mataco Indians", Los Angeles, University of California Press, 1982. Referencias etnológicas e históricas citadas en: CARRASCO, Morita y BRIONES, Claudia: "La Tierra que nos quitaron". Documento IWGIA No. 18, Buenos Aires, 1996, p. 195. Document provided as an annex of the petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.

<sup>140</sup> As recounted by the petitioners, "in 1991 the communities of Fiscal Lots 55 and 14 resorted to their memory - zealously guarded by the elders- in order to identify the dimensions of the physical space they traditionally occupy. The - then- 27 communities that participated in the elaboration of an ethnic map to justify their claim to a single title, indicated over one thousand locations with names in their corresponding languages (...) and, on the grounds of this information, it was possible to indicate the areas traveled by each communities, and the usage superimpositions between communities (...). This form of 'naming the land' is, as explained by a chief of the Toba people, the manner in which 'the grandparents' explain to the youth what these must know in order to become full members of the group. In giving significant names to the environment in which they live, the men and women of the communities transform the geographical space where they live into a 'culturally organized territory'." Petitioners' observations on the merits, received by the IACHR on January 4, 2007, and transmitted to the State through note of January 12, 2007.



158. The Provincial Government of Salta, in three of the documents that it submitted in the present process, contested the ancestral presence of the Wichi (Mataco), Iyjawaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) indigenous peoples in the area, referring to the historical accounts from the beginning of the 20<sup>th</sup> century which only refer to the presence of the "mataguayo" peoples in this region. On the last occasion the Provincial Government adopted this stance, it asserted that "a reliable survey made in 1902, which has not been contested, indicates that as of that time, there were no 'Wichís' in the area of Lots 55 and 14. The very sparse inhabitants that existed at that time were creole settlers and mataguayo Indians. (sic) It is believed that the 'Wichís' emigrated from the neighbouring countries and began to settle in the area in the 1920s decade."<sup>141</sup> In response to these statements, the National Government, through note received on September 7, 2006, expressly refuted and corrected the Provincial Government's stance, explaining to the IACHR that the term "mataco-mataguayo" corresponds to the designation of a linguistic family, of which the indigenous peoples who currently inhabit the place form part - their ancestral presence in the area being uncontested. In the National Government's words, "the area of Lot 55 in its entirety and part of Lot 14, has been inhabited by communities of the Wichí, Chorote, Toba, Chulupi, Tapiete indigenous peoples, inter alia, who were cornered in these lands as a consequence of the private appropriation of the best agricultural lands of Salta during the period of incorporation of the Northern Frontier of the country. This fact permitted the entry of creole population into the area, and its cattle-raising colonization."

159. The serious ethnological error of the Provincial Government of Salta was thus clarified and corrected by the National Government. The IACHR, taking into account the evidence which confirm the explanations given by the National Government, gives credit to the latter's statements, as also consistently asserted by the petitioner indigenous communities, and takes as a starting point that these five indigenous peoples are claiming, in the lands of Fiscal Lots 14 and 55, a part of what was once their vast ancestral territory.

160. In addition, even if it was assumed for the purposes of the discussion that any of these five indigenous peoples arrived in Salta in the course of the nineteenth or twentieth centuries, there is no doubt that they are the descendants of the ancestral inhabitants of the Great Chaco, a geographical region that covers vast portions of the territory of Argentina, Bolivia and Paraguay. They arrived, following their traditional nomadic routes and as a product of the process of contact with the non-indigenous, at some point in the course of the past two centuries to the Salta Chaco region, and established therein, over the course of the decades, their cultural and internationally protected bond with that specific area of the Chaco territory, being accepted and incorporated into the ethnic and cultural panorama of the area by other aboriginal inhabitants, with whom they established community and family ties which are currently existing and uncontested, and which the IACHR must ensure are respected and protected. In this regard, the IACHR recalls that a key element in the determination of when a given group can be regarded as indigenous or tribal is the historical continuity of its presence in a given territory, and, for indigenous peoples, an ancestral relationship with the societies that pre-existed a period of colonization or conquest.

161. This does not imply that indigenous or tribal peoples are static societies that remain identical to their predecessors. On the contrary, as human groups, indigenous and tribal peoples have their own social trajectory that adapts to changing times, maintaining in whole or in part the cultural legacy of their ancestors. Indigenous cultures evolve over time. The indigenous communities of the present are the descendants of inhabitants of the pre-Columbian Americas; over the centuries they have been through specific events which have shaped their distinctive social structures, spirituality and ritual practices, language, art, folklore, memory and identity – in sum, their culture.

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<sup>141</sup> Report of the Provincial Government of Salta, received on August 23, 2005, and transmitted by the IACHR to the petitioners on September 15, 2005.

It is on the basis of that individual history that the relationship of each indigenous people and community with its territory is built, a relationship from which their physical and cultural subsistence emerges, and to which international law has given a privileged level of protection.<sup>142</sup> The history of indigenous peoples and their cultural adaptations over time, as constitutive elements of their contemporary structural configuration, are consistent with the preservation of a fundamental relationship to their territory, protected by international human rights law.<sup>143</sup> The five indigenous peoples that today inhabit Fiscal Lots 14 and 55 of the Province of Salta have proven that they preserve that historically constructed and internationally protected relationship with the territory of this area in particular.

## **B. Delimitation of the legal controversy to be resolved**

### **1. Evolution of the subject matter of the petition before the IACHR**

162. The initial petition received in 1998 by the IACHR referred mainly to the lack of prior consultation of a series of public works undertaken in the indigenous ancestral territory. Nonetheless, the issue of territorial property, as well as other related topics that refer to the ancestral territory – such as the illegal extraction of timber, the tending of wire fences and the environmental degradation caused by the cattle-raising activities of the creole population - were central axes of the debate between the parties before the IACHR; both the petitioners and the State, in their arguments and reports, positioned the issue of territory as a central issue to be resolved in the present case.

163. In Admissibility Report No. 78/06 the IACHR delimited the object of the controversy, to include a possible violation of Article 21 of the American Convention due to the lack of guarantee of the right to property of the ancestral territory of the indigenous communities represented by the Lhaka Honhat Association in correlation with their right to prior consultation and to preserve the identity of their territory. This issue was thus expressly incorporated into the subject-matter of the litigation before the inter-American system, with full notice to the parties.

### **2. Issues not in dispute**

164. Both the petitioners and the State have expressed their agreement on two issues that need not be addressed in resolving the present claim. First, both parties, and in particular the State, at the provincial and national levels, have expressly acknowledged that the indigenous communities that inhabit Fiscal Lots 14 and 55 have the right to property in their ancestral territory. Indeed, the State, at the national and provincial levels, has repeatedly expressed its manifest will to formally allocate such property, in compliance with the provisions of the Constitution and domestic legislation. In this sense, what is under discussion is not these communities' right to receive property title, but rather the effective allocation of that title. Second, both parties recognize that the rights of the non-indigenous inhabitants of the area are not at issue in the present case.

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<sup>142</sup> IACHR, "Indigenous and tribal peoples' rights over their ancestral lands and natural resources – Norms and Jurisprudence of the Inter-American Human Rights System", 2010, par. 35.

<sup>143</sup> In the case of *Yakye Axa v. Paraguay*, the Inter-American Court described the history of the affected community as follows: "...it is necessary to consider that the victims of the instant case have to date an awareness of an exclusive common history; they are the sedentary expression of one of the bands of the Chanawatsan indigenous peoples (...). Possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity. In the process of sedentarization, the Yakye Axa Community took on an identity of its own that is connected to a physically and culturally determined geographic space, which is a specific part of what was the vast Chanawatsan territory" IA Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17<sup>th</sup>, 2005. Series C No. 125, par. 216. In the same sense, see: I/A Court H.R., Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, pars. 37-43.

- C. The indigenous right to property (Article 21 of the convention, in connection with Articles 1.1, 2, 8 and 25)**
  - 1. Legal framework for the analysis of the territorial claims process**
    - 1.1. Indigenous peoples' right to suitable and culturally adequate property title to ancestral territory**

165. The legal controversy between the parties with regard to the property title to the ancestral territory centers on the modality of the title. The communities that form part of the Lhaka Honhat Association claim a single communal property title which is shared by all, on account of their nomadic hunter-gatherer way of life. The Provincial Government of Salta, and a few indigenous communities of the area that do not form part of the Association, have opted for separate communal property titles for each community. This debate necessarily requires consideration of the inter-American legal standards regarding the suitability and cultural adequacy of territorial property title. The application of these standards to the facts of the case is not a simple process, given the manifest divergences that exist between the different indigenous communities with regards to this matter.

166. The IACHR has pointed out that in relation to indigenous and tribal peoples, States are under the obligation of "granting [them] lands, at no cost, of sufficient extent and quality to conserve and develop their ways of life"<sup>144</sup>. Lands are of sufficient extension and quality if the members of the indigenous community are guaranteed the continuous exercise of the activities from which they derive their livelihood, and on which the preservation of their culture depends.<sup>145</sup> The right to a territory of sufficient quality and extension is particularly relevant for certain types of indigenous and tribal peoples whose sociocultural specificity and concrete situations require a special level of protection. In the case of hunter-gatherer indigenous communities, who are characterized by itinerant residence patterns and traverse their territory along culturally established circuits that follow the availability of natural resources, "the area transferred must be sufficient for conservation of their form of life, to ensure their cultural and economic viability, as well as their own expansion"<sup>146</sup>.

167. Under the inter-American human rights instruments, indigenous and tribal peoples have the right to recognition and protection of their specific versions of the right to use and enjoy property, "springing from the culture, uses, customs, and beliefs of each people."<sup>147</sup> There is not just one form of using and enjoying property protected; both the property and the mode of possession of territories by indigenous and tribal peoples can differ from the non-indigenous notion

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<sup>144</sup> IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 50, Recommendation 1.

<sup>145</sup> The IACHR has recommended States, in this sense, to "promptly adopt any such measures as may be necessary to enforce the right to property and possession of the ancestral territory of [indigenous communities] and [their] members, specifically to (...) guarantee the members of the Community the exercise of their traditional subsistence activities". IACHR, Report No. 73/04, case of the Sawhoyamaya Indigenous Community (Paraguay), October 19, 2004, Recommendation 1. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 8.

<sup>146</sup> IACHR, "Indigenous and tribal peoples' rights over their ancestral lands and natural resources – Norms and Jurisprudence of the Inter-American Human Rights System", 2010

<sup>147</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 120.

of ownership.<sup>148</sup> The unique indigenous relationship to traditional territory “may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.”<sup>149</sup> Any one of these modalities is protected by Article 21 of the Convention.<sup>150</sup>

168. The allocation of suitable and culturally adequate territorial property enables the respective indigenous peoples and their members to have access to food, water, and their traditional health and healing systems. Consequently, the suitability and cultural adequacy of the property title may be considered as pre-conditions to the rights to life, personal integrity and health. The IACHR has explained that “continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples.”<sup>151</sup> Control of the land “refers both its capacity for providing the

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<sup>148</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 120.

<sup>149</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 131.

<sup>150</sup> Indeed, as clarified by the IACHR, the general international legal principles applicable in the context of indigenous human rights include “the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property” [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130]; indigenous and tribal peoples have a right to communal property over the lands they have traditionally used and occupied, and “the character of these rights is a function of [the respective people’s] customary land use patterns and tenure” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 151]. For the Inter-American Court, “disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 120]. The notion of use of indigenous territory is understood by the Court in a broad sense, which encompasses not only permanent occupation of such territory, but also an entire array of activities, both permanent and seasonal, aimed at the use of land and natural resources for subsistence purposes, and also at other uses related to the exercise of indigenous culture and spirituality. This interpretive approach is supported by the terms of other international instruments, which indicate international attitudes towards the role of traditional land tenure systems within modern human rights protection systems; for example, ILO Convention 169 expressly establishes the state duty to “safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.” [ILO Convention 169, Art. 14.1]. The right to legal recognition of indigenous peoples’ distinctive forms and modalities of control, property, use and enjoyment of territories, property and natural resources is also protected by Art. 27 of the International Covenant on Civil and Political Rights, which establishes the right of persons who belong to ethnic, religious or linguistic minorities to enjoy their own culture together with other members of the group [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97], given that said distinctive forms and modalities of relating to territory are manifestations of indigenous peoples’ culture. The Human Rights Committee has explained that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” [Human Rights Committee, General Comment No. 23 (1994): Article 27 (rights of minorities), CCPR/C/21/rev.1/Add.5 (1994), par. 7; cited in IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97]. Therefore the protection of the cultural rights of an indigenous people may encompass traditional activities of relatedness to natural resources, such as fishing or hunting [Comité de Derechos Humanos, Observación General No. 23: Los derechos de las minorías (Art. 27 del PIDCP), 08/04/94, Doc. ONU CCPR/C/21/Rev. 1/Add.5, párrafo 7; citado en CIDH, Informe No. 75/02, Caso 11.140, Mary y Carrie Dann v. Estados Unidos, 27 de diciembre de 2002, párr. 130, nota al pie No. 97.], insofar as hunting, fishing and gathering are essential elements of the indigenous culture [Corte IDH. Caso Comunidad Indígena Yakye Axa Vs. Paraguay. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005. Serie C No. 125, párr. 140]. This complex notion of the right to indigenous property is also reflected in the United Nations Declaration on the Rights of Indigenous Peoples, by which “indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired” [United Nations Declaration on the Rights of Indigenous Peoples, Article 26.2].

<sup>151</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128.

resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group”<sup>152</sup>.

169. It is equally important for indigenous peoples to be allocated a territory which is of sufficient extension and materially continuous, that is, not fragmented, for purposes of allowing the full development of their ancestral ways of life. In the case of nomadic, hunter-gatherer indigenous communities, sufficient extension and territorial continuity guarantee that the traditional traveling circuits are maintained without obstacles that hamper mobility. The IACHR, referring to such hunter-gatherer indigenous communities, has clarified that “the area transferred must be sufficient for conservation of their form of life, to ensure their cultural and economic viability, as well as their own expansion”.

170. According to various documents presented, the indigenous communities that inhabit Lots 14 and 55, not belonging to the Lhaka Honhat Association, have stated on different opportunities that they wish to receive collective, communal property titles which are separate from those of the other communities of the area, given that they do not wish to share the management of their autonomous decisions with those communities<sup>153</sup>.

171. The IACHR finds that the communities belonging to the Lhaka Honhat Association are entitled to a single title that ensures the maintenance of their traditional way of life and social and economic activities. At the same time, the IACHR considers that any dispute with other communities should be resolved through modalities of negotiation and settlement dictated by the indigenous communities themselves and through demarcation of the lands in a way that preserves the traditional nomadic pathways and circuits of the petitioners.

## 1.2. The Scope of indigenous peoples’ territorial rights

172. Indigenous peoples have a special, unique and internationally protected relationship with their ancestral territories, which is absent in the case of the non-indigenous. This special and unique relationship has international legal protection. As reiterated by the IACHR and the Inter-American Court,<sup>154</sup> preserving the particular connection between indigenous communities and their lands and resources is linked to these peoples’ very existence and thus “warrants special measures of protection.”<sup>155</sup> Indigenous and tribal peoples’ right to property, established in Article 21 of the American Convention and Article XXIII of the American Declaration, protects the close bond they have with their territories and the natural resources linked to their culture that are present therein.<sup>156</sup> As the Court has stated “the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their

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<sup>152</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128.

<sup>153</sup> Minutes of a meeting held on April 28, 2009 between the Ministry of Environment and Sustainable Development, the Secretariat of Environmental Policy, and representatives of the indigenous communities that inhabit Fiscal Lots 55 and 14. Annex to a communication of the State of May 3, 2011.

<sup>154</sup> 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, par. 91.

<sup>155</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128.

<sup>156</sup> IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 156. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 148. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 118, 121.

economic survival.”<sup>157</sup> For the IACHR, “the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.”<sup>158</sup>

173. The right to territory also encompasses the use and enjoyment of its natural resources, and is directly related, even a pre-requisite to, enjoyment of the rights to an existence under conditions of dignity, and to food, water, health and life;<sup>159</sup> therefore, “[each community’s] relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.”<sup>160</sup> It must be noted that the life of members of indigenous and tribal communities “fundamentally depends” on the subsistence activities – agriculture, hunting, fishing, gathering – that they carry out in their territories.<sup>161</sup> As explained by the IACHR, “continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples.”<sup>162</sup> Control of the land “refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group”<sup>163</sup>.

174. As for the socio-cultural dimension of this relationship, it has been pointed out that the close relationship between indigenous and tribal peoples and their traditional territories and natural resources is a constitutive element of their culture, understood as a particular way of life; the free exercise of the right to territorial property is essential for the enjoyment and perpetuation of their culture.<sup>164</sup> Their notions of family and religion are intimately connected to the traditional territory, where ancestral cemeteries, places of religious meaning and importance, and kinship patterns are linked to the occupation and use of physical territories.<sup>165</sup> Therefore, since territory and natural resources are constitutive elements of the worldview, spiritual life and mode of subsistence of indigenous and tribal peoples, they form an intrinsic part of their members’ right to cultural identity.<sup>166</sup> Recognition of ancestral lands and territories is fundamental for the perpetuation of indigenous and tribal peoples’ cultural structure.<sup>167</sup> Indigenous and tribal peoples are entitled to have

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<sup>157</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awaj Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149

<sup>158</sup> IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 114.

<sup>159</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080.

<sup>160</sup> IACHR, “Indigenous and tribal peoples’ rights over their ancestral lands and natural resources – Norms and Jurisprudence of the Inter-American Human Rights System”, 2010.

<sup>161</sup> IACHR, “Indigenous and tribal peoples’ rights over their ancestral lands and natural resources – Norms and Jurisprudence of the Inter-American Human Rights System”, 2010.

<sup>162</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128.

<sup>163</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128.

<sup>164</sup> IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 155.

<sup>165</sup> IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 155. Á

<sup>166</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1054.

<sup>167</sup> IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 3.

the State effectively guarantee their right to their cultural identity.<sup>168</sup> If the State fails to secure the right to territorial property of indigenous communities and their members, they are deprived “not only of material possession of their territory but also of the basic foundation for the development of their culture, their spiritual life, their wholeness and their economic survival”<sup>169</sup>.

175. The IACHR has clearly stated that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the States”<sup>170</sup>. This implies that whatever rights the non-indigenous may claim over the lands, the State must devise mechanisms which can accommodate such rights or claims without sacrificing the prevailing territorial rights of indigenous and tribal peoples.

## **2. The indigenous territorial claim in the present case**

176. After a detailed assessment of the indigenous territorial claim process under study, the IACHR considers that the State of Argentina incurred international responsibility for having violated Article 21 of the American Convention, as a consequence of (i) having failed to comply with the legislation that the authorities themselves promulgated to grant a joint collective property title to the ancestral lands of all of the communities, and for the same reason, having violated the agreements that were later formalized as provincial decrees and thereby created enforceable legal rights in domestic law; and (ii) having failed to create and apply an effective and prompt procedure for transferring title to indigenous territorial property.

177. Nonetheless, the IACHR considers that from October, 2007 to date, the State with the active participation of the indigenous and non-indigenous communities of the area – including the indigenous communities that form part of the Lhaka Honhat Association, has made visible and significant advances in the process, of recognizing indigenous territorial rights. This stage of the process should be finalized following the parameters established by inter-American jurisprudence, to provide a real opportunity for the practical materialization of the right to indigenous territorial property in this case. In the present report the IACHR shall issue a set of recommendations and guidelines for the culmination of this participative process, in order to ensure full reparation of the violated rights and promote the effective enjoyment of the petitioners’ territorial rights.

### **2.1. Failure of the Provincial Government to Implement and Enforce Legal Rights**

178. It has been proven in the present case that the Provincial Government signed several agreements with the indigenous communities of the area, and promulgated Decrees enacting said agreements into law.<sup>171</sup> In these decrees the Provincial Government committed itself to, and

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<sup>168</sup> IACHR, “Indigenous and tribal peoples’ rights over their ancestral lands and natural resources – Norms and Jurisprudence of the Inter-American Human Rights System”, 2010.

<sup>169</sup> IACHR, “Indigenous and tribal peoples’ rights over their ancestral lands and natural resources – Norms and Jurisprudence of the Inter-American Human Rights System”, 2010.

<sup>170</sup> “Special Protection for Indigenous Populations: Action to combat racism and racial discrimination”, 1972. Cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 126.

<sup>171</sup> It has been proven that (i) on December 5, 1991, an “Agreement” was signed by the representatives of the indigenous communities and the General Director of Fiscal Lands Adjudications of the Province of Salta; (ii) this Agreement was later ratified in its entirety and formalized by the Governor of the Province through Decree 2609 of 1991, transcribed above; (iii) Decree 2609/91 was confirmed and convalidated through another provincial Decree, adopted on November 6, 1992; (iv) the implementation of the provisions of these agreements and decrees was subjected to the expertise of an Honorary Advisory Commission created by Decree No. 18 of January 13, 1993 of the Provincial Government; (v) the Honorary Advisory Commission eventually issued recommendations for implementation which were accepted by the indigenous communities; (vi) the report and recommendations presented by the Honorary Advisory Commission were formally approved by Decree 3097/95 of the Provincial Government; and (vii) in April, 1996 a new agreement was signed between

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assumed the legal obligation of, recognizing a single territorial property title shared by all of the indigenous communities of Fiscal Lots 14 and 55. The communities expressed through their representatives a unanimous common will to achieve this result.

179. The commitment of the Provincial Government of Salta to grant a common, shared territorial property title to all of the indigenous communities of Fiscal Lots 14 and 55 was thus enshrined in four provincial decrees, adopted and promulgated by the Government, which generated legal rights for the petitioner communities.

180. In addition to having generated legal rights for the indigenous communities of the Lots, the successive signing of agreements later formalized into binding legal provisions generated a series of legitimate expectations among the authorities and members of said communities that the Provincial Government would honor its commitments and comply with the law, enforcing the legal rights that the Provincial Government itself had created.

181. These decrees, with the rights and entitlements that necessarily stemmed from them, were not implemented. It has been proven that due to a unilateral change in the Provincial Government's will, the provincial authorities refused to grant a common shared property title, and began a series of actions aimed at granting separate property titles to different indigenous communities, indigenous families and non-indigenous persons – actions that included (i) the allocation of the property of parcels within the claimed area to individuals, families and communities through Provincial Decree 461 of 1999 (eventually invalidated by the Courts in May, 2007); (ii) the submission to the IACHR of formal proposals for parceling and allocating portions of land through separate communal titles; (iii) the development of actions to convince the leaders and members of some indigenous communities to accept separate community titles; (iv) the sending of officials, contractors or agents of the Provincial State to the field to carry out works of measurement and demarcation of the parcels that were supposedly going to be adjudicated; (v) the presentation of a formal proposal on March 2, 2005, before the IACHR, in the sense of allocating separate communal, not shared territorial property titles; (vi) the submission of that proposal to a referendum; and (vii) the obstinate implementation of that proposal once the referendum was held in October, 2005.

182. Thus from 1999 there was a radical repudiation of the Provincial Government's legal commitments. The Provincial Government maintained the repudiation constantly during the following years, although on some occasions, from 2005, the Provincial Government accepted that as an exception to the general rule of adjudication of separate property titles, it would grant joint title to those communities that expressly requested it (commitments which were not made effective).

183. For the IACHR, this unilateral denial of legal rights by the Provincial Government of Salta constituted a violation of Article 21 of the American Convention. It disregarded the right of the indigenous communities of the area to the effective application and implementation of the law that recognized their property rights. In addition, such repudiation frustrated the legitimate expectations that the Government had created, expectations that are themselves a form of intangible property.<sup>172</sup>

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the indigenous communities (represented by the Lhaka Honhat Association) and the Provincial Government, aimed at creating a Coordinating Unit for the implementation of these commitments.

<sup>172</sup> Legitimate expectations are recognized as a form of intangible property in contemporary legal systems and, in the IACHR's opinion, form part of Article 21 of the American Convention on Human Rights. In light of this legal principle, whenever States have generated legitimate expectations through their actions in the framework of legality, the general legal principles of good faith, legality and estoppel prohibit frustration of those expectations due to a change in the authorities' position, except when there exists an overriding public interest that justifies repudiation of the State's position. Persons have



*The indigenous communities' right to effective implementation of the law*

184. Article 2 of the American Convention on Human Rights provides:

“Where the exercise of any of the Rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

185. By virtue of this Article, States must effectively implement and enforce the constitutional, legislative and regulatory provisions of their internal law that enshrine the rights of indigenous and tribal peoples and their members, so as to ensure the real and effective enjoyment of such rights.<sup>173</sup>

186. The IACHR positively values the adoption of legal provisions on the collective rights of indigenous peoples, but at the same time it has forcefully called upon States to submit information about their implementation.<sup>174</sup> On several occasions, the IACHR has deemed it a good practice for states to adopt and promulgate rules in their domestic legal systems that recognize and protect the rights of indigenous peoples and their members.<sup>175</sup> At the same time, it has also insisted that juridically beneficial laws “cannot by themselves guarantee the rights of such peoples.” A favorable legal framework is “insufficient for due protection of their rights if it does not go hand in hand with policies and actions by the State to ensure application of and effective compliance with the provisions which the State itself has, in a sovereign manner, undertaken to apply.”<sup>176</sup> From this perspective, indigenous and tribal peoples have a right to see the law implemented and applied in

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the right to see their legitimate expectations fulfilled. The protection of legitimate expectations has been recognized in the domestic law of States within the main legal systems of the world, and it has also been consistently applied by international tribunals, including human rights tribunals. At the international level, particular relevance is attached to the jurisprudential line developed by the European Court of Human Rights on the protection of legitimate expectations under the right to property. The European Court of Justice, in turn, has given solid application to this principle in its case-law. Also at the international level, the principle of protection of legitimate expectations has been consistently applied during the past years by arbitral tribunals in cases of foreign investment disputes. At the national level, the principle of protection of legitimate expectations has received a broad and solid acceptance in the legal systems of the continental European tradition; most saliently in Germany, Spain, France, Italy, and Colombia. The principle is also present and has been applied –although with less consistency- in the legal systems of the Common Law tradition, specifically in the United Kingdom, Australia, Canada, India, Hong Kong, Singapore, Ireland, Malaysia and South Africa.

<sup>173</sup> CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párr. 1062. Ver también: CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párrs. 220, 297 - Recomendación 4. CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II.135, Doc. 40, 7 de agosto de 2009, párrs. 134, 149.

<sup>174</sup> Ver, entre otros: CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párrs. 1052-1061. CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párrs.218, 219. CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II.135, Doc. 40, 7 de agosto de 2009, párr. 134, y nota al pie No. 147.

<sup>175</sup> Ver, entre otros: CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párrs. 1052-1061. CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párrs.218, 219.

<sup>176</sup> CIDH, Quinto Informe sobre la situación de los derechos humanos en Guatemala. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., 6 de abril de 2001, párr. 36. CIDH, Tercer Informe sobre la situación de los derechos humanos en Paraguay. Doc. OEA/Ser.L/VII.110, Doc. 52, 9 de marzo de 2001, párr. 28.

practice,<sup>177</sup> and only a sustained implementation of constitutional and legal advances that are pertinent for the legal force of indigenous and tribal peoples' rights can mark an advance in their real situation.<sup>178</sup> In the same line, the Inter-American Court of Human Rights has explained that "legislation alone is not enough to guarantee the full effectiveness of the rights protected by the Convention, but rather, such guarantee implies certain governmental conducts to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights"<sup>179</sup>

187. Specifically with regard to the right to property, purely formal abstract recognition of indigenous and tribal peoples' right to communal property in domestic law must be accompanied by concrete measures to make the right effective.<sup>180</sup> "Merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."<sup>181</sup> For the IACHR and the Inter-American Court, it is necessary that the legally guaranteed territorial rights of indigenous peoples are coupled with the adoption of the legislative and administrative measures and mechanisms to ensure the enjoyment of said rights in reality. Under Article 21, it is necessary for the legal and constitutional provisions that enshrine the right of members of indigenous communities to the property of their ancestral territory to be translated into the effective restitution and protection of such territories.<sup>182</sup> Even if there is a formal affirmation of the territorial and other rights of indigenous and tribal peoples, States' failure to adopt the measures required to recognize and guarantee said rights generates situations of uncertainty among the members of the communities.<sup>183</sup>

188. In the specific case of the indigenous communities of Fiscal Lots 14 and 55, the IACHR considers that they had a legally recognized right to the property of their ancestral territory under the specific modality of a common shared title; as a consequence of the successive promulgation of the four above-referred provincial decrees, these communities had a consolidated and legally protected interest in their territory, which could only be disregarded or withdrawn, by means of a new decree or other legal act, and respecting the minimum guarantees established in the

<sup>177</sup> CIDH, *Democracia y Derechos Humanos en Venezuela*, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párr. 1062.

<sup>178</sup> CIDH, *Quinto Informe sobre la situación de los derechos humanos en Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., 6 de abril de 2001, Capítulo XI, párr. 35.

<sup>179</sup> Corte IDH. *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146, párr. 167. Corte IDH. *Caso de la Masacre de Pueblo Bello Vs. Colombia*. Fondo, Reparaciones y Costas. Sentencia de 31 de enero de 2006. Serie C No. 140, párr. 142.

<sup>180</sup> Corte IDH. *Caso Comunidad Indígena Yakye Axa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005. Serie C No. 125, párr. 141.

<sup>181</sup> Corte IDH. *Caso Comunidad Indígena Yakye Axa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005. Serie C No. 125, párr. 143.

<sup>182</sup> IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser.L/V/II.110, Doc. 52, March 9, 2001, Chapter IX, par. 50, Recommendation 1.

<sup>183</sup> IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 170. Applying these rules, in the *Awas Tingni* case the Inter-American Court held that it "believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to Article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community." [Corte IDH. *Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua*. Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2001. Serie C No. 79, párr. 138.] In the same terms, in the case of the *Sawhoyamaxa v. Paraguay*, the Inter-American Court insisted that "merely abstract or legal recognition becomes meaningless in practice if the lands have not been physically delimited and surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right by the members of the Sawhoyamaxa Community are lacking." [Corte IDH. *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146, párr. 143.]

American Convention for cases of expropriation. By virtue of the existence of these provincial decrees, the relationship between these indigenous communities and the State authorities in the area of territorial property was not contractual, nor one of mere offers or governmental good will: it was a relationship mediated by legally created and recognized rights. The communities had, in turn, a right to the due application of the law. The lack of implementation of these decrees, with the ensuing lack of recognition of these created and recognized rights of access to the ancestral territory, constitutes a violation of Article 21 of the American Convention, in connection with Article 2 thereof.

189. The IACHR cannot fail to note that in 2005, in order to validate the unilateral imposition of its land regularization proposal for Fiscal Lots 14 and 55, the Provincial Government of Salta promoted, summoned and held a referendum or popular consultation with the general population of the Province, in which voters were asked, in an open and generic manner, whether they agreed or not with the objective of giving the lands in question to their current indigenous and non-indigenous inhabitants, and develop works of infrastructure. It is necessary to note that fundamental rights are inalienable and the majority cannot by vote repudiate or withdraw the rights of any segment of the society. The realization of the referendum constituted an improper use of a democratic mechanism, insofar as through its organization, the territorial rights of the indigenous population were subjected to the expression of the will of the general population, in order to defeat in this fashion the opposition that the governmental posture had raised within the indigenous communities. This modality of popular vote is not tantamount to a process of prior consultation of this land allocation decision. Prior consultation is a specific procedure which is clearly regulated by international human rights law.

**2.2. The lack of provision of an effective and suitable procedure to have access to territorial property, because of the successive variations in the applicable norms and procedures**

190. Indigenous and tribal peoples have the right to the existence of effective and prompt mechanisms to protect, guarantee and promote their rights over their ancestral territories, through which the processes of recognition, titling, demarcation and delimitation of their territorial property can be carried out.

191. These procedures must comply with the rules of due process of law established in Articles 8 and 25 of the American Convention.<sup>184</sup> The Inter-American Court has specified that due process must be followed both in the administrative procedures and in any other procedure whose decision may affect a person's rights.<sup>185</sup> In light of this requirement, the inter-American system's jurisprudence has identified a series of characteristics that these mechanisms must fulfill under Articles 8, 25, 1.1 and 2 of the American Convention.

192. These special mechanisms and procedures must be effective; their ineffectiveness violates Articles 1 and 2 of the American Convention on Human Rights. The Inter-American Court has assessed, in light of the requirements of effectiveness and reasonable time established in Article 25 of the American Convention, whether States have procedures in place for granting title to

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<sup>184</sup> Corte IDH. *Caso Comunidad Indígena Sawhoyamaya Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146, párrs. 81, 82.

<sup>185</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 62. I/A Court H.R., *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72, par. 127. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 82, 83.

property over lands, and if so, whether they implement such procedures in practice;<sup>186</sup> and it has explained that in order to comply with the conditions set forth in Article 25, it is insufficient for there to be legal provisions that recognize and protect indigenous property – it is necessary for there to exist specific and clearly regulated procedures for matters such as the granting of title over lands occupied by indigenous groups or their demarcation, attending their specific traits,<sup>187</sup> and for those procedures to be effective in practice so as to allow for the enjoyment of the right to territorial property – that is, that in addition to the formal existence of the procedures, these actually produce results or responses to the violations of the legally recognized rights.<sup>188</sup> Ineffectiveness of administrative or judicial procedures for territorial claims represents, in practice, a failure by the State to guarantee indigenous peoples’ property rights over their ancestral territories. The Inter-American Court has also required that administrative procedures for the restitution of indigenous communities’ lands be suitable and offer a real possibility for the members of indigenous and tribal peoples to recover their traditional lands<sup>189</sup>. In order to afford a real possibility of protection of territorial rights, States “must ensure that such proceedings are accessible and simple and that the agencies responsible for them have the technical and material conditions necessary to respond promptly to applications and requests submitted in the course of such proceedings.”<sup>190</sup>

193. The IACHR considers that the State of Argentina violated the rights established in Articles 8 and 25 of the American Convention, in connection with Article 21 thereof, for two reasons: (a) because of the successive modification of the procedures applicable to the indigenous territorial claim, variations which took place no less than six times in the course of this process, and all of which were indefinite and lacking in clarity; and (b) because of the ultimate ineffectiveness of the claim procedures to afford effective enjoyment of the right to territorial property, two decades after the claim was initiated.

194. The IACHR notes that the six successive variations in the applicable procedures were introduced in an ad-hoc manner, that is, they were not due to a change in the legislation in force as such, but rather to a sequence of actions, namely: the initiation under such legislation of unconcluded proceedings, the adoption of specific decrees that varied the initial procedures introducing concrete methodologies for the case of this claim, the opening of new parallel proceedings that contradicted the course of action initially followed in order to allocate parcels to creole and indigenous families, and thereafter the establishment of new procedures and methodologies for territorial adjudication by the decisions adopted by the Provincial Government since 2001, which did not even refer to the legislation in force any more, but established an

<sup>186</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 115.

<sup>187</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 122, 123.

<sup>188</sup> Corte IDH. *Caso de la Comunidad Indígena Xákmok Kásek Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 24 de agosto de 2010, Serie C No. 214, párr. 140.

<sup>189</sup> Corte IDH. *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146, párr. 108.

<sup>190</sup> CIDH, *Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 242. Ver también: Corte IDH. *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146, párr. 109. In the Court’s terms, by virtue of Article 2 of the American Convention on Human Rights, “it is necessary to establish appropriate procedures in the framework of the domestic legal system to process the land claims of the indigenous peoples involved. The States must establish said procedures to resolve those claims in such a manner that these peoples have a real opportunity to recover their lands. For this, the general obligation to respect rights set forth in Article 1(1) of said treaty places the States under the obligation to ensure that said procedures are accessible and simple and that the bodies in charge of them have the necessary technical and material conditions to provide a timely response to the requests made in the framework of said procedures.” [Corte IDH. *Caso Comunidad Indígena Yakye Axa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005. Serie C No. 125, párr. 102]

apparently autonomous normative and methodological framework, which was tailored along the way, in some cases with the agreement of the parties involved in the process, and is currently unfolding in its last stages.

195. In sum, the protracted land regularization process of Lots 14 and 55, which was initiated with the first claim presented by the indigenous communities in 1991, has been marked by the successive variation of the applicable procedures to be followed. This clearly implies that the indigenous communities have not been afforded a specific, clearly regulated and suitable procedure to obtain their territorial property title. The main result of this complicated sequence of ad hoc modifications of the applicable procedure has been a profound legal insecurity, which has prevented the petitioner indigenous communities, their leaders and representatives, to have a minimum degree of certainty as to which are the steps to be followed in order to obtain a territorial property title, thus causing marked levels of uncertainty among their members.

196. Moreover, the result of this situation has been that the indigenous communities of Lots 14 and 55 have not been afforded an effective procedure to obtain the recognition of the ownership of their ancestral territory. With this, the IACHR considers that a violation of Articles 8 and 25 of the American Convention was proven, in connection with Article 21 thereof.

### **2.3. The development of a participatory process since October, 2007.**

197. It is clear that the communities that form part of the Lhaka Honhat Association have consistently persisted in their claim to a common, shared territorial property title. In the same sense, it has been proven that during the preceding stages of the territorial claim process, the Government of Salta prompted indigenous chiefs and communities to accept individual parcels and abandon the claim to a common property title; but the IACHR does not have precise or sufficient information to conclude that the communities who are currently requesting a separate community property title have done so as a result of that strategy deployed by the Provincial Government. Without inferring their reasons or their motives, the proven fact is that several communities are requesting a separate community property title, not shared with the rest.

198. In response to the observations made by the petitioners on the adjudication proposal of the Province of Salta, which were received on September 9, 2005, the Provincial Government introduced substantial modifications into the proposal, which reflect and accommodate the nine issues raised as objections by the Lhaka Honhat Association; inter alia, the Government (i) established that indigenous territorial rights would be the guiding criteria for the proposal, (ii) assigned the power to solve conflicts between the parties in case of lack of agreement to the Broadened Board, (iii) expressly opened the possibility of issuing joint communal property titles to the indigenous communities that so request, and (iv) reiterated the prohibition of tending wire fences in the area, applicable to both the creole population and the indigenous.

199. Moreover, the IACHR notes that after a meeting held on March 14, 2006, between the General Secretary of the Provincial Governor's Office and the General Coordinator of the Lhaka Honhat Association, the Provincial Government agreed to adjudicate a surface of 400.000 hectares for exclusively indigenous ownership and use. This point was later formally reiterated in the agreement of October 2007.

200. The Lhaka Honhat Association signed an Agreement on October 2007 with the National and Provincial Governments, the Organization of Creole Families and their respective advisors. The agreement was formalized by the Provincial Government through Decree 2786/07 of October 23, 2007 and marked the initiation of the current stage of the process. The information submitted by the State indicates that the Lhaka Honhat Association participated freely in the

signature of the agreement, as well as in the subsequent stages of the land adjudication process which have developed since then.

201. Since the Agreement of October 17, 2007, and its formalization in Decree 2786/07, a complex participative process has been developed, aimed at the final resolution of the territorial situation of Lots 14 and 55.

202. Despite having earlier imposed in a unilateral manner its territorial formalization proposal, the Provincial Government has shown a new flexibility and openness to the suggestions, recommendations and claims of the indigenous communities of the area. The main disagreements which have arisen between the Provincial Government and the Lhaka Honhat Association during this last phase of the process regard to processes of titling, demarcation and delimitation of ancestral territories in these conditions.

203. In this same sense, the IACHR notes that in the course of this fifth stage of the territorial claim, through the participative process which has been documented in detail, the State has obtained positive achievements of great importance, the scope of which has been recognized by the representatives of the Lhaka Honhat Association themselves. The undeniable advances achieved by the State include the recognition of 400.000 hectares of exclusively indigenous territory; the guarantee that the indigenous territory will be continuous, in order to allow for the development of their nomadic, hunter-gatherer way of life; the deployment of a participative methodology; the voluntary relocation, with financial State support, of half of the creole population that resides in the area; and the active inclusion in the process of both the creole families and the indigenous communities that do not form part of the Lhaka Honhat Association, so as to arrive at a solution which satisfies the broadest possible range of the rights that are at play in this complex socio-economic situation. For the IACHR, it is indispensable to acknowledge that faced with a factual situation of this level of complexity, the State has displayed in the past years a significant capacity to develop a participative and broad methodology, and thus accommodate multiple and rivaling interests and rights, respecting the right to consultation and the modalities of territorial relatedness of the numerous inhabitants of this large territorial area.

204. Within this framework, the IACHR notes that the disagreements between the parties, and the issues about which the petitioners have expressed their opposition to the actions of the Provincial Government, are of an essentially methodological nature; they mainly refer to (i) the order in which the different stages of delimitation of the indigenous territory and subscription of relocation agreements with the creole population should be carried out, (ii) the fact that as of this moment it has only been possible to obtain the consent of 50% of the creole population to relocation, and it is feared that the consent of the remaining 50% will not be obtained, and (iii) the fact that it is unclear how to proceed in case that no agreements between the indigenous and the creole are reached with regard to the delimitation of their respective properties.

205. The IACHR shall not issue an opinion on which stage should be carried out first – whether the delimitation of the exclusively indigenous area or the agreements for the relocation of the creole population -, nor about the partial results obtained as of this date in the course of the relocation process or the manner in which the other relocation agreements should be obtained. The IACHR considers a duty of the State of Argentina, to secure an exclusively indigenous territory for the alleged victims of this case, with a common shared title and to respect and implement in the course of what remains of the process of formalization of indigenous territorial property, its international obligations.

206. For the above reasons, the IACHR considers that the advances and achievements which have been made since October 2007 until present correspond to incipient reparation of the violations of Articles 21, 8 and 25 of the American Convention that were configured previously and

were described in the preceding stages. The achievement of full reparation for these violations, and likewise access to the effective enjoyment of the right to territorial property by the indigenous communities of Lots 14 and 55, will be possible insofar as the State of Argentina guarantees, during the subsequent development and culmination of the process, respect for the parameters and guidelines provided by inter-American human rights law.

**D. The rights of the indigenous peoples of fiscal lots 55 and 14 with regard to the public works and natural resource exploration and exploitation activities within their ancestral territory**

207. It has been proven that the authorities of the National and Provincial Government carried out, or planned the execution of, different public works in the ancestral territory of Fiscal Lots 55 and 14 during recent years, and granted a concession for the exploration of hydrocarbons, without having made prior consultations with the indigenous communities that inhabit this territory, which is pending formal allocation, and also without having carried out prior social and environmental impact assessments. These public works were:

(a) The construction of the international bridge Misión La Paz – Pozo Hondo over the Pilcomayo River, which was started in 1995 and finalized without actually executing the other public and urbanization works that had been planned in its vicinity, which are currently paralyzed.

(b) The works of improvement of a road that links Santa Victoria Este with La Paz, in July 2001.

(c) The planning of works for the construction of Route 86, and the opening of a public tender process for that purpose, in 2000 and 2001.

(d) The works of maintenance and broadening of Provincial Route No. 54, in 2005.

(e) The conduction of a public tender and the grant of a concession for oil and gas exploration in the area affected by the claim, in 2001.

*Requirements of inter-American human rights law for carrying out public works and granting concessions in indigenous territories*

208. Infrastructure or development mega-projects, such as roads, canals, dams, ports and the like, as well as concessions for the exploration or exploitation of natural resources in ancestral territories, may affect indigenous populations with particularly serious consequences, given that they imperil their territories and the ecosystems within, for which reason they represent a danger to their survival as peoples, especially in cases where the ecological fragility of their territories coincides with demographic weakness.<sup>191</sup> For the above reasons, the organs of the inter-American protection system have linked the negative effects of development and investment plans and projects in indigenous or tribal territories, as well as those of concessions for the exploration and exploitation of natural resources, to multiple violations of individual and collective human rights. For example, they have concluded that the right to life in conditions of dignity is violated whenever development projects cause environmental contamination, generate noxious effects upon basic

<sup>191</sup> IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, pars. 33-35.

subsistence activities and affect the health of the indigenous and tribal peoples who live in the territories where they are implemented.<sup>192</sup> They have also held that “adverse effects on health and production systems; changes in domestic migration patterns; a decline in the quantity and quality of water sources; impoverishment of soils for farming; a reduction in fishing, animal life, plant life, and biodiversity in general, and disruption of the balance that forms the basis of ethnic and cultural reproduction”, inter alia, constitute violations of the human rights of indigenous peoples who live in the vicinity of the places where the mining, timber or oil industries develop their projects<sup>193</sup>.

209. The IACHR and Inter-American Court have established that these types of concession, together with the State acts that relate to them, are violations of the right to property protected by the American Convention, and of other human rights and the granting of concessions by States under these circumstances violates Articles 1 and 2 of the American Convention. They have also concluded that the environmental damages caused by concessions for the exploration and exploitation of natural resources exacerbate the violations of the right to communal property by the authorities, and give rise to international responsibility.<sup>194</sup> In this regard, the IACHR has reiterated that it “acknowledges the importance of economic development for the prosperity of the populations of this Hemisphere”<sup>195</sup>; but it also acknowledges that “at the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.”<sup>196</sup>

210. In evaluating the granting of concessions or the implementation of development or investment plans or projects, States must take into account, as a primary consideration, the indigenous communities that inhabit the respective territories, and their traditional modes of land tenure. For the Court, the term “development or investment plan” refers to “any proposed activity that may affect the integrity of the lands and natural resources within the [indigenous] territory, particularly any proposal to grant logging or mining concessions”<sup>197</sup>. In the Court’s opinion, “Article 21 of the Convention does not *per se* preclude the issuance of concessions for the exploration and exploitation of natural resources in indigenous or tribal territories.” For the inter-American Court, “while it is true that all exploration and extraction activity in the [indigenous] territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the [indigenous peoples], it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within [indigenous] territory.”<sup>198</sup> In accordance with

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<sup>192</sup> CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 250.

<sup>193</sup> CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, 7 de agosto de 2009, párr. 158.

<sup>194</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 148.

<sup>195</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 150.

<sup>196</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 150.

<sup>197</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 129, nota al pie No. 127.

<sup>198</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 126.



the above, the American Convention establishes “safeguards and limitations regarding the State’s right to issue concessions that restrict the use and enjoyment of such natural resources”<sup>199</sup>.

211. In application of these safeguards and limitations, for purposes of granting extractive concessions or undertaking development or investment plans or projects over natural resources, the Inter-American Court has designed a three-tier test to be applied by States when they are considering their approval: (a) compliance with the expropriation requirements of Article 21; (b) ensuring the physical and cultural survival of the group; and (c) fulfilling the procedural guarantees of participation, environmental impact assessment, and benefit sharing. Each one of the three components helps ensure or safeguard the respective indigenous or tribal peoples in the exercise of their rights.<sup>200</sup> The requirements also “are consistent with the observations of the Human Rights Committee, the text of several international instruments, and the practice in several States Parties to the Convention.”<sup>201</sup> They are equally consistent with the United Nations Declaration on the Rights of Indigenous Peoples.<sup>202</sup>

212. It is necessary to comply with these requirements when the “natural resource is one that has been traditionally used by the members of the [corresponding] people in a manner inextricably related to their survival.”<sup>203</sup> The requirements also apply when the projects will have an impact upon any natural resources that are critical for the physical and cultural survival of such communities; thus, in general terms, it is necessary to comply with all of these requirements even with regard to concessions within ancestral territory that impact natural resources which have not been traditionally used by members of the corresponding community, if their extraction will necessarily affect other resources that are vital to their way of life.<sup>204</sup> Compliance with the requirements is mandatory, even if there are domestic law provisions that reserve for the State the property of the subsoil resources, or other natural resources in indigenous territories; such is the case even when there are constitutional provisions by which subsurface resources in indigenous territories belong to the State<sup>205</sup>.

*First requirement: compliance with the general conditions to be met in cases of expropriation*

213. States must comply with the requirements established in Article 21 of the American Convention on Human Rights for cases of expropriation. As explained by the Court, “the protection of the right to property under Article 21 of the Convention is not absolute (...). Although the Court recognizes the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival,

<sup>199</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 141.

<sup>200</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 130.

<sup>201</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 130. La Corte Interamericana cita en este punto: el Convenio 169 de la OIT; la Política Operacional OP/BP 4.10 del Banco Mundial; el Comentario General 23 del Comité de Derechos Humanos, párrafo 7; y la Recomendación General 23 del Comité para la Eliminación de la Discriminación Racial, párrafo 4(d).

<sup>202</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 131.

<sup>203</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 144.

<sup>204</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 155.

<sup>205</sup> CIDH, Tercer Informe sobre la situación de los derechos humanos en Colombia. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 de febrero de 1999, párrs. 29-31 y Recomendación 4.

said property rights, like many other rights recognized in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the 'law may subordinate [the] use and enjoyment [of property] to the interest of society'. Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.<sup>206</sup><sup>207</sup>

*Second requirement: not affecting the survival of the respective people*

214. The State granting the concession may not affect the survival of the corresponding indigenous or tribal people, in accordance with its ancestral ways of life. In the Inter-American Court's terms: "another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members."<sup>208</sup> The notion of "survival" is not tantamount to mere physical subsistence: "The Court emphasized that the phrase 'survival as a tribal people' must be understood as the ability of the [indigenous] to 'preserve, protect and guarantee the special relationship that [they] have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [...]'. That is, the term 'survival' in this context signifies much more than physical survival."<sup>209</sup> In similar terms, for the IACHR, "the term 'survival' (...) does not refer only to the obligation of the State to ensure the right to life of the victims, but rather to take all the appropriate measures to ensure the continuance of the relationship of the [indigenous] people with their land and their culture"<sup>210</sup>.

*Third requirement: participation, impact assessments, and access to the benefits of the project*

215. The third element of the test is composed of three mandatory elements. According to the Court, "in accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of [indigenous or tribal peoples] by the issuance of concessions within their territory does not amount to a denial of their survival as [an indigenous or] tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the [corresponding] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (...) within [ancestral] territory. Second, the State must guarantee that the [members of the people] will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within [ancestral] territory unless and until independent and

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<sup>206</sup> Cf. *Case of the Indigenous Community Yakye Axa*, *supra* note 75, paras. 144-145 citing (*mutatis mutandi*) *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111, para. 96; *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 127, and *Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 155. Cf., also, *Case of the Indigenous Community Sawhoyamaxa*, *supra* note 75, para. 137.

<sup>207</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 127.

<sup>208</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 128.

<sup>209</sup> Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 37 [footnotes omitted].

<sup>210</sup> Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 29.

technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the [respective] community have with their territory, which in turn ensures their survival as a tribal people."<sup>211</sup> These three conditions are complementary requirements, aimed at guaranteeing survival as indigenous or tribal peoples.<sup>212</sup>

216. *Participation and prior consultation.* Indigenous and tribal peoples have the right to "be involved in the processes of design, implementation, and evaluation of development projects carried out on their lands and ancestral territories"<sup>213</sup>, and the State must "ensure that indigenous peoples be consulted on any matters that might affect them"<sup>214</sup>, taking into account that "the purpose of such consultations should be to obtain their free and informed consent"<sup>215</sup>. When States grant natural resource exploration or exploitation concessions to utilize property and resources encompassed within ancestral territories, they must adopt adequate measures to develop effective consultations, prior to granting the concession, with communities that may potentially be affected by the decision<sup>216</sup>. The right of every person to participate in matters that may affect them (Art. 23, American Convention on Human Rights), for the case of indigenous peoples in the framework of development projects carried out over the lands, territories and natural resources they use or occupy, translates into prior, free and informed consultation processes, as provided for in ILO Convention 169<sup>217</sup>. Natural resource exploitation in indigenous territories without the affected indigenous people's consultation and consent causes, in many cases, a deterioration of the environment which imperils these peoples' survival<sup>218</sup> and violates their right to property<sup>219</sup>. Consequently there is a state duty to consult and, in given cases, obtain indigenous peoples' consent towards plans or projects for investment, development or exploitation of natural resources in indigenous territories: states must "promote, consistent with their relevant international obligations, participation by indigenous peoples and communities affected by projects for the exploration and exploitation of natural resources by means of prior and informed consultation aimed at garnering their voluntary consent to the design, implementation, and evaluation of such projects, as well as to the determination of benefits and indemnization for damages according to their own

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<sup>211</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 129.

<sup>212</sup> Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 38.

<sup>213</sup> CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, 7 de agosto de 2009, párr. 157.

<sup>214</sup> CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, 7 de agosto de 2009, párr. 157.

<sup>215</sup> CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, 7 de agosto de 2009, párr. 157.

<sup>216</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 143.

<sup>217</sup> CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 246. CIDH, Segundo Informe sobre la situación de los derechos humanos en el Perú. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 de junio de 2000, párr. 26.

<sup>218</sup> CIDH, Segundo Informe sobre la situación de los derechos humanos en el Perú. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 de junio de 2000, párr. 26. CIDH, Informe No. 75/02, Caso 11.140, Mary y Carrie Dann v. Estados Unidos, 27 de diciembre de 2002, párr. 131. CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 140.

<sup>219</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 144.

development priorities.”<sup>220</sup> Through such prior consultation processes, indigenous and tribal peoples’ participation must be guaranteed “in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation”<sup>221</sup>.

217. The right to property over natural resources does not depend on state recognition; therefore, prior consultation procedures “must involve the groups that may be affected, either because they own land or territory or because such ownership is in the process of determination and settlement.”<sup>222</sup> In other words, indigenous and tribal peoples who lack formal titles of property over their territories must also be consulted in *relation* to the granting of extractive concessions or the implementation of development or investment plans or projects in their territories. States violate indigenous peoples’ right to property “by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified or protected, without effective consultations with and the informed consent of the [respective] people and with resulting environmental damage”<sup>223</sup>.

218. In order to be consistent with inter-American human rights law, consultation with indigenous peoples must meet certain requirements: it must be prior, that is, it must be developed “preceding the design and execution of natural resource projects on the ancestral lands and territories of indigenous peoples;”<sup>224</sup> it must be culturally adequate and take into account the respective people’s traditional decision-making methods, as well as their own forms of representation;<sup>225</sup> it must be informed, which requires the full provision of precise information on the

<sup>220</sup> CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párr. 1141, Recomendación 5. Ver también: CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 297, Recomendación 5.

<sup>221</sup> CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 248.

<sup>222</sup> CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 246.

<sup>223</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 153, 194 and 197. Corte IDH. Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2001. Serie C No. 79, párr. 153-2. Applying this rule, in the Awas Tingni case the Inter-American court concluded that the state had “violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property”, for having “granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled [Corte IDH. Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2001. Serie C No. 79, párr. 153]

<sup>224</sup> CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 249. In this sense, the inter-American Court’s judgment in the Saramaka case establishes that consultation of indigenous or tribal peoples must take place during the first stages of the development or investment plan or project or the extractive concession: “the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State.” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133]

<sup>225</sup> Corte IDH, Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 131. In general terms, “all issues related to the consultation process with the [respective] people, as well as those concerning the beneficiaries of the ‘just compensation’ that must be shared, must be determined and resolved by the [respective] people in accordance with their traditional customs and norms” [Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 27]; “in ensuring the effective participation of members of the [respective] people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133.]. States must allow for the effective participation of indigenous and tribal peoples, in accordance with their traditions and customs, in the decision-making processes that relate to extractive concessions or development or

nature and consequences of the consulted project to the communities;<sup>226</sup> and it must be conducted in good faith and with the aim of reaching an agreement.<sup>227</sup>

219. *Participation in the benefits of the project.* The second component of this third requirement is the establishment of benefit-sharing mechanisms in favor of the communities or

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investment plans or projects; Articles 21 and 1.1 of the American Convention are violated by not doing so [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 154]. As the Inter-American Court has explained, “consultations must be [conducted] through culturally appropriate procedures” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133], peoples must be consulted “in accordance with their own traditions” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133], and “consultation should take account of the [respective] people’s traditional methods of decision-making.” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133].

<sup>226</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 142. According to the Inter-American Court’s jurisprudence, consultation must be informed, in the sense that indigenous peoples must be made “aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily.” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133] The right to participation in decision-making processes related to investment or development plans or projects or extractive concessions, and the right of access to information, are two basic elements to “support and enhance the ability of individuals to safeguard and vindicate” [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997.] the rights to life and personal integrity in situations of serious environmental contamination, and thus contribute to “the quest to guard against environmental conditions which threaten human health” [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997]. As explained by the IACHR, “access to information is a prerequisite for public participation in decision-making and for individuals to be able to monitor and respond to public and private sector action. Individuals have a right to seek, receive and impart information and ideas of all kinds pursuant to Article 13 of the American Convention. (...) The Government should ensure that [basic information about exploitation activities taking place locally, and about potential risks to their health] as the law in fact requires be submitted is readily accessible to potentially affected individuals.” [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997]. Therefore, the IACHR has made recommendations to States such as the following: “as the right to participate in decision-making and the right to effective judicial recourse each require adequate access to information, the Commission recommends that the State take measures to improve systems to disseminate information about the issues which affect them, and to enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.” [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997]. For the Inter-American Court, “this duty requires the State to both accept and disseminate information, and entails constant communication between the parties” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133]. Informed consultation also requires States to ensure that the procedures “establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities.” [CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 248].

<sup>227</sup> As a general rule, states must “ensure, through clear consultation procedures, that their free and informed prior consent is obtained in order to carry out said projects” [CIDH, Informe de Seguimiento – Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II.135, Doc. 40, 7 de agosto de 2009, párr. 165], and the achievement of consent must be the primary objective of every consultation process. States’ primary obligation is to secure, in accordance with Convention 169, that “all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their *habitat* or culture is processed and decided on with the participation of and in consultation with the peoples interested, with a view to obtaining their consent and possible participation in the benefits.” [CIDH, Segundo Informe sobre la situación de los derechos humanos en el Perú. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 de junio de 2000, Capítulo X, párr. 39 – Recomendación 5] In the inter-American Court’s words, “consultations must be in good faith (...) and with the objective of reaching an agreement” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 133].

peoples affected by the extraction of natural resources or the implementation of development or investment plans or projects.<sup>228</sup>

220. *Prior environmental and social impact assessments.* Finally, the third safeguard included within the third requirement is the conduction of a “prior environmental and social impact assessment”, carried out by “independent and technically capable entities, with the State’s supervision”<sup>229</sup>. The ultimate purpose of environmental and social impact assessments is “to preserve, protect and guarantee the special relationship” of indigenous peoples with their territories, and guaranteeing their subsistence as peoples.<sup>230</sup> For the Inter-American Court, Article 21 of the American Convention, in connection with Article 1.1, is violated when the State fails to carry out or supervise environmental and social impact assessments prior to granting the concessions.<sup>231</sup> The Inter-American Court’s judgment in the Saramaka case establishes that social and environmental impact assessments must be carried out prior to the approval of the respective plans,<sup>232</sup> and requires states to allow indigenous peoples to participate in the conduction of prior environmental

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<sup>228</sup> Indeed, indigenous and tribal peoples have the right to participate in the benefits derived from projects for the exploration and exploitation of natural resources or from development or investment plans or projects in their territories [CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párr. 1137, Recomendación 6. Ver también: CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 297, Recomendación 6]. In the Court’s terms, “the second safeguard the State must ensure when considering development or investment plans within [indigenous or tribal] territory is that of reasonably sharing the benefits of the project with the [respective] people” [Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 138]; consequently, “the State must guarantee that the [members of the affected indigenous or tribal communities] will receive a reasonable benefit from any such plan within their territory” [Saramaka, párr. 129.]. Indigenous and tribal peoples also have the right to participate in the determination of the benefits of projects for natural resource exploration and exploitation, or of investment or development plans, in accordance with their own priorities for development, and States are in the international obligation of guaranteeing their participation in said determination of the benefits to be produced by the proposed projects. [CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009, párr. 1137, Recomendación 5. Ver también: CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 297, Recomendación 5] Therefore, states must ensure that prior consultation procedures “establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities.” [CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 248]

<sup>229</sup> Corte IDH, *Caso Pueblo Saramaka*, *supra* nota 42, párr 129.

<sup>230</sup> *Ibidem*. In general terms, “ESIAs serve to assess the possible damage or impact a proposed development or investment project may have on the property in question and on the community.” [Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 40] States must guarantee that the sustainability of investment or development plans or projects and natural resource exploration and exploitation projects in indigenous and tribal peoples’ territories is “measured in advance, using effective mechanisms of participation for the persons and groups affected, regardless of whether the State has recognized their ownership” [CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párr. 254]. Consequently, as stated by the inter-American Court in its Saramaka judgment, “the purpose of ESIAs is not only to have some objective measure of such possible impact on the land and the people, but also (...) to ‘ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily’.” [Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 40]

<sup>231</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 154.

<sup>232</sup> As explained by the Court, “ESIAs must be completed prior to the granting of the concession, as one of the objectives for requiring such studies is to guarantee the [corresponding people’s] right to be informed about all the proposed projects in their territory. Hence, the State’s obligation to supervise the ESIAs coincides with its duty to guarantee the effective participation of the [respective] people in the process of granting concessions.” [Corte IDH. Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 41]

and social impact assessments<sup>233</sup>. In general terms, ESIA's "must respect the [corresponding] people's traditions and culture"<sup>234</sup> and the results must be shared with the indigenous communities so that they can make an informed decision.

***The right of access to information in relation to the development or investment plans or projects***

221. For the IACHR, the right of access to information protected by Article 13 of the American Convention "comprises the positive obligation of the State to provide its citizens with access to the information in its possession, and the corresponding right of individuals to access the information held by the State."<sup>235</sup>

222. The right of access to information cannot be reduced to the duty of turning over information requested by a particular person. The right also includes the obligation to make public administration transparent<sup>236</sup> and to provide, *ex officio*, the information needed by the public (the general citizenry or a particular group) for the exercise of other rights. In effect, when the exercise of the fundamental rights of people depend on those people having relevant public knowledge, the State must provide it in a manner that is timely, accessible, and complete. In this sense, the Commission has established that the right of access to information is a key instrument for the exercise of other human rights, "particularly by the most vulnerable individuals."<sup>237</sup>

223. The timely, sufficient, and clear provision of information to indigenous peoples outside interventions that can affect their territory is an indispensable condition for adequately

<sup>233</sup> Corte IDH, *Caso Pueblo Saramaka*, *supra* nota 42, párr. 133 (el Estado tiene el deber de "asegurarse que los miembros del pueblo Saramaka tengan conocimiento de los posibles riesgos, incluidos los riesgos ambientales y de salubridad, a fin de que acepten el plan de desarrollo o inversión propuesto con conocimiento y de forma voluntaria"). *Cf.* Corte IDH, *Caso Pueblo Saramaka vs. Surinam* (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas), Sentencia de 12 de agosto de 2008, Serie C No. 185, párr. 16.

<sup>234</sup> Corte IDH. *Caso del Pueblo Saramaka Vs. Surinam*. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008 Serie C No. 185, párr. 41.

<sup>235</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February, 2009. Chapter III. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>. Likewise, Article 4 of the IACHR's Declaration of Principles on Freedom of Expression (2000) establishes that "Access to information (...) is a fundamental right of every individual," and also that "States have the obligation to guarantee the full exercise of this right." See also IACHR, Office of the Special Rapporteur for Freedom of Expression. Estudio Especial sobre el Derecho de Acceso a la Información. August, 2007. IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2005. OEA/Ser.L/V/II.124. Doc. 7. 27 February, 2006. Chapter IV. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=662&IID=1>.

<sup>236</sup> I/A Court H.R., *Case of Claude-Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. Para. 77. In this respect, the UN, OSCE and OAS Special Rapporteurs on Freedom of Expression, in their Joint Declaration, established that "Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest" (Joint Declaration on Access of Information and Secrecy Legislation, December 6, 2004, available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=319&IID=1>), which is particularly relevant when the information is necessary for the exercise of other fundamental rights. The scope of this obligation is also spelled out by the Inter-American Juridical Committee in its Resolution CJI/RES.147(LXXIII-O/08) on "Principles on the Right of Access to Information," Rio de Janeiro, Brazil, August 7, 2008, available at: [http://www.oas.org/cji/eng/CJI-RES\\_147\\_LXXIII-O-08\\_eng.pdf](http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf), in which it is established that "Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable" (id., Principle 4).

<sup>237</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. Para. 147. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>. Likewise, Article 9 of the Inter-American Democratic Charter provides that "the promotion and protection of human rights of indigenous peoples (...) contribute to strengthening democracy and citizen participation."

guaranteeing the exercise of their right to collective property over their territories. Likewise, the close relationship that indigenous peoples have with their territory means that the right of access to information about possible exogenous interventions on indigenous territory that could have a serious impact on the community's habitat can become a mechanism that is necessary for ensuring other right like the right to the health of group members and even their right to exist as a community. Finally, the right of access to information on exogenous interference on indigenous land is an indispensable condition for guaranteeing control over political decisions that can compromise the collective rights of a People, as well as fundamental rights that would also be affected.<sup>238</sup> The Inter-American Court has indicated that indigenous peoples' exercise of the right to collective property requires "the State to both accept and disseminate information, and entails constant communication between the parties (...) in good faith, through culturally appropriate procedures and [have] the objective of reaching an agreement."<sup>239</sup>

224. According to a systematic interpretation of the jurisprudence and instruments of the inter-American system for the protection of human rights, the right of access to information as a condition for the exercise of the rights derived from the collective property of indigenous peoples and as a condition for an adequate prior consultation in those cases in which that right is enforceable includes indigenous peoples' right to have the State provide accessible, sufficient, and timely information on, at least, two aspects: (1) the nature and the impact of the outside intervention on goods or resources that are the people's property, and (2) the consultation process to be carried out and the reasons justifying it. Only in this way can it be ensured that the information submitted by the State will allow the communities to form a genuinely free and informed opinion in the decision-making process on the exploration and exploitation of natural resources in their territories.<sup>240</sup>

***Evaluation of the present case in light of the foregoing rules***

225. Neither the public works undertaken by the State of Argentina in the ancestral territory, nor the concession granted for hydrocarbon exploration complied with the minimum requirements established by the inter-American human rights protection system.

226. In effect, neither the construction of the international bridge over the Pilcomayo River, nor the public tender and awarding process for the construction of Route 86, nor the adaptation works of Route 54, nor the works of improvement of the provincial road between Santa Victoria Este and La Paz, neither the granting of the oil and gas concession, complied with the minimum standard that requires (a) satisfying the requirements established in Article 21 for cases of expropriation, (b) not threatening the subsistence of the indigenous communities that inhabit Fiscal Lots 14 and 55, (c) being preceded by a prior, free and informed consultation, (d) being preceded by social and environmental impact assessments in accordance with international parameters, or (e) securing the participation of the indigenous communities in the benefits derived from each project.

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<sup>238</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 142.

<sup>239</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, par. 133-134.

<sup>240</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, par. 133-37. I/A Court H.R., Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127 para. 225. IACHR, Report No. 75/02. Case 11.140. Mary and Carrie Dann. United States. December 27, 2002, para. 140. IACHR, Report No. 40/04. Case 12.053. Merits. Maya Indigenous communities of the Toledo District. Belize. October 12, 2004, para. 142.



The State did not comply, in any of these cases, with its obligations of allowing and promoting access to the respective public information by the affected indigenous communities<sup>241</sup>.

227. The fact that these indigenous communities did not have a territorial property title formally recognized by the State authorities heightens the international responsibility of the Argentinean State, because –as established by the inter-American system’s jurisprudence–, the safeguards of the right to property under inter-American human rights instruments can be fully enforced by indigenous and tribal peoples in relation to territories that belong to them but which have not yet been formally titled, demarcated or delimited by the State, and also in relation to territories whose possession they have lost, partially or totally. States violate indigenous and tribal peoples’ right to property when they grant concessions for the exploration and exploitation of natural resources or carry out public works in untitled, undemarcated or unprotected territories.<sup>242</sup> Following this line, the IACHR has established that States are in the obligation of “carry[ing] out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the [indigenous] people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the [respective] people”<sup>243</sup>.

228. For the above reasons, the IACHR considers that the State of Argentina violated the right to territorial property established in Article 21 of the Convention and the right of access to information established in Article 13, as well as the right to participation established in Article 23, to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, petitioner in the present case.

#### **E. Deforestation of the territory by illegal logging**

229. The IACHR considers it pertinent to recall, in relation to the issue of deforestation of the ancestral territory, that the indigenous communities who inhabit this area have (a) the right to property of the natural resources present in their territory, and (b) the right to environmental integrity, which create clear obligations of prevention and immediate action on the part of the State authorities, including the duty to control and punish illegal extraction of wood.

230. The Inter-American human rights system’s jurisprudence on indigenous peoples’ right to communal property has explicitly incorporated, within the material scope of the right to property, the natural resources traditionally used by indigenous peoples and linked to their cultures, including uses which are both strictly material and other uses of a spiritual or cultural character..<sup>244</sup> As explained by the Inter-American Court, “the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land

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<sup>241</sup> Copy of letter sent on March 22, 2001 to the Foreign Ministry. Copy of a letter sent on March 22, 2001 to the Government of Salta. Copy of the response letter from the Foreign Ministry dated March 27, 2001. Annex to a communication sent by the petitioners on July 19, 2001.

<sup>242</sup> CIDH, Application to the Inter- American Court on the case Pueblo Kichwa of Sarayaku y sus miembros vs. Ecuador, 26 de abril de 2010, parr 125. CIDH Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, parr. 142 y 143.

<sup>243</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 197 – Recomendación 2.

<sup>244</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 118.

ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life."<sup>245</sup>

231. Indigenous peoples' right to property, access and use of the natural resources present in their traditional territories has been linked by the Inter-American Court to these peoples' survival as differentiated peoples, taking into account aspects of both material subsistence and cultural survival. According to the Inter-American Court's jurisprudence, "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake."<sup>246</sup>

232. Insofar as indigenous and tribal peoples have property rights over the natural resources present in their ancestral territories which are linked to their culture, States must adopt effective measures to secure those rights<sup>247</sup>, in accordance with the traditional use and occupation patterns. The state's failure to adopt such measures violates Articles 1 and 2 of the American Convention.

233. The exercise of rights over natural resources is not conditioned to the existence of a formal title to property. Indigenous and tribal peoples' territorial rights, which include their rights over natural resources, exist even without State actions which specify them, given that such peoples have communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory.<sup>248</sup>

234. Moreover, although neither the American Declaration of the Rights and Duties of Man, nor the American Convention on Human Rights, contain express references to the protection of the environment, it is clear that several rights of a fundamental rank which are enshrined therein require, as a precondition for their proper exercise, a minimum environmental quality, and are profoundly affected by the degradation of natural resources. The IACHR has emphasized in this sense that there is a direct relationship between the physical environment in which persons live, and the rights to life, security and physical integrity: "The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."<sup>249</sup>,

235. In this sense, the protection of the environmental integrity of the natural resources that are present in ancestral territories is necessary to secure certain substantial rights of a

<sup>245</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 122. Corte IDH. Caso Comunidad Indígena Yakye Axa Vs. Paraguay. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005. Serie C No. 125, párrs. 124, 137. Corte IDH. Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146, párrs. 118, 121.

<sup>246</sup> Cf. Case of the Indigenous Community Yakye Axa, supra note 75, para. 137, and Case of the Indigenous Community Sawhoyamaxa, supra note 75, para. 118.

<sup>247</sup> Corte IDH, Caso de la Comunidad Yakye Axa Vs. Paraguay. Fondo, Reparaciones y Costas. Sentencia de 17 de junio de 2005. Serie C No. 125, párr. 141.

<sup>248</sup> CIDH, Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales. Normas y jurisprudencia del Sistema Interamericano de Derechos Humanos. OEA/Ser.L/V/II.Doc.56(09, 30 de diciembre de 2009, párr. 68.

<sup>249</sup> CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997.

fundamental nature for the members of indigenous and tribal peoples, such as life, dignity, personal integrity, health, property, privacy or information, inter alia. These rights are directly affected whenever there are episodes or situations of pollution, deforestation, contamination of waters, or other types of environmental damages in ancestral territories.<sup>250</sup>

***State duty to implement the existing environmental standards***

236. The rule of law requires that State authorities implement the environmental protection standards that bind them at the national and international levels; this is a positive obligation of States, which expresses the States' general obligation to implement their own legislation in order to protect the human rights of indigenous or tribal peoples and their members. States must adopt measures to ensure that recognition of indigenous and tribal peoples' territorial rights in their constitutions and in the international treaties to which they are parties, is incorporated in a cross-cutting manner to their domestic legislation on the different matters that can potentially affect them directly or indirectly, especially to the internal legislation on development projects;<sup>251</sup> but at the same time they have the obligation of securing the effective implementation of the provisions they adopt, and of the international human rights law provisions that bind them.

237. The State duty to apply the environmental provisions in force gains special importance vis-a-vis non-State actors whose conduct is harmful for natural resources and in relation to which the authorities have clear international obligations. This obligation to implement the existing environmental standards is linked to the general State duty of guarantee and protection of human rights from violations or threats by private actors. In practice, States have resorted to different instruments in order to implement their environmental standards and thus comply with their international obligations. Whichever option is taken, the lack of implementation of the environmental protection provisions towards the acts of private parties, in particular of extractive companies and industries, may give rise to a declaration of international responsibility for the State,

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<sup>250</sup> Hence the integrity of the environment is directly linked to the exercise of the right to life in conditions of dignity; this implies that the State is under a number of international duties of prevention and positive action, aimed at guaranteeing that environmental impacts do not compromise persons' capacity to exercise their most basic human rights. In this line, the IACHR has explained that the right to life protected by both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights "is not (...) limited to protection against arbitrary killing. States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury." [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997] The link between the protection of the environment and respect for human dignity has also been emphasized by the IACHR: "The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being." [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997] The IACHR has also underlined the direct link between the preservation of environmental integrity and access to livelihood sources, a link which is encompassed by the right to life and other connected rights; citing the World Charter for Nature, it has held that "mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients." [CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997] On the other hand, the IACHR has signaled the link between the protection of the environment and the right to health. Since 1983, in its report on the situation of human rights in Cuba, the IACHR recommended the State to adopt specific measures to protect the environment in order to comply with its obligations appurtenant to the right to health, explaining that a healthy environment is essential for a healthy population, and noting that factors such as water provision, basic sanitation and hygiene services and waste management bear an important impact in this regard. [CIDH – La situación de los Derechos Humanos en Cuba, Séptimo Informe. Doc. OEA/Ser.L/V/II.61, Doc.29 rev. 1, 4 de octubre de 1983, párs. 1, 2, 41, 60, 61]

<sup>251</sup> CIDH, Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, 28 de junio de 2007, párrs. 220, 297 – Recomendación 4.

for violation of the human rights of indigenous or tribal populations affected by activities that are harmful for nature<sup>252</sup>.

238. States have a general duty to prevent damage to the environment in indigenous or tribal territories. States must adopt the measures that are necessary to protect indigenous communities' habitat from ecological deterioration as a consequence of extractive, cattle-raising, agricultural, timber and other economic activities, as well as from the consequences of infrastructural projects, given that such deterioration reduces their traditional capacities and strategies in terms of food, water and subsistence activities. In adopting these measures, States must place "special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities"<sup>253</sup>.

239. In more specific terms, the IACHR has demanded that States establish adequate safeguards and mechanisms to supervise, control and guarantee there is sufficient personnel so as to ensure that concessions for the exploitation of natural resources do not cause environmental damages that affect the lands or the indigenous communities<sup>254</sup>; and it has prompted them to "take steps to prevent harm to affected individuals through the conduct of its licensees and private actors (...) [and to] ensure that measures are in place to prevent and protect against the occurrence of environmental contamination which threatens the lives of the inhabitants of development sectors."<sup>255</sup>

240. By virtue of the foregoing rules, States are under the obligation of controlling and preventing illegal extractive activities, such as illegal mining, logging or fishing in ancestral indigenous or tribal territories, and of investigating and punishing those responsible for them. On different occasions, the IACHR has described situations where illegal extraction of natural resources in indigenous territories are taking place, explaining that such activities constitute threats and usurpations of the effective property and possession of indigenous territories<sup>256</sup>, and that they imperil said peoples' survival, especially because of their impact upon the rivers, soils and other resources that constitute the main sources of their livelihood.<sup>257</sup>

### ***Evaluation of the present case***

241. The petitioner indigenous communities have constantly and consistently reported the occurrence of logging and illegal extraction of wood and other natural resources in their territories, with the ensuing result of environmental degradation by deforestation. These illegal natural resource extractive activities have been timely reported to the State authorities by the indigenous inhabitants, and in different ambits, in particular in the course of the proceedings before the IACHR. The State representatives have acknowledged the existence of this problem, and vowed to adopt measures to

<sup>252</sup> CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997. Ver también: CIDH, Resolución No. 12/85, Caso No. 7.615, Pueblo Yanomami v. Brasil, 5 de marzo de 1985.

<sup>253</sup> CIDH, Tercer Informe sobre la situación de los derechos humanos en Paraguay. Doc. OEA/Ser./L/VII.110, Doc. 52, 9 de marzo de 2001, Capítulo IX, párrs. 38, 50 – Recomendación 8.

<sup>254</sup> CIDH, Informe No. 40/04, Caso 12.053, Comunidades Indígenas Mayas del Distrito de Toledo v. Belice, 12 de octubre de 2004, párr. 147.

<sup>255</sup> CIDH, Informe sobre la situación de los derechos humanos en Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 de abril de 1997.

<sup>256</sup> CIDH, Informe sobre la Situación de los Derechos Humanos en Brasil. Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, 29 de septiembre de 1997, párr. 33.

<sup>257</sup> CIDH, Democracia y Derechos Humanos en Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, 30 de diciembre de 2009.

prevent its occurrence. Nonetheless, as it has been reiteratively reported to the IACHR, illegal logging continues to devastate the environmental integrity of Fiscal Lots 55 and 14, at significant levels.

242. In light of the foregoing considerations, the IACHR considers that the Argentinean State, at the national and provincial levels, had a due diligence duty to take effective measures to prevent illegal logging in the ancestral territory of these indigenous communities. In spite of the signature of successive substantial agreements and of the acquisition of other formal commitments in which State authorities announced they would carry out actions to control illegal wood extraction, it has not been proven before the IACHR that such actions were adopted in a manner that was effective and proportional to the serious danger of deforestation caused by irregular loggers inside the territory.

243. As happens with the issue of the public works carried out within the ancestral territory, the fact that the indigenous communities of Fiscal Lots 14 and 55 lacked a territorial property title that was formally recognized by the authorities heightens the State's international responsibility, because, as established by the jurisprudence of the system, the safeguards of the right to property under the inter-American human rights instruments can be fully enforced by indigenous and tribal peoples in relation to territories that belong to them, but which have not yet been formally titled, demarcated or delimited by the State; and in fact, in the IACHR's view States are under the special obligation of protecting untitled indigenous territories from any act which can affect or diminish the existence, value, use or enjoyment of the property, including the natural resources, that is present therein.

244. Consequently, the IACHR considers that in failing to adopt effective actions to control the illegal deforestation of the indigenous territory, the State of Argentina incurred international responsibility for violation of Article 21 of the American Convention.

**F. Actions tending to undermine the Lhaka Honhat association, and their rights to participation and of petition before the inter-American system**

245. The petitioners assert that the State, through the Provincial Government of Salta, has carried out actions aimed at weakening the Lhaka Honhat Association, which is the form of organization freely chosen by the indigenous communities of Lots 14 and 55 to pursue their territorial claim. They argue that these actions took place when the Provincial Government promoted the disaffiliation of the indigenous communities that form part of the Association, and spurred division among their members.

246. Article 23.1.a. of the Convention establishes the right of every citizen to "take part in the conduct of public affairs, directly or through freely chosen representatives". Even though the mechanisms of representative democracy are the manifestation *par excellence* of this right, the IACHR considers its scope to be much broader, encompassing other forms of participation through which persons take part, in a direct manner, in the administration of public affairs in their States. The American Convention thus adopts a broad notion of participation, which includes –for example– the diverse and profound manifestations of democratic participation, or also the establishment of forms of incidence upon the management of public affairs.

247. After examining the petitioners' claims in light of these legal parameters, the IACHR considers that there is insufficient evidence in the case file to substantiate the claims of deliberate weakening of the Association by the authorities of the Provincial Government, promotion of the disaffiliation of its members, or of the division among the indigenous communities that form part of it.

248. The IACHR therefore concludes that in this process, it was not convincingly proved that there was a violation of the right established in Article 23.1 of the American Convention, in these specific terms alleged by the petitioners.

## **VI. CONCLUSIONS**

249. By virtue of the considerations of fact and of law established in the present report, the Inter-American Commission on Human Rights concludes that:

1. The State of Argentina violated the right to property established in Article 21 of the American Convention on Human Rights, to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, because they were not given effective title to their ancestral territory during the two decades since they presented their initial request for title in 1991.

2. The State of Argentina violated the right to property established in Article 21 of the American Convention on Human Rights, to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, insofar as the State abstained from ensuring the right to obtain a single shared title to territory for all of the communities of the Fiscal Lots, a right that had been legally recognized in provincial decrees adopted between 1991 and 1995, thereby violating these indigenous communities' right to the effective implementation of the law, and also frustrating the legitimate expectations that the provincial authorities' actions had generated among the petitioner indigenous communities, to obtain a single common title to territorial property.

3. The State of Argentina violated Articles 8 and 25 of the American Convention, in connection with Articles 21 and 1.1 of the Convention, because the State did not afford them an effective procedure to acquire recognition of their ancestral territory, and also because successive, *ad hoc* variations were introduced to the administrative procedure that was applicable to the resolution of their territorial claim, on no less than six occasions.

4. The State of Argentina violated Articles 21, 13 and 23 of the American Convention, in connection with Articles 21 and 1.1 of the Convention and to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, in having carried out public works and granting a concession for oil and gas exploration in the ancestral territory without complying with the requirements set by inter-American law, namely, to conduct expropriation procedures, to ensure no impact on the survival of the indigenous communities, to conduct prior, free and informed consultations, to conduct prior social and environmental impact assessments, and to grant participation in the benefits derived from the works and the concession.

5. The State of Argentina violated Article 21 of the American Convention, in connection with Articles 1.1 and 2 of the Convention, to the detriment of the indigenous communities that form part of the Lhaka Honhat Association, in having failed to exercise the required due diligence to control the deforestation of the ancestral territory by illegal loggers.

## **VII. RECOMMENDATIONS**

250. On the grounds of the analyses and conclusions of the present report,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF ARGENTINA:**

1. The State should finalize promptly the territorial formalization process in Fiscal Lots 14 and 55, taking as guiding parameters for its conclusion, in addition to the Inter-American standards described in this report, the following minimum guidelines:

- the petitioners have the right to a materially continuous territory which can allow them to develop their nomadic way of life; the 400.000 hectares that the government already promised to allocate them must be continuous, without obstacles, subdivisions or fragmentation, with due regard to the claims of other indigenous communities.
  - removal of the fences which have been tended within the indigenous territory.
  - control of deforestation.
2. Provide reparations for the violations of the right to territorial property and access to information derived from the development of public works without prior informed consultation, environmental impact assessments or benefit sharing.
  3. Ensure that in the demarcation of the territory and approval of any future public works or concessions on indigenous ancestral lands, the State conduct prior informed consultations, environmental impact assessments and benefit sharing conforming to Inter-American standards.