2012 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

American University Washington College of Law | May 2012

In the INTER-AMERICAN COURT OF HUMAN RIGHTS

Case of the Chupanky Community *et al.*

Petitioners

v.

The State of Atlantis

Respondent

MEMORIAL FOR THE STATE

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STATEMENT OF FACTS

The State of Atlantis, an island nation in the Americas, ratified all universal and regional conventions on human rights, including the American Convention on Human Rights (Convention), and relevant free trade agreements (FTA) through its Constitution of 1994.[1] Although an emerging nation, Atlantis currently depends on expensive foreign energy to supply power to its nine million inhabitants.[2] In the Chupancué region, indigenous people and peasant farmers live in extreme poverty.[3] Both the lack of sustainable domestic energy and its poverty remain real concerns in Atlantis' struggle toward social and economic progress.[4]

To address its lack of domestic energy and poverty, Atlantis adopted the 2003 National Development Plan (NDP).[5] Under the NDP, the Energy and Development Commission (EDC), a parastatal entity, solicited bids to build a national hydroelectric power plant.[6] The plant will create a sustainable domestic source of energy and generate industrial benefits that include promoting construction, creating jobs, and providing energy to Atlantis' remote regions.[7]

Atlantis conducted a feasibility study in November 2003, which showed that the Motompalmo River, located in the Chupancué region and one of Atlantis' main rivers, was an ideal location for the project.[8] In January 2005, the EDC granted the bid for the power plant to the Turbo Water Company (TW).[9] The project was divided into three phases: entering into

[1] Hypo ¶¶ 4 & 31.
[2] Hypo ¶ 1.
[3] Hypo ¶¶ 1 & 5.
[4] Hypo ¶ 5.
[5] *Id.*
[6] Hypo ¶ 5; Clarification Question 37.
[7] Hypo ¶ 5.
[8] *Id.*
[9] Hypo ¶ 10.

agreements with the land owners; draining and constructing reservoirs; and irrigating, testing, and operating the plant.[10] The location impacts the La Loma and Chupanky communities.[11]

The Chupanky

The Chupanky pre-dates European colonization and is part of the Rapstan nation.[12] The Rapstan's language, customs, practices, traditions, and religion characterize the Chupanky.[13] The Chupanky are a patriarchal community led by the Council Elders, whose culture is tied to the Motompalmo River.[14] The Chupanky fish, plant seeds and hunt.[15] Atlantis has taken measures to legally recognize, delimit, and demarcate title for the Chupanky ancestral territories.[16]

In November 2007, Atlantis created the Intersectoral Committee (IC) to negotiate with the Chupanky.[17] The IC conducted four meetings with the Council of Elders and male heads of households with Rapstan interpreters present.[18] To provide just compensation, IC offered the Chupanky alternative agricultural land.[19] The land is located just 35 kilometers from the river's eastern banks and exceeds the size of their current land. [20] Additionally, IC offered to provide electrical power, computers, jobs, a direct highway to the river, and eight water wells [21] A majority of the Chupanky approved the project's first and second phases in December 2007.[22]

On 28 February, 2008, Atlantis' Ministry of the Environment and Natural Resources (MENR) designated *Green Energy Resources* (GER), an independent organization, to conduct an

[10] *Id.*
[11] Hypo ¶ 6.
[12] Hypo ¶ 7.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Clarification Question 60.
[17] Hypo ¶ 14.
[18] Hypo ¶¶ 14 & 15.
[19] Hypo ¶ 15.
[20] *Id.*
[21] *Id.*
[22] *Id.*

environmental impact study.[23] MENR supervised, certified and sent a true and accurate copy of GER's report to the Chupanky in Spanish.[24] The report detailed possible geological damage and alteration to the ecosystem that would not harm human beings.[25] The report also anticipated social and cultural risks and provided ways to remedy them, including securing direct access to the Motompalmo River so that the Chupanky may maintain their spiritual custom.[26]

The Chupanky began work on 20 June, 2008.[27] TW hired seven divers and 215 masons and paid them US $4.50 per day.[28] The women prepared food and cleaned and washed clothes for US $2.00 per day.[29] TW also hired eighty-nine qualified individuals through employment contracts.[30] In the first two months, each person worked nine-hour days.[31] As project demands increased, the men's workday increased to fifteen hours per day.[32]

Before work began, Mina Chak Luna, a Chupanky woman, formed the Rainbow Warrior Women (RWW) to protest the agreement.[33] Mina sent a communiqué to IC, which it agreed to review.[34] On 16 November, 2008, RWW sent to *El Oscurín Pegri* medical results of four divers who suffered partial disability due to faulty equipment.[35] RWW also documented 50 masons who complained of work conditions.[36] Shortly after publication of the report, Atlantis offered the four divers medical vouchers and a year's supply of food, which they accepted.[37] On 10

[23] Hypo ¶ 18; Clarification Question 24.
[24] Hypo ¶ 18; Clarification Question 11.
[25] Hypo ¶ 18.
[26] *Id.*
[27] Hypo ¶ 19.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Hypo ¶ 17.
[34] *Id.*
[35] Hypo ¶ 20.
[36] *Id.*
[37] Hypo ¶ 44.

December, 2008, RWW and La Loma members met with EDC and MENR representatives in Tripol.[38]

On 20 December, 2008, the Council of Elders held a community meeting to veto the remaining stages of the project, notifying TW and IC on 25 December, 2008.[39] TW refused to halt construction, threatening to fire the indigenous employees and sue for breach of contract.[40] TW immediately conducted proceedings to remove the Chupanky to alternative lands.[41]

Morpho Azul an NGO representing the Council of Elders, filed an administrative claim before the EDC on 9 January 2009 requesting cancellation of the project.[42] EDC denied the claim on 12 April, 2009, holding that the Chupanky were fully informed and approved of the project.[43] Morpho Azul appealed to the Court for the Judicial Review of Administrative Acts (CJRAA).[44] On 10 August, 2009, CJRAA held that negotiations complied with international standards.[45] On 26 September, 2009, the Chupanky filed a petition for a constitutional remedy to the Supreme Court of Justice.[46] The Supreme Court rejected the petition on 15 December 2009, holding that Atlantis complied with national and international standards and that cultural integrity asserted in the claim is not recognized as an autonomous right in the case law of the Inter-American Court.[47]

The La Loma

[38] Hypo ¶ 21.
[39] Hypo ¶ 22.
[40] *Id.*
[41] *Id.*
[42] Hypo ¶ 23.
[43] *Id.*
[44] Hypo ¶ 24.
[45] *Id.*
[46] Hypo ¶ 25.
[47] Hypo ¶ 25; Clarification Question 51.

Women who entered into mixed-race marriages were exiled from Rapstan communities and formed the La Loma community in the 1980s.[48] Although the La Loma retains certain Rapstan cultural practices, they do not preserve the traditional Rapstan dialect, clothing, crafts or social hierarchy.[49] In 1985, Atlantis officially recognized La Loma as a peasant farming community and provided them with government subsidies.[50]

Atlantis declared the power plant a public utility in April 2005 and made a judicial deposit of half of the assessed value of the affected lots as compensation.[51] Additionally, Atlantis offered the La Loma alternative agricultural land located only 25 km west of the Motompalmo River.[52] 25% of the La Loma accepted the initial offer without asserting cultural ties.[53]

Atlantis then initiated expropriation proceedings before the Seventh Civil Court of Chupancué (Civil Court) to determine just compensation for the lands.[54] In February 2006, the Civil Court confirmed Atlantis' declaration that the land was of public interest, which allowed the project to move forward.[55] Members who refused to leave the land were reassigned to temporary locations.[56] In May 2006, the Civil Court found the La Loma were not entitled to indigenous protection because they are not an indigenous group.[57] On 19 October, 2006, an expert appraiser rendered his opinion on the value of the La Loma land.[58] The La Loma continue

[48] Hypo ¶ 8.
[49] *Id.*
[50] *Id.*
[51] Hypo ¶ 11; Clarification Question 54.
[52] *Id.*
[53] *Id.*
[54] Hypo ¶ 12.
[55] *Id.*
[56] *Id.*
[57] Hypo ¶ 13.
[58] *Id.*

to refuse any form of compensation for their land and contested the opinion on 30 October, 2006.[59] The proceeding is pending decision to determine an amount for just compensation.[60]

Proceedings before the Commission

Community representatives, the Petitioners, submitted a petition to the Inter-American Commission on Human Rights (Commission) on 26 May, 2010.[61] Atlantis did not file preliminary objections in its submission of observations on 1 September, 2010.[62] The Commission issued its report finding that Atlantis violated Articles 1(1), 4(1), 5(1), 6(2), 21 and 25 of the Convention against the Chupanky and violated Articles 5(1), 21 and 25 against the La Loma.[63] It recommended that Atlantis implement various comprehensive reparation measures for both communities, taking into account their cultural characteristics.[64] The compliance period lapsed, and the Commission brought this case before this Court on 4 October, 2011.[65]

LEGAL ANALYSIS

I. PRELIMINARY OBJECTIONS

This Honorable Court has jurisdiction to hear this case. Atlantis has ratified all regional and universal human rights instruments, including the American Convention.[66] Atlantis accepted this Court's jurisdiction on January 1, 1995.[67] Nonetheless, Atlantis asserts that the Commission has prematurely and improperly invoked the Court's authority.

A. Petitioners Have Not Exhausted All Available Domestic Remedies

[59] *Id.*
[60] *Id.*
[61] Hypo ¶ 26.
[62] Hypo ¶ 27.
[63] Hypo ¶ 28.
[64] *Id.*
[65] Hypo ¶ 29.
[66] Hypo ¶ 31.
[67] Hypo ¶ 31.

The Commission improperly invoked this Court's jurisdiction because the Chupanky and the La Loma have not exhausted all available domestic remedies. Under the Convention, the Commission may admit a petition only if domestic remedies have been pursued and exhausted.[68] A principle of international law requires that domestic remedies be adequate and effective.[69] The domestic remedies must address an infringement of a legal right and produce the result it was designed for.[70] Domestic remedies need not be exhausted when there is an inadequate remedy.[71] Moreover, an ineffective remedy, which includes unjustified delay in providing domestic remedies, also exempts exhaustion.[72] If the Petitioner cannot show exhaustion of local remedies, then the Commission cannot assert its authority.[73]

The Chupanky workers have not exhausted all domestic remedies. In addition to employment authority provided to them under state law, workers can bring their case before a judicial entity under relevant free trade agreements (FTA). Under both the North American Free Trade Agreement (NAFTA) and the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), a party has a right to appear before a judicial tribunal to petition their case and gain procedural protections under domestic law.[74]

Accordingly, the Chupanky workers have access to adequate and effective local remedies. The workers can contact the proper employment authority regarding work conditions under state law or seek judicial remedies under NAFTA and DR-CAFTA. Atlantis showed its willingness to provide an adequate and effective remedy when Atlantis provided the affected

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[68] American Convention art. 46(1).
[69] *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights)*, Advisory Opinion OC-11/90, Inter-Am. Ct. H.R., Ser. A, No. 11, (10 Aug., 1990), ¶ 36.
[70] *Id.*
[71] American Convention art. 46(2).
[72] *Juan Humberto Sánchez v. Honduras* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 99, (7 June, 2003), ¶ 67.
[73] American Convention art 46(1).
[74] North American Free Trade Agreement (NAFTA) art.1805; Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) art. 16(3).

divers with healthcare and food.[75] Thus, unhappy workers can file a petition before local authority for remedies but have not yet done so.[76] Additionally, under NAFTA and DR-CAFTA, workers can also seek judicial remedies but have not yet done so.[77]

The La Loma community has also failed to exhaust all domestic remedies. The expropriation proceeding is pending in a court that would offer affected owners just compensation for their lands.[78] The Civil Court has not reached a settlement with the La Loma because dissenters continue to refuse Atlantis' offer for compensation and because Atlantis attempted to reach a friendly settlement before the Commission.[79] However, the Civil Court continues to be willing to settle.[80] Furthermore, the La Loma can also bring their claim before the Court for the Judicial Review of Administrative Acts (CJRAA) to determine whether Atlantis' actions comply with its Constitution.

B. The Chupanky Women Cannot Invoke This Court's Jurisdiction Pertaining to Their Issues Because Neither Atlantis Nor The Commission Brought This Issue Before This Court

The Chupanky women cannot invoke this Court's jurisdiction because the Commission did not bring this issue before this Court. Under the Convention, only a state party and the Commission may submit a case to the Court and can only do so if proper procedures are followed.[81] The Commission, based on relevant facts, may draw up a report and state its conclusion and it may then file that report with the Court if it chooses.[82]

In its admissibility reports, the Commission did not find that Atlantis violated its obligation to the Chupanky women under the Convention of Belem do Pará nor were there

[75] Clarification Question 44.
[76] Clarification Question 68.
[77] NAFTA art.1805; DR-CAFTA art. 16(3).
[78] Hypo ¶ 13.
[79] Hypo ¶ 13; Clarification Question 86.
[80] Hypo ¶ 13.
[81] American Convention art. 61(1).
[82] American Convention art. 49 & 61.

reparations ordered through a gender perspective.[83] Therefore, because neither Atlantis nor the Commission brought the issue before the Court, the Court is unable hear this case.

B. The Commission Cannot Invoke This Court's Jurisdiction Because It Violated The Fourth Instance Formula

This Court is further unable to invoke this Court's jurisdiction because it violates the fourth instance formula. Under the fourth instance formula, Inter-American organs can only determine whether the State violated its international human rights obligations.[84] However, neither the Court nor the Commission can serve an appellate function to determine whether the State correctly applied its own domestic law.[85] Thus, when a legal issue is settled domestically, the Court may not question the domestic courts' competence.[86]

The Commission improperly inserted its authority here and, as a result, violated the fourth instance formula. The Atlantis Supreme Court held that the Chupanky did not have a constitutional remedy because Atlantis properly applied national and international standards in its negotiations.[87] Atlantis did not find a human rights violation in this case. As a result, neither the Commission nor the Court can interfere in this case.

C. The Court May Review All Issues To Ensure That The Commission Followed Proper Procedures

A state may waive, either implicitly or explicitly, certain admissibility requirements.[88] A state may implicitly waive an objection to a petition's admissibility if a state does not raise the objection in a timely manner, which is recognized as a tacit admission of a lack of domestic

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[83] Hypo ¶ 28.
[84] *Cesti Hurtado v. Peru* (Preliminary Objections), Inter-Am. Ct. H.R., Ser. C, No. 49, (26 Jan., 1999), ¶ 47.
[85] *Santiago Marzioni v. Argentina*, Case 11.673, Report No. 39/96, Inter-Am. Comm'n H.R., No. 86, OEA/Ser.L/V/II.95, doc. 7 rev., (15 Oct., 1996), ¶ 51; *Emiliano Castro Tortrino v. Argentina*, Case 11.597, Report No. 7/98, Inter-Am. Comm'n H.R., No. 54, OEA/Ser.L/V/II.98, doc. 7 rev., (2 Mar., 1998), ¶ 17.
[86] *Case of Las Palmeras v. Colombia*, (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 90, (6 Dec., 2001), ¶ 33.
[87] Hypo ¶ 25.
[88] *Castillo Paez v. Peru*(Preliminary Objections), Inter-Am. Ct. H.R., Ser. C, No. 25, (30 Jan., 1996), ¶ 40.

remedies.[89] However, the American Convention authorizes it to exercise full jurisdiction over all issues relevant to a case without being restricted by the Commission's previous decision.[90] This Court should review the issue regarding preliminary objections because Atlantis has a strong basis for it that merits this Court's review.

However, even if this Court finds that it can review this case, Atlantis did not violate Article 1(1), 4(1), 5(1), 6(2), 21, and 25 of the Convention against the Chupanky nor did it violate Article 5(1), 21, and 25 against the La Loma.

II. ATLANTIS SUBORDINATED EACH COMMUNITY'S INTEREST TO PROPERTY FOR A LEGITIMATE STATE PURPOSE

Article 21 of the Convention requires a State to protect the use and enjoyment of property.[91] O.A.S. conventions embrace an evolutionary method of interpretation, recognizing normative developments in international law both within and outside the inter-American system.[92] This includes communal property rights as defined by an indigenous community's customary land tenure.[93] However, the right to property is not absolute.[94] The State may subordinate a community's interest in traditional land for a legitimate state purpose.[95]

A. Atlantis Complied With Established International Law Pertaining To The Subordination Of The Chupanky's Property

Atlantis respected the property rights of the Chupanky by adhering to international standards for the subordination of traditional lands to State interests. Pursuant to Article 21 of the

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[89] *Id.* at ¶ 43.
[90] *Velásquez Rodríguez v. Honduras* (Preliminary Objections), Inter-Am. Ct. H.R., Ser. C, No. 1, (26 June, 1987), ¶ 29.
[91] American Convention art. 21.
[92] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Comm'n H.R., Report No. 52/02, OEA/Ser.L./II.117, doc. 1 rev. (1997), ¶ 18.
[93] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., Ser. C, No. 79, (31 Aug., 2001), ¶ 151.
[94] *Case of the Saramaka People v. Suriname* (Preliminary Objections), Inter-Am. Ct. H.R., Ser. C, No. 172, (28 Nov., 2007), ¶ 127.
[95] *Id*.

Convention, a state must respect the relationship between an indigenous community and its traditional lands, guaranteeing its social, cultural, and economic survival.[96] A State may, however, subordinate an indigenous community's use and enjoyment of land to the interest of society by ensuring the community's effective participation in the project, guaranteeing the community will receive a reasonable benefit, and providing a prior environmental impact assessment (ESIA).[97] Where a large-scale development or investment project will have a major impact within an indigenous community's territory, the State must also obtain the community's free, prior, and informed consent.[98] The duty to obtain consent, however, must not amount to a right to veto a State's democratically enacted legislation or projects.[99]

1. Atlantis Ensured Effective Participation According To Chupanky Customs

Atlantis ensured effective participation of the Chupanky according to their customs by negotiating with representatives with Rapstan interpreters present. Ensuring effective participation requires a State engage in active consultation with an indigenous community according to their customs and traditions.[100] The State must consult with the community in good faith, with the objective of reaching an agreement.[101] The good faith requirement means that consultations must occur at early stages in order to provide time for internal member discussion and to ensure members knowingly and voluntarily accept the State's plan.[102] Issuing concessions in an indigenous community's territory without consulting the community violates effective

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[96] *Case of the Saramaka People v. Suriname* (Interpretation of Preliminary Objections), Inter-Am. Ct. H.R. Ser. C, No. 185, (Aug. 12, 2008), ¶ 90.
[97] *Case of Saramaka People* (Preliminary Objections), ¶ 129.
[98] United Nations Declaration on the Rights of Indigenous Peoples art. 32(2); *Case of Saramaka People* (Preliminary Objections), ¶¶ 131 &137.
[99] *Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples* (13 Sept., 2007), ¶ 3.
[100] *Case of the Saramaka People* (Preliminary Objections), ¶ 133.
[101] *Id*.
[102] *Id*.

participation.[103] In *Saramaka v. Suriname*, Suriname issued multiple logging and mining concessions within Saramaka's territory without consulting the community.[104]

Unlike *Saramaka*, Atlantis participated in negotiations directly with the Chupanky's representative authority before entering their land. Atlantis created the Intersectoral Committee (IC) in order to negotiate with the Chupanky according to their traditional decision-making processes as suggested by the Council of Elders, the legitimate Chupanky representatives according to their patrilineal customs and traditions.[105] Additionally, Atlantis facilitated disseminating and receiving information by providing Rapstan language interpreters at each of the four meetings and conducted the meetings at the project's earliest stages, before planning had ended and before entering the Chupanky's land.[106] This gave the Council of Elders adequate time to inform their community and to obtain consensus concerning the project's benefits and potential impacts. IC entered into an agreement with the Chupanky at the conclusion of the fourth informational meeting, after fully informing them of all three phases of the project and offering them benefits, which suggests IC's consultations were made in good faith. Therefore, Atlantis ensured the Chupanky's effective participation.

2. Atlantis Guaranteed A Reasonable Benefit

Atlantis guaranteed the Chupanky a reasonable benefit from the project by offering benefits specifically addressed to the Chupanky's needs. A State must guarantee an equitable share of benefits from its plan, thereby providing just compensation.[107] Just compensation must account for both the deprivation of title through expropriation and the deprivation of regular use

[103] *Id*.
[104] *Id*. at ¶ 147.
[105] Hypo ¶ 14
[106] Hypo ¶ 15
[107] *Case of the Saramaka People* (Preliminary Objections), ¶ 139; UNCERD, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador, supra* note 136, ¶ 16.

of land.[108] In *Saramaka*, Suriname's failure to reasonably share benefits resulting from logging concessions did not satisfy its obligation to provide just compensation.[109] Suriname allowed logging companies to extract valuable timber from indigenous territory without compensating for the land, destruction to the natural environment, or the remaining spiritual problems.[110]

Unlike *Saramaka*, Atlantis offered many benefits the Chupanky members themselves considered acceptable per their agreement with IC. IC provided full compensation for expropriating the Chupanky's title by offering them alternative land of good agricultural quality, which exceeded the size of their current land.[111] IC sought to ensure the Chupanky's ability to support their community, by providing agricultural land on which the Chupanky could "plant seeds" according to their traditional diet.[112] IC also ensured full compensation for the use of the Chupanky's land by agreeing to construct eight water wells on their alternative land and agreeing to construct a direct road so the Chupanky could easily visit the Motompalmo River.[113] These benefits sought to compensate the community for any impact the relocation would cause to their spiritual use of the river.[114] Additionally, the IC offered community members economic benefits through employment during the plant's construction, energy once the plant was operational, and three computers for the community to use their newly acquired energy.[115] Atlantis specifically addressed these benefits to ameliorate the extreme poverty of the Chupanky people.[116]

3. Atlantis Obtained A Prior And Independent Environmental Impact Assessment (ESIA)

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[108] U.N., *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, *supra* note 97, ¶ 66; *Case of the Saramaka People* (Preliminary Objections), ¶ 139.
[109] *Id*. at ¶ 153.
[110] *Id*.
[111] Hypo ¶ 15.
[112] Hypo ¶ 7.
[113] Hypo ¶ 15.
[114] *Id*.
[115] *Id*.
[116] *Id*.

Atlantis provided the Chupanky a prior and independent ESIA, by hiring the *Green Energy Resources* (GER) to conduct supervised studies, before beginning construction in their territory. ESIAs are used for the purpose of assessing the environmental, social and cultural impacts of expropriation on indigenous communities.[117] The State is responsible for designating and supervising independent and technically capable entities to conduct ESIAs.[118] According to emerging international standards, ESIAs must integrate cultural, environmental and social impacts and address both benefits and potential risks.[119] A state violates its obligation if they do not conduct ESIAs prior to granting concessions within the community's territory.[120] In *Saramaka*, the Court found that Suriname failed to comply with international standards when it did not complete an ESIA prior to issuing logging concessions.[121]

In contrast, Atlantis complied with its international obligation to provide a prior and independent ESIA.[122] Atlantis's Ministry of the Environment and Natural Resources (MENR), designated GER to perform environmental impact studies under MENR's supervision.[123] GER's studies assessed both the plant's benefits and adverse effects.[124] The study showed that the dams could cause "minor geological damage" and change the ecosystem in the region by producing sediments in the water harmless to humans.[125] The study also assessed the dams' social and cultural impact by addressing the effect of relocation on the Chupanky's spiritual connection to the river.[126] It suggested Atlantis provide a secure road for the Chupanky to access the river from

[117] *Case of the Saramaka People v. Suriname* (Interpretation), ¶ 40.
[118] *Case of the Saramaka People* (Preliminary Objections), ¶ 140.
[119] Akwe:Kon Voluntary Guidelines, ¶ 6(d).
[120] *Case of the Saramaka People* (Preliminary Objections), ¶ 148.
[121] *Id*.
[122] Hypo ¶ 18.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*

their alternative lands to protect their religious practices.[127] Although the EDC decided to grant concession in January 2005, the concession was contingent on the completion of Phase 1 and providing the ESIA prior to commencing construction.[128] IC provided its ESIA at least one month before entering the Chupanky's land to begin construction, giving them ample time to consider the environmental, social and cultural risks posed by the project.[129] Even though the ESIA was provided in Spanish, IC anticipated its cultural and social risks by initially offering to provide direct access to the river from the alternative land. Furthermore, Atlantis certified the ESIA and provided it to the Chupanky, before entering their territory, giving the Council of Elders adequate time to translate and discuss the study.

4. Atlantis Obtained The Chupanky's Free, Prior, And Informed Consent

Atlantis ensured the Chupanky's free, prior, and informed consent by describing the nature of the construction over four meetings with tribal leaders. When the State engages in large-scale industrial activities that affect the indigenous community, it has an obligation to obtain free, prior, and informed consent.[130] The State must fully inform all community members of the project by providing an effective opportunity for them to participate either as individuals or collectives.[131] When relocation is necessary and consent cannot be obtained, the State may proceed following appropriate procedures for public inquiry and effective representation.[132]

Where a State obtains consent from indigenous members who are not acting in a representative capacity, it violates its obligation to ensure effective participation.[133] In *Mary and*

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[127] *Id.*
[128] Hypo 15.
[129] Hypo ¶¶ 18 & 19.
[130] ILO Convention No. 169, art.16; UN Declaration on the Rights of Indigenous Peoples, arts. 19 & 32; *Case of the Saramaka People*, (Preliminary Objections), ¶134.
[131] *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, (27, Dec., 2002) ¶ 140; American Declaration of the Rights and Duties of Man, art. XVIII & XXIII.
[132] ILO Convention No. 169, art.16.
[133] *Mary and Carrie Dann*, ¶¶ 140 & 142.

Carrie Dann, the Commission held that the United States settled its land claim with only one band of the Western Shoshone.[134] The agreement between them carried no apparent mandate applying to other Western Shoshone bands or members.[135]

Unlike the agreement in *Mary and Carrie Dann*, the Council of Elders and male heads of households reached an agreement that carried a mandate for the entire Chupanky community, because they were acting in a representative capacity.[136] Atlantis informed Chupanky representatives regarding the entire project during the informational meetings and the representatives knowingly and willingly agreed to begin Phases 1 and 2.[137] Additionally, before any construction began, IC provided the Chupanky with an ESIA detailing risks.[138] The community accepted the project, by initiating work in light of the multiple consultations and ESIA. Moreover, even if Atlantis failed to obtain informed consent, it could still proceed with relocation following appropriate procedures. Atlantis supplied appropriate procedures by initiating expropriation proceedings, following the *Saramaka* safeguards and providing the Chupanky with public judicial forums in which to challenge the project.[139]

Finally, even if this Court considers such procedures lacking, the right to an indigenous community's self-determination requiring free, prior and informed consent to domestic legislation that may impact the community, may not confer the power to veto democratically enacted laws.[140] While commentators have argued the Declaration partly reflects customary international law, this characterization must not extentd to controversial provisions such as

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[134] *Id*, at ¶ 136.
[135] *Id*.
[136] Hypo ¶¶ 14, 15, & 16.
[137] Hypo ¶ 14 & 15.
[138] Hypo ¶ 18.
[139] Hypo ¶ 15; Clarification Question 27.
[140] Observations of the United States With Respect To The Declaration On the Rights of Indigenous Peoples, Sept. 13, 2007; James Anaya, International Human Rights and Indigenous Peoples. (Aspen 2009), pp.70-75.

Articles 19 and 32.[141] Instead, customary international law requires consultations between State and community that provide a true dialogue.[142] Atlantis ensured a true dialogue with the Chupanky through its meetings with the Council of Elders.

B. The La Loma Is Not An Indigenous Community Under International Law

Atlantis was under no obligation to recognize a communal right to property on behalf of the La Loma, because the La Loma does not qualify as an indigenous community. The standard of being "indigenous" remains an undefined concept in international law, although various authorities have provided general requirements.[143] ILO-Convention No. 169 defines indigenous people as descending from populations that pre-date colonization, who retain their own social, economic, cultural and political institutions.[144] Emerging criteria focuses primarily on whether a community engages in self-identification as indigenous, whether ancestral land is necessary for their physical and cultural survival, and whether they have a distinct cultural identity, including maintaining a traditional language, customs, traditions, and social structure.[145]

Parties of mixed-ethnic heritage formed the La Loma community in 1980 on land that was not traditionally held by indigenous groups.[146] The mixed-ethnicity of the La Loma resembles the mixed race heritage of the dominant culture of Atlantis.[147] Although members preserved some Rapstan cultural traditions, these traditions have almost completely gone from the community.[148] The La Loma have preserved their dialect only partially, do not use traditional

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[141] *Id*. at pp.82-96.
[142] Lee Swepston, *The ILO Indigenous And Tribal Peoples Convention (No. 169): Eight Years After Adoption*, The Human Rights of Indigenous Peoples, (Cynthia Price Cohen ed., 1998), 17, 18-28.
[143] International Human Rights and Indigenous Peoples, pp. 27-35.
[144] ILO-Convention 169 preamble.
[145] The World Bank, Operational Policy on Indigenous Peoples (OP 4.10) (2005); *Report of the African Commission's Working Group on Indigenous Populations/Communities, Adopted by the African Commission on Human and People's Rights at its 34th Ordinary Session*, (6-20 Nov., 2003), (2005 ed. ACHPR & IWGIA), 86-93.
[146] Hypo ¶ 8.
[147] *Id*.
[148] *Id*.

clothing, and do not produce Rapstan cultural crafts.[149] Moreover, they no longer maintain a patrilineal Rapstan social hierarchy.[150] The La Loma's break from their indigenous heritage accomplished in only a thirty-year period suggests a movement toward assimilation with the greater group of peasant farmers inhabiting the western bank of the Motompalmo River and, ultimately, the greater population of Atlantis.

The La Loma may argue that they have cultural ties to the Motompalmo River that binds the community, that they regulate themselves at least partially by their own norms, customs, and traditions, and have a "special" relationship with their ancestoral territories. These aspects standing alone do not suggest a uniform indigenous community, because they do not rise to the level of self-identification as indigenous. In fact, 25% of the community initially accepted Atlantis' offer of alternative land and did not assert cultural ties, suggesting that the community significantly comprises individuals with de minimis ties to "cultural" territory.[151] The La Loma has not existed in the present location long enough to develop a "special relationship" with "ancestoral territories." Any such relationship can only be deemed to exist on behalf of the La Loma women as deriving from their previous relationship to the Rapstan nation.[152] Because the community is already losing its cultural traditions within thirty years of its creation, this further demonstrates that the La Loma is not an indigenous or tribal community.

As a result, Atlantis satisfied its international obligations to the La Loma by adhering to the general requirements of subordinating an individual's right to property under Article 21. A State may subordinate an individual's right to property if for reasons of public utility or social

[149] *Id.*
[150] *Id.*
[151] Hypo ¶ 11.
[152] Hypo ¶ 8.

interest, through the forms established by law, and by providing just compensation.[153] Atlantis provided just compensation by offering individual farmers alternative land of equivalent size and good quality, initiated expropriation proceedings against them legally, and did so for the purpose of constructing the power plant, a valid social interest.

III. ATLANTIS DID NOT VIOLATE THE PETITIONERS PHYSICAL, MENTAL, OR MORAL INTEGRITY

Atlantis did not violate Petitioners physical, mental, or moral integrity under Article 5 of the Convention because Atlantis properly negotiated with the Chupanky and properly relocated the La Loma. Under regional and international instruments, indigenous groups have the right to freely determine and define their group through the self-determination principle.[154] The State also has an obligation to offer the same rights and liberties to women that are granted to men.[155]

A. Atlantis Did Not Violate The Chupanky's Right to Self-Determination

The self-determination principle states that people have a right to independently choose their form of political organization and establish the means to bring about their economic, social, and cultural development.[156] This principle extends to indigenous people, who have a right to control their way of life within their state.[157] This Court has stated that the self-determination principle takes into account a community's ancestral practices because failure to do so affects their personal integrity.[158] Failure to consider an indigenous community's ancestral land can also

[153] American Convention art. 21.
[154] U.N. Declaration on the Rights of Indigenous Peoples art. 3; International Convention on Civil and Political Rights (ICCPR) art. 27; ILO-Convention No. 169 preamble.
[155] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (IACPPEVW) art. 4.
[156] Universal Declaration of Human Rights art. 2; ICCPR art. 27; ILO-Convention No. 169 preamble; *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, Inter-Am. Comm'n H.R., OEA/Ser.L/V.II.62, doc. 10 rev. 3 Part Two, B (29 Nov., 1983), ¶ 9.
[157] U.N. Declaration on the Rights of Indigenous Peoples art. 3; ILO-Convention No. 169 preamble.
[158] *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 239, (24 Aug., 2010), ¶ 184.

disturb its livelihood because it affects their spiritual, cultural, and material practices.[159] If the State deprives the community of its ancestral territory and restricts its ability to live in habitable conditions, then the State may be violating its obligation to protect the community's integrity.[160]

However, an indigenous community's right to self-determination must be balanced with the State's interest in their land, especially if the land is of public utility.[161] The State may expropriate a community's ancestral land if it implements the *Saramaka* safeguards.[162] When a community understands and agrees to a project, then a contract is created and *pacta sunt servanda* applies.[163] As a result, both parties in an agreement must observed it in good faith.[164] An exception applies if circumstances affect a contract's binding force or when obligations go against a peremptory norm including prohibition of genocide or piracy.[165]

In this case, Atlantis acquired Chupanky land for a public benefit and formed a proper contract with them.[166] Atlantis recognized the Chupanky's right to self-determination and their legal capacity in its Constitution of 1994.[167] Atlantis properly negotiated with the Chupanky by holding consultation meetings consistent with Chupanky customs.[168] Unlike the *Yakye* case, the Chupanky were not forcibly removed from their ancestral land to an area that impeded their way of life. The Chupanky continued to have access to their river with a direct road from their

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[159] *Case of the Moiwana Community v. Suriname* (Preliminary Objections), Inter-Am. Ct. H.R., Ser. C, No. 124, (15 June, 2005), ¶ 17.
[160] *Case of the Yakye Axa Indigenous Community v. Paraguay* (Judgment), Inter-Am. Ct. H.R., Ser. C, No. 79, (17 June, 2005), ¶ 162.
[161] *Case of the Saramaka People* (Interpretation), ¶ 34.
[162] *Id.* at ¶ 38.
[163] *Sapphire Int'l Petroleums LTD. v. Nat'l Iranian Oil Co.*, Arbitral Award,. ILR (1967) p. 136 et seq. at p. 181.
[164] BLACK'S LAW DICTIONARY 1216 (9th ed. 2009); *Sapphire Int'l Petroleums LTD* at p. 181.
[165] *Questech Inc. v. Iran*, 9 IRAN-U.S. C.T.R. 9, at 107 et seq. pp. 122-123.
[166] Hypo ¶¶ 5 & 15.
[167] Hypo ¶ 3.
[168] Hypo ¶¶ 14 & 15.

alternative land.[169] By using Rapstan interpreters, the Chupanky understood the terms of the agreement.[170] Thus, Atlantis did not violate the Chupanky's physical, mental, or moral integrity.

Because translators were present at the informational meetings, the Chupanky must uphold the contract in good faith and cannot deem the project unfair and inequitable.[171] There have been no changes in circumstances that alter the agreement's binding force. Furthermore, no peremptory norm invalidates the contract because neither genocide nor piracy occurred. The Commission will argue that TW's treatment of the Chupanky workers violated a peremptory norm. However, the Chupanky employment was reasonable for that profession. Since Atlantis fairly formed an agreement with the Chupanky, *pacta sunt servanda* applies, whereby the Chupanky must uphold the agreement in good faith.

B. Atlantis Did Not Violate The Chupanky Women's Physical, Mental, Or Moral Integrity Because Atlantis Followed Chupanky Customs and Traditions

International law states that women may use all regional and universal instruments on human beings to exercise her civil, economic, social, and cultural rights.[172] Thus, member states to human rights conventions have obligations to ensure that men and women enjoy all the same rights.[173] Contemporaneously, the State must also provide effective consultation to an indigenous group, which means respecting the indigenous people's customs and traditions.[174] In following this *Saramaka* safeguard other people's rights may be affected.[175] Effective consultation means that the community must be fully and accurately informed of the project.[176] In *Mary and Carrie*

[169] Hypo ¶¶ 15 & 18.
[170] Hypo ¶¶ 14 & 15.
[171] Hypo ¶ 15.
[172] IACPPEVAW art. 6; Convention on the Elimination Of All Forms of Discrimination Against Women preamble.
[173] IACPPEVAW art. 4.
[174] Case of *Yatama v. Nicaragua* (Judgment), Inter-Am. Ct. H.R., Ser. C., No. 127, (23 June, 2005), ¶ 225; *Aloeboetoe et al. Case*, Inter-Am. Ct. H.R., Ser. C, No. 11, (4 Dec., 1991), ¶ 63.
[175] *Case of the Saramaka People* (Interpretation), ¶ 34.
[176] *Mary and Carrie Dann*, ¶ 140.

Dann, the Court found a lack of effective participation because the Western Shoshone community was not accurately represented.[177] However, *Mary and Carrie Dann* did not stand for the fact that every community member be represented.[178]

In this case, Atlantis, in upholding the self-determination principle, must respect Chupanky custom. Chupanky custom and tradition for the consultation process involved only the Council of Elders and male heads of households.[179] Unlike *Mary and Carrie Dann*, there was effective participation here because the community as a whole was represented. Here, the male heads of each household represented each family and the members present at the meetings were representative of the community.[180] Since Atlantis adhered to the customs and traditions of the Chupanky, Atlantis did not violate the Chupanky women's physical, mental, or moral integrity.

C. Atlantis Did Not Interfere With The La Loma Community's Physical, Mental, Or Moral Integrity

This Court must balance a community's right to property with the State's interest in land, even if it places a community member's personal integrity in jeopardy and could disturb the community's livelihood.[181]. In addition, just compensation is also a necessary condition in taking property, whether it is a private party or a community.[182] When that condition is fulfilled, then the State has taken the land without violating its obligation to protect a community member's personal integrity.[183] Furthermore, national authorities, rather than international authorities, should decide the fairness of expropriation proceedings because they are better situated with direct knowledge of their society and its needs than international judges are in determining what

[177] *Id.*
[178] *Id.*
[179] Hypo ¶¶ 14 & 15.
[180] Hypo ¶ 14; Clarification Question 29.
[181] *Xákmok Káásek Indigenous Community*, ¶ 184; American Convention art. 21.
[182] *James et al v. The United Kingdom*, App. No. 8793/79, (21 Feb., 1986), ¶ 54.
[183] *Id.*

is in the public interest.[184] Thus, when a project is a public utility, then the State has discretion to determine whether there was just compensation that did not interfere with the owner's dignity.[185]

Here, Atlantis facilitated expropriation proceedings that did not negatively disturb the La Loma's way of life. The expropriation proceedings are justified because the power plant offered a public benefit that would improve national energy and create industrial benefits.[186] The Energy and Developmental Commission (EDC), unlike Suriname's treatment of the Moiwana, offered the La Loma alternative agricultural land at the outset close to their river, where they could continue practicing their customs.[187] EDC then deferred to the Civil Court to set compensation.[188] The La Loma, as a peasant farming community, would continue receiving government subsidies and could continue their way of life.[189] Thus, Atlantis has properly respected the La Loma's physical, mental, and moral integrity under Article 5 of the Convention.

Although the dissenting property owners are currently in temporary camps, where they allege poor living conditions, they have the option to move into their new homes.[190] The expropriation proceeding is still a pending decision for setting a final amount of compensation. However, community members have refused the alternative lands and refuse to negotiate a settlement.[191] As a result, the La Loma cannot argue an Article 5 violation.

IV. ATLANTIS DID NOT VIOLATE THE CHUPANKY MEMBERS' RIGHT TO FREEDOM FROM SLAVERY OR COMPULSORY LABOR

Atlantis properly and sufficiently protected the Chupanky workers'right to be free from compulsory labor because the workers voluntarily agreed to TW's employment opportunities and

[184] *Id.* at ¶ ¶ 45 & 46.
[185] *Id.* at 46.
[186] Hypo ¶ 5.
[187] Hypo ¶ 11.
[188] Hypo ¶ 12.
[189] Hypo ¶ 8.
[190] Hypo ¶ 13.
[191] *Id.*

worked under conditions expected of that profession. The Forced Labour Convention (FLO) Article 2 defines forced labor as work that a person did not offer voluntarily and obtained under a "menace of penalty."[192] Compulsory labor is prevalent when indigenous communities are dispossessed of their land because the communities often cannot define work conditions, work excessive hours for little wage, and both fear and depend heavily on their employer to survive..[193] As a result, the State has an obligation to protect those communities from compulsory labor. First, to determine whether work was forced, there must be a fear of penalty for work that was not voluntarily offered. Second, there is no voluntary offer if the work imposed is excessive or disproportionate that it could not be treated as being voluntarily accepted.[194] However, if the work does not fall outside of a person's normal activities in that profession, then there is no excessive or disproportionate burden.[195]

Atlantis did not create work conditions that could equate to compulsory labor. The Chupanky voluntarily worked for the company without a "menace of penalty" because the employment opportunities offered were part of the agreement for the community's benefit, not for individual purposes.[196] The Chupanky were not dispossessed of their lands and worked under conditions within the sphere of a worker undertaking a large project. In fact, the agreement did not forbid the Chupanky from terminating their employment. Since the Chupanky voluntarily agreed to work for TW with the option to terminate employment, Atlantis did not violate its obligation to protect the Chupanky from compulsory labor under Article 6 of the Convention.

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[192] Forced Labour Convention No. 29 art. 2.
[193] *Third Report on the Situation of Human Rights in Paraguay*, Inter-Am. Ct. H.R., OEA/Ser./L/VII.110, doc. 52, ch. IX, (9 Mar., 2001), ¶ 37; *Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 58, (24 Dec., 2009), ¶ 166.
[194] *Case of Van der Mussele v. Belgium*, App. No. 8919/80, Judgment, (23 Nov., 1983), ¶ 34.
[195] *Id*.
[196] Hypo ¶ 15; Clarification Question 49.

The Commission may argue that the workload demand affected the Chupanky way of life and those excessive hours without overtime pay constitutes compulsory labor. However, unlike the indigenous group in Paraguay or the Chaco in Bolivia, the Chupanky did not depend on TW for survival.[197] The Chupanky's complaint stems from their employment interfering with their way of life.[198] However, the Chupanky could terminate employment and return to their traditional way of life at any point. The Commission will also argue that TW's threat to fire all indigenous employees and its threat to sue constitutes a "menace of penalty." However, TW's decision to increase work hours was consistent with the contract and its threat to sue was a result of the Chupanky's attempt to circumvent their contract. The Chupanky and TW had an agreement in which the Chupanky must fulfill and TW's threat to sue was an international right for TW as a remedy for the Chupanky's breach of contract rather than a menace of penalty.

V. ATLANTIS PROVIDED THE RIGHT TO JUDICIAL PROTECTION

Atlantis ensured Petitioners right to judicial protection by providing recourse to its administrative process, court of appeals, and its Supreme Court. Article 25 of the Convention requires a state provide an indigenous community access to a legal or administrative authority.[199] A state ensures judicial protection by offering access to a proceeding conducted with due diligence, in a reasonable time, and offering the possibility of an effective legal remedy.[200]

A. Atlantis Afforded The Chupanky Community A Competent Authority

1. Atlantis' Administrative Proceedings Satisfied Due Diligence

Atlantis satisfied due diligence by administering the Chupanky's claim according to international standards in four months. A state satisfies due diligence when an administrative

[197] Hypo ¶ 15.
[198] Hypo ¶ 20.
[199] *Case of the Moiwana Community v. Suriname*, ¶ 143.
[200] *Case of the Xákmok Kásek* , ¶ 126.

agency takes significant measures towards a definitive resolution of the community's claim.[201] Atlantis' administrative court made a full determination of the Chupanky's claims, considering the merits of each issue over which it had jurisdiction.[202] The administrative court took significant measures by considering both domestic and international law and sought a definitive resolution of the Chupanky's land claim.[203] Moreover, Atlantis' Supreme Court gave a full review of the Chupanky's constitutional right to title in three months.[204] The Court recognized the Chupanky's free determination in entering a valid contract with IC.[205] Therefore, each administrative proceeding and subsequent appeal satisfied due diligence.

2. Each Proceeding Was Determined In A Reasonable Time

The Court considers four elements to determine whether the duration is reasonable: the complexity of the matter, the conduct of the State's judicial authorities, the procedural activity of the indigenous community, and the effects of delays on the community's legal situation.[206] By satisfying each element, Atlantis administered the Chupanky's claim in a reasonable time.

The Chupanky's matter is complex because their claim is based on the interweaving of indigenous rights, state law, and international norms. Regardless of the claim's complexity, Atlantis took an active role in administering the Chupanky's claim. Atlantis' administrative proceedings were attentive and responsive. The Court actively administered the Chupanky's claims in three to four months and tailored its judgments to international principles.[207]

On the other hand, the Chupanky failed to bring their employment claims before the appropriate employment authority, unduly delaying their own proceedings. Whereas this Court

[201] *Id.* at ¶¶ 127 & 128.
[202] Hypo ¶¶ 23, 24, & 25.
[203] Hypo ¶ 23.
[204] Hypo ¶ 25.
[205] *Id.*
[206] *Case of the Xákmok Kásek* , ¶ 133.
[207] Hypo ¶ 23.

has held a State's delay of proceedings for over six years directly impacting a community's living conditions was unreasonable and delays in proceedings of 11 and 13 years as *per se* unreasonable, Atlantis' administration took only two years.[208] Therefore, Atlantis determined the Chupanky's claim in a reasonable time.

3. Effectiveness Of The Administrative Remedy

Atlantis' administrative proceeding was effective because it offered the possibility of a real legal remedy. To be effective, an administrative process must carry the authority to provide remedies for violations.[209] Unlike the administrative proceedings in both *Yakye* and *Xakmok*, which lacked the domestic authority to demand a return of property, Atlantis' administrative proceedings had direct authority over both the project and the State's obligations.[210] Both the EDC's administrative proceeding and Atlantis' courts of appeal carried the possibility of canceling the project and returning the Chupanky's land. Additionally, Atlantis' Supreme Court has the authority to rule the project unconstitutional for violating the Chupanky's indigenous right to title. Therefore each proceeding carried the appropriate authority.

B. Atlantis' Administrative Proceedings Provided The La Loma Community A Competent Authority

Atlantis ensured a competent judicial authority by first employing the proper procedures for initiating expropriation proceedings and then allowing the La Loma to contest the standards that applied to their community. Even though the La Loma is not an indigenous community, Atlantis has provided them judicial protection not afforded indigenous communities in other States. For example, the United States failed to provide effective judicial protection to the

[208] *Case of the Xákmok Kásek* , ¶ 133; Hypo ¶¶ 23, 24, & 25.
[209] *Case of the Xákmok Kásek* , ¶ 140; Hypo ¶ 13.
[210] *Case of the Xákmok Kásek* , ¶ 140.

Western Shoshone for a full and fair determination of the status of their land.[211] The United States extinguished the Western Shoshone's aboriginal rights by finding "gradual encroachment" by non-tribal people.[212] Even though the Shoshone pursued their matter to the Supreme Court, the judicial remedy was not effective, because it did not provide a challenge to land status.[213] As a non-indigenous community, Atlantis need only ensure individuals receive the right to judicial protection.[214] The Seventh Civil Court of Chupancué found the La Loma's land to be of public interest.[215] It also considered and rejected arguments by the La Loma concerning possible status as an indigenous community.[216] It then appointed an expert appraiser to set the final amount of compensation.[217] Final compensation remains pending only because the La Loma do not accept the authority of Atlantis' civil court by refusing to sell their land or accept just compensation.[218]

VI. ATLANTIS RESPECTED THE CHUPANKY'S RIGHT TO LIFE

Atlantis respected the Chupanky's right to life by taking measures to ensure its social and cultural survival. Article 4(1) of the Convention ensures the right to conditions that guarantee an indigenous community's decent existence.[219] A state violates this right by failing to adopt measures to prevent risking the life of the indigenous community.[220] Limiting the community's access to traditional habitats may threaten its physical and cultural survival.[221] However, a state

[211] Yomba Shoshone Tribe and Ely Shoshone Tribe of the Western Shoshone People, Amended Request for Urgent Action Under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, July 1, 2000; *Mary and Carrie Dann*, ¶ 137.
[212] *Id*.
[213] *Id.*
[214] American Convention art. 25.
[215] Hypo ¶ 13.
[216] *Id*.
[217] *Id.*
[218] *Id*.
[219] American Convention art. 4(1); *Case of the Xákmok Kásek* , ¶ 183.
[220] U.N. Committee on Economic, Social, and Cultural Rights, Comment 14; *Case of the Yakye Axa*, ¶ 166; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., Ser. C, No. 146, (29 Mar., 2006), ¶ 146.
[221] *Case of the Xákmok Kásek* , ¶¶ 183-190.

may limit access to natural resources by providing informed consent and just compensation.[222] The State may still violate the right to life by causing significant environmental damage in ancestral territories.[223] But measures having a limited impact will not necessarily amount to a denial of an indigenous community's right to life or culture.[224]

Atlantis protected the Chupanky's right to life by complying with international requirements for expropriation. Atlantis obtained the Chupanky's prior informed consent to construction, provided an ESIA, and shared benefits.[225] Further, the plant's construction did not cause significant environmental damage. As the ESIA predicted, the plant's construction caused minor geological disruption, which affected fishing near the construction.[226] Although construction may have slightly disrupted the Chupanky's fishing, they have not suggested they are prevented from fishing or that construction has denied them fishing rights. Atlantis offered the Chupanky land of good agricultural quality, in keeping with their traditional practice of planting seeds.[227] Finally, unlike Suriname in *Sawhoyamaxa*, Atlantis took affirmative measures to provide the Chupanky with alternative land within their ancestral territory. Atlantis guaranteed access to the river, allowing the Chupanky to maintain spiritual traditions, as well as providing wells for fresh water.[228]

VII. ATLANTIS DID NOT DISCRIMINATE AGAINST THE CHUPANKY

Atlantis respected the rights of the Chupanky under the Convention by implementing legislation recognizing their communal title and by adhering to international law in subordinating

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[222] *Mary and Carrie Dann* ¶ 131; World Bank Operational Policy OP/BP 4.10.
[223] *Report on the Situation of Human Rights in Ecuador*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.96, doc. 10 rev.1 (24 Apr., 1997); *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 34, ¶ 251 (28 June, 2007).
[224] *Apirana Mahauika et al. v. New Zealand*, Views of the H.R. Committee, Oct. 27, 2000, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000), ¶ 9.4.
[225] Hypo ¶ 14 & 15.
[226] Hypo ¶ 20.
[227] Hypo ¶¶ 7 & 11.
[228] Hypo ¶ 15.

that title. The State must provide effective methods to recognize the delimitation, demarcation and titling of lands traditionally held by indigenous communities and must provide adequate judicial protection when such property rights are challenged.[229] It must respect the rights provided under the Convention and not discriminate against such rights in relation to indigenous communities.[230] The principle of non-discrimination is a *jus cogens* right.[231]

Because Atlantis has not violated articles within the Convention, it has not violated Article (1). Atlantis afforded the Chupanky with the protections provided to indigenous communities under international law.[232] Atlantis has implemented legislation recognizing the Chupanky's indigenous right to title.[233] There is no discrimination against the Chupanky because Atlantis appropriated La Loma land under similar circumstances to the Chupanky. The nature of it being near the river and its benefit to the nation determined Atlantis' demand for the Chupanky's land. By ensuring effective consultation with the community, Atlantis has taken every measure to protect the cultural integrity of the Chupanky community.

REQUEST FOR RELIEF

Atlantis respectfully requests that the Court find that Petitioners has not exhausted all available remedies as required by Article 46 of the Convention. Therefore, this Court's jurisdiction cannot be invoked to hear the Petitioners issues. Atlantis also requests that if the Court finds that it can hear the case, this Court should dismiss the because Atlantis did not violate Articles 1, 4, 5, 6, 21, and 25 of the Convention in regards to the Chupanky and Articles 5, 21, and 25 of the Convention in regards to the La Loma.

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[229] *Mayagna (Sumo) Awas Tingni Community*, ¶140.
[230] *Case of the Xákmok Kásek* , ¶ 148.
[231] *Id*.
[232] Hypo ¶ 14.
[233] Hypo ¶ 31.