INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

IACHR 50 years defending HUMAN RIGHTS

ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

November 23, 2009

RE: Hul'qumi'num Treaty Group
Case 12.734
Canada

Dear Sir:

I am pleased to address you in order to inform you that the Inter-American Commission on Human Rights examined the case referred to above during its 137 regular period of sessions and, in connection therewith, adopted its Report on Admissibility N° 105/09, copy enclosed, in compliance with Article 46 of the American Convention on Human Rights.

In accordance with Article 37(2) of the Commission's Rules of Procedure, Petition N° 592-07 has been registered as Case N° 12.734, as cited above. I ask that you utilize the latter reference in all future communications.

Pursuant to Article 38(1) of its Rules of Procedure, the Commission has set a period of two months, as from the date of the present communication, for you to present additional observations regarding the merits.

Further, as provided for in Article 38(4) of the Rules of Procedure, the Commission places itself at the disposal of the parties with a view toward reaching a friendly settlement of this matter, in compliance with Article 48(1)(f) of the American Convention.

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Accordingly, I request that you present your response to that offer as soon as possible.

Sincerely yours,

Santiago A. Canton
Executive Secretary

Enclosure

Organization of American States

50 years defending HUMAN RIGHTS

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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REPORT N° 105/09
PETITION 592-07
ADMISSIBILITY
HUL'QUMI'NUM TREATY GROUP
CANADA

Approved by the Commission at its session N° 1809
held on October 30, 2009

REPORT N° 105/09
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ADMISSIBILITY
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CANADA
October 30, 2009

I. SUMMARY

1. On May 10, 2007, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," "the Commission," or the "IACHR"), received a complaint lodged by the *Hul'qumi'num Treaty Group* and the *Indigenous Peoples Law and Policy Program* of the University of Arizona (hereinafter the "petitioners"), on behalf of six indigenous peoples and their members,[1] who make up the Hul'qumi'num Treaty Group (hereinafter, "the alleged victims," "the Hul'qumi'num peoples," or "HTG"), against the State of Canada (hereinafter "the Canadian State," "Canada" or the "State"). The petition alleges that the State has violated the human rights of the HTG because of the absence of demarcation, established boundaries and recording of title deed to their ancestral lands; the lack of compensation for HTG ancestral lands currently in the hands of private third parties; the granting of licenses, permits and concessions within ancestral lands without prior consultation; and the resulting destruction of the environment, the natural resources and of those sites the alleged victims consider sacred.

2. The petitioners allege that the Canadian State is responsible for violating the rights guaranteed under the provisions of Article XXIII (right to property), Article XIII (right to culture), and Article II (equality before the law) of the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration," or the "American Declaration") and of other human rights enshrined in international common law. The petitioners claim exception from the requirement of exhaustion of domestic remedies because, they argue, domestic legislation does not provide for adequate and efficient remedies to serve the specific claims of the petitioners and, also, due to the petitioners' lack of financial means.

3. For its part, the State argues that the petition should be declared inadmissible because the human rights of the alleged victims have not been violated since the petitioners have not exhausted all domestic remedies available; because, despite their lack of financial means, the petitioners have access to government loans to file legal actions, and because certain alleged facts do not constitute violations of the American Declaration but of other international instruments that are not connected. Therefore, the State maintains that the requirement of prior exhaustion of domestic remedies established in Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights has not been met.

4. As this report indicates, after analyzing the information and the arguments submitted by the parties with regard to admissibility, the Commission concludes that the petition is admissible with regard to alleged violations of Articles II, III, XIII and XXIII of the American Declaration. The Commission resolves to notify the parties of this decision, to publish it and to include it in its Annual Report to the General Assembly of the Organization of American States.

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[1] The alleged victims include the indigenous peoples or "First Nations" Cowichan; Chemainus; Penelakut; Halalt; Lyackson; and Lake Cowichan, and their members. The petitioners point out that the Hul'qumi'num Treaty Group (HTG) is an organization legally established and recognized in the province of British Columbia, formed in 1993 to represent the interests of the six indigenous peoples mentioned above within the framework of the process of negotiation of treaties or agreements with the State to resolve territorial claims, the recognition of indigenous self-government, and the promotion of the language, culture and economic self-sufficiency of those peoples.

II. PROCESSING BEFORE THE COMMISSION

A. Processing of the Petition

5. The Commission received the petition on May 10, 2007, and assigned it number 592-07. The petitioners also requested the adoption of precautionary measures in order to safeguard the integrity of the ancestral lands of the Hul'qumi'num peoples.[2] On January 15, 2008, the Commission forwarded copies of the relevant parts of the petition to the State, and requested that the submit its response within a period of two months, in accordance with Article 30 of the Rules of Procedure of the IACHR. The State's response was received on April 30, 2008.

6. The IACHR also received additional information from the petitioners on the following dates: June 6, 2008; July 11, 2008; September 24, 2008; October 14, 2008; November 21, 2008; February 13 and 16, 2009; March 10, 2009; September 14, 2009; and on October 27, 2009. Those communications were duly forwarded to the State.

7. The IACHR also received observations from the State on the following dates: October 17, 2008; December 15, 2008; and on February 25, 2009. Those communications were duly forwarded to the petitioners.

8. The parties presented oral arguments regarding the admissibility of the petition during hearings held by the Commission within the framework of the 133rd and 134th Sessions, held respectively on October 27, 2008, and on March 23, 2009.

9. On February 24, 2009, and on March 16, 2009, the IACHR forwarded to the parties the *amicus curiae* briefs filed by Canadian indigenous peoples and organizations.[3]

III. POSITION OF THE PARTIES

A. Position of the petitioners

10. The petitioners point out that all the efforts carried out by the HTG to secure recognition, protection and restitution of their ancestral lands are based on the plundering of their territory beginning in the 19th century, when 85 percent of their ancestral lands were transferred by force to private third parties without prior consultation and without any compensation for the lands taken.

11. The petitioners point out that, despite this loss of territory, for a long time, the alleged victims hunted, fished, gathered food and practiced ceremonies and spiritual activities within a good portion of their ancestral lands. The petitioners allege that, during the last 7 years, those activities have been significantly limited due to the dramatic increase in concessions granted to private individuals and real estate developers for the construction of homes, commercial buildings and resorts within that territory, as a result of the 2010 Winter Olympic Games being held in British

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[2] The petition for adoption of precautionary measures is currently in the phase of requesting information from the State. The petitioners requested that the granting of permits and licenses to private third parties for residential and commercial development within a specific area of their ancestral lands, be suspended until an appropriate consultation process between the HTG and the State gets underway with the mediation of the IACHR.

[3] *Amicus curiae* briefs were filed with the IACHR by: Ahousaht First Nation, Assembly of First Nations, First Nations Summit, Nunavut Tunngavik Inc., Union of British Columbia Indian Chiefs, Westbank First Nation, Leich-Kwil-Tach Treaty Society, Wets'uwet'en Hereditary Chiefs, Tsilhqot'in Nation, British Columbia Assembly of First Nations, Stolo Tribal Council y los Gitanyow Hereditary Chiefs.

Columbia. The petitioners maintain that those concessions were granted without prior consultation of the alleged victims. In addition to encouraging the destruction of the environment by the cutting down of trees this type of commercial and residential development requires, the petitioners allege that these activities have prevented the alleged victims from continuing to practice their culture and their way of life such as hunting, fishing, and gathering food, as well as to practice their religious activities by denying them access to their sacred sites, since those who hold the licenses to those places have prohibited HTG members from entering and trespassers would be subject to arrest and prosecution were they to engage in traditional ceremonies in certain private lands.

12. The petitioners point out that the recognition of their ancestral rights to those lands is essential to protecting them from such development and to preserve their culture and their way of life. They point out that, for decades, the members of the HTG have sought the recognition of their ancestral rights through meetings, letters and through written complaints filed with various government agencies and authorities. Since 1994, the petitioners contend, the HTG has participated in a process of political negotiation of treaties with the State known as the *British Columbia Treaty Commission* - BCTC[4]. The petitioners point out that the process has not been able to produce any results due to the fact that the State is not willing to conduct negotiations involving lands in private hands or to discuss compensation for the loss of ancestral lands. The petitioners allege that the State makes reaching these agreements contingent on the indigenous peoples not filing lawsuits based on any issue object of the negotiations while the negotiations are being conducted or after a treaty has been ratified; otherwise, the process of negotiation would end or the indigenous peoples would have to compensate the State for any lawsuit filed afterwards. The petitioners explain that the imposition of those conditions is part of the policy of *"extinguishment" or "renouncement"* pursued by the State, which they consider discriminatory toward indigenous peoples due to the fact that, under this government policy, the benefits they gain through negotiated treaties are obtained in exchange for recognition of the rights of the indigenous peoples to only a reduced portion of the ancestral lands in question, and without any possibility of reclaiming the rest of their ancestral lands in the future.

13. The petitioners argue that such conditions imply that the HTG could only acquire rights to state lands of the "Crown," which represent only 12% of their ancestral lands.[5] The petitioners point out that if the HTG were to file suit in court to claim the remainder of its territory, it would not be able to take part in the process of negotiation of treaties which would result in the loss of time and money they have already invested in that process. Furthermore, the petitioners contend that a petition for recognition of their *"aboriginal title"* would have no chance of success because Canadian legal precedent indicates that the State has never recognized the existence of the aboriginal title of an indigenous people to their ancestral lands. Therefore, the petitioners contend that the conditions imposed by those domestic remedies imply a discriminatory situation that violates the right of equality before the law.

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[4] According to the information provided by the parties, the British Columbia Treaty Commission is part of current Canadian policy favoring the negotiation of political agreements between indigenous peoples, the federal Canadian government and the provinces above legal litigation, in order to resolve claims regarding lands, the administration of natural resources, self-government, education, and compensation for indigenous peoples. The indigenous peoples taking part in these negotiations receive government loans based on the condition that the unpaid balance is deducted from whatever monetary compensation is agreed upon in the final agreement. According to the petitioners, the HTG owes the State $13 million for participating in the BCTC process, due to the fact that these funds are needed to carry out the historical, legal, geographical and ethnographical studies needed to support their rights in these negotiations.

[5] The petitioners point out that this percentage represents 38,800 hectares (has) classified as state lands. The petitioners add that 900 hectares of these ancestral lands are currently under the system of protected areas, and that 5,782 hectares (2% of their ancestral lands) are classified as Indigenous Reserves for the benefit of the HTG and are under the jurisdiction of the Canadian federal government.

14. With regard to the preceding matter, the petitioners add that, in 2004, representatives of the Cowichan Peoples of the HTG enlisted the services of the law firm Ratcliff & Company, which is recognized as one of the experts in defending the interests of indigenous peoples in Canada, to study the viability of filing a lawsuit to obtain restitution of their ancestral lands. The petitioners point out that the report prepared by that law firm concluded that, in light of Canadian legal precedent, such a lawsuit would have no chance of success given that there were no domestic remedies available to pursue that action. The petitioners argue that this professional opinion confirms the impediment the HTG faces in order to obtain restitution of its ancestral lands in the domestic courts.

15. With regards to the State's allegation that the HTG has not exhausted all domestic remedies available based on recent events such as the proposal made by British Columbia to the Cowichan peoples, offering to negotiate a treaty granting them full control over lands, and also with regard to the recent motion the Cowichan peoples filed with the Supreme Court of British Columbia petitioning the court to review the permits issued for a residential project, (see *infra* paragraphs 20 and 23), the petitioners point out that these remedies are not sufficient to resolve all their complaints. With regard to the first point, the petitioners allege that the agreement in question offers an insufficient amount of state lands and, furthermore, if they were to accept that agreement, the Cowichan people would have to surrender their right to self-government in those specific lands and would have to accept the jurisdiction of the municipal government. With regard to the motion for review referred to above, the petitioners emphasize that this action is only a petition to review the administrative approval process of a permit issued for the construction of a specific project, and that in no way does it represent a legal action that would result in a decision regarding the property rights that the alleged victims claim to all their ancestral lands currently in private hands.

16. Additionally, the petitioners point out that the high financial cost of accessing the domestic remedies represent an obstacle due to the lack of financial means of the alleged victims who, according to socio-economic studies, live in one of the poorest communities in Canada. The petitioners contend that this situation has led the HTG to accumulate $13 million in debts for taking part in the BCTC process and made it impossible for it to continue with the administrative challenges it had filed to try to stop the issuing of licenses in individual cases where sacred sites were being threatened in certain private lands. The petitioners further contend that the extreme poverty in which the alleged victims live provides added proof of their need to have access to their ancestral lands in order to preserve their cultural, social and economic ways.

B. Position of the State

17. For its part, the State requests that the petition be declared inadmissible because the allegations do not constitute violations of human rights and because the domestic remedies have not been exhausted. The State asserts that the Hul'qumi'num peoples have sufficient legal remedies to secure the lands necessary to preserve their culture and their way of life.

18. The State points out, that the main recourse available is the BCTC process of treaty negotiations, which, in the HTG case, is still underway. The State contends that the BCTC process encourages the search for consensus in finding solutions by concentrating on the interests that indigenous peoples have in the lands claimed (interest-based approach), rather than on their rights in a strictly legal sense (rights-based approach), since that would imply the need to provide legal evidence through costly historical and ethnological studies. The State maintains that, in this process, indigenous peoples can establish which state-owned lands are best suited to resolve their claims. The State adds that, together with the HTG, they have identified the state-owned lands that are available for negotiation.

19. With regard to lands in private hands, the State contends that these lands can be purchased, even after an agreement has been signed, if owners are willing to sell them. The State asserts that this process allows for consideration of the interests of thirds parties who may be affected. The State asserts that this process of negotiation saves time and financial resources that would otherwise be spent in litigating these claims in the courts, and encourages the reconciliation of interests of all sectors of the Canadian population. Furthermore, the State contends that a final agreement can give indigenous peoples the authority to preserve their cultural interests inside and outside of the ancestral lands agreed upon in the negotiating process.

20. By way of example of what the BCTC process of negotiation offers, the State points out that on July 14, 2009, the Province of British Columbia offered to negotiate an incremental treaty agreement with the Cowichan People of the HTG, whereby full control over a certain amount of land would be transferred to them as part of the lands that would eventually be agreed upon between the HTG and the State under the BCTC process. The State affirms that, as in other incremental agreements made with other indigenous peoples, the Cowichan people would also receive funds to administer their territory and its protection as indigenous territory would be constitutionally guaranteed.

21. The State contends that the petitioners are not limited to the treaty negotiating process and that they have several legal avenues available to file petitions with the courts such as a "declaration of Aboriginal rights and title," as well as petitioning to obtain compensation for the violation of these rights. The State also points out that the petitioners could also petition for a judicial review of any government decision, including those made regarding urbanization projects, should they consider that the government has failed to comply with its obligation to consult with the HTG about the possible negative effects that decision could have on their rights to the land in question. The State adds that those petitions may be lodged even while the HTG is involved in the BCTC process. In order to prevent actions that are the object of claims for violation of prior consultation, the State also points out that the petitioners may file interim or interlocutory injunctions) to prevent the actions that represent that threat.

22. As an example of available remedies, the State reviews Canadian jurisprudence where other indigenous peoples have accessed some of the legal remedies mentioned above to protect their rights and where interim costs have been granted based on their indigence, but which the Hul'qumi'num have not requested with regard to their land claims.

23. The State further adds that on July 13, 2009, the Cowichan people filed a motion with the Supreme Court of British Columbia petitioning the review of a permit granted by agents of the provincial government for an area known as the Paldi Development, where a massive residential project is scheduled to be built, and which is one of the projects the petitioners have shown great concern about. According to the State, this shows the effectiveness of domestic remedies to address the claims being presented by the petitioners before the IACHR, since with that legal motion, the Cowichan People seek to have the permit granted for the project, together with the permit for wastewater treatment, in that particular area suspended, and they also seek a ruling that the provincial government's agents violated the right to prior consultation with the Cowichan people.

24. With regard to other remedies available in Canada, the State also mentions the Heritage Conservation Act as a mechanism that the Hul'qumi'num could use in order to coordinate with the State the implementation of measures to preserve those sites considered to be of high significance and value to their heritage.

25. The State also contends that some of the allegations made by the HTG are inadmissible *ratione materiae* because they are not based on the American Declaration but, rather,

on international instruments which Canada is not a party to, such as the American Convention on Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples, and the Draft American Declaration on the Rights of Indigenous Peoples, which the IACHR is not competent to evaluate. Likewise, the State argues, the petitioners base their claims on judgments issued by organs and special proceedings of the United Nations with regard to governmental policy on treaty negotiations which are not within the purview of the Commission.

26. With regard to the alleged violations of the right to equality before the law and of the right to religious freedom, the State contends that these are not properly developed and, therefore, should be declared inadmissible. At the same time, the State asserts that, with regard to this point, the domestic remedies have not been exhausted because the petitioners have not filed any legal action under the Canadian Charter of Rights and Freedoms for the alleged violations of the right to equality before the law and of the right to religious freedom.

IV. ANALYSIS

A. Competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae* of the Inter-American Commission

27. After examining all available evidence, the Commission considers that it is competent to examine the present petition. Article 23 of the Rules of Procedure of the Commission authorizes the petitioners to lodge a petition alleging the violation of rights protected by the American Declaration of the Rights and Duties of Man. The alleged victims, the six peoples who make up the Hul'qumi'num Treaty Group and their members,[6] fall under the jurisdiction of Canada and their rights are protected by the American Declaration, whose provisions the State is obligated to respect in accordance with Article 17 of the OAS Charter, Article 20 of the Commission's Statute, and Article 29 of the Rules of Procedure of the Commission. Canada is subject to the jurisdiction of the Commission since depositing its instrument of ratification of the OAS Charter on January 8, 1990. Therefore, the IACHR is competent *ratione personae* with regard to the Hul'qumi'num Treaty Group and its members.

28. To the extent that the petitioners allege the violation of Articles XXIII, XIII and II of the American Declaration of the Rights and Duties of Man, the Commission is competent *ratione materiae* to examine the petition.

29. The Commission is competent *ratione temporis* to examine the complaints with regard to the facts alleged in the petition which took place after Canada's obligations under the Declaration were already in force.

30. Last, the Commission is competent *ratione loci*, because the petition alleges facts which presumably took place within Canada's jurisdiction.

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[6] The alleged victims are primarily the six indigenous peoples mentioned *supra* note 1 who are located in the British Columbia province. Altogether, these six indigenous peoples comprise a population of approximately 6,400 inhabitants. These communities are located in specific geographic areas, and their members can be identified individually. In that regard, see IACHR. Report 62/04, Admissibility, P 167/03, Kichwa de Sarayaku Indigenous People and their members, Ecuador, October 13, 2004, par. 47; IA Court H.R., *Case Mayagna (Sumo) Awas Tingni Community*. Judgment issued on August 31, 2001. Series C N° 79, par. 149; and IACHR. Report 58/09, Admissibility, P12.354, Kuna de Madungandi and Emberá de Bayano Indigenous Peoples and their Members (Panamá), April 21, 2009, par. 26.

B. Other requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

31. Article 31(1) of the Rules of Procedure of the Commission establishes that for a petition to be admissible, a) the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. Article 31(2) establishes that the preceding will not apply when: a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. The jurisprudence of the inter-American system clearly indicates that only those remedies that are suitable and effective, if pertinent, in resolving the matter in question, must be exhausted.

32. The Commission will analyze the exhaustion of domestic remedies taking into consideration that, for years, the alleged victims, as indigenous peoples, have tried to protect these rights as being interrelated: 1) recognition of their right to property of their ancestral lands, including lands in private hands, primarily by setting boundaries, demarcation and by recording the title deed to that territory, or, if that is not possible, by obtaining alternative lands as restitution or by obtaining just and equitable compensation; and 2) by implementing a process of prior consultation between the HTG and the State for the purpose of preventing the destruction of the environment, and, consequently, the necessary restrictions to preserve their cultural, religious and spiritual practices as a result of a series of licenses, permits, and concessions granted on ancestral lands that are currently in private hands.

33. In this case, the parties disagree as to whether this requirement has been met. The petitioners argue that they have been prevented from exhausting the domestic remedies because, first, there is no effective mechanism to obtain legal recognition and restitution of their ancestral lands, and second, access to Canadian courts is very costly for the HTG and makes it impossible to lodge the legal remedies mentioned by the State. The petitioners add that, for decades, the HTG has sought recognition of its ancestral rights through various actions with different authorities and governmental agencies, and since 1994, the HTG has taken part in a political negotiation of treaties process with the State known as the British Columbia Treaty Commission – BCTC.[7] But, the petitioners maintain that the process has not produced results because the State is not willing to negotiate lands in private hands or to discuss compensation for the loss of ancestral lands, and making these agreements conditional on the indigenous peoples not pursuing legal action regarding the matter that is the object of the negotiations.

34. For its part, the State contends that the petitioners have not exhausted the domestic remedies available which consist, primarily, of: the treaty negotiation process under the BCTC; legal actions to obtain recognition of aboriginal title and compensation for the violation of that right; filing petitions under the provisions of the Heritage Preservation Act to demand that the Crown fulfill its obligation to conduct prior consultation with indigenous peoples, and petitioning for

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[7] According to the information provided by the parties, the British Columbia Treaty Commission is part of current Canadian policy favoring the negotiation of political agreements between indigenous peoples, the Canadian federal government, and the provinces, rather than litigation, to resolve land claims, the management of natural resources, self-government, education, and compensation of indigenous peoples. The indigenous peoples who take part in these negotiations receive government loans on the condition that the unpaid balance of the loan be deducted from whatever monetary compensation the parties agree to. According to the petitioners, the HTG owes the State $13 million for taking part in the BCTC process, due to the fact that the funds are needed to carry out historical, legal, geographical and ethnographical studies to support their rights in those negotiations.

interim or interlocutory measures against violations; and, legal action under the provisions of the Canadian Charter of Rights and Freedoms.

35. With regard to the negotiation of treaties under the BCTC, the Commission notes that the State promotes that process as an ideal mechanism to address, in a comprehensive manner, the territorial claims of indigenous peoples without having to incur the high financial costs or meet the legal and technical requirements necessary to carry out litigation. Therefore, the IACHR considers that the HTG's use of this resource is an important reference point to evaluate the exhaustion of remedies by the petitioners.

36. In that regard, the IACHR recalls that the jurisprudence of the inter-American system has determined that with regard to indigenous peoples, the State must provide them with effective protection that takes into consideration their own traits, their social and economic condition as well as their specially vulnerable situation, their common law, values, practices and customs.[8] This also includes taking into account the political mechanisms indigenous peoples use through their respective representatives, to manage their relations with the State and to claim their rights.

37. The Commission notes that for over a decade, the HTG, through its representative institutions, has sent letters and complaints to various government authorities with regard to activities that impact their ancestral lands,[9] and, furthermore, since 1994, the HTG, through the treaty negotiation process of the BCTC, has brought to the attention of official authorities the central facts contained in the petition, to wit: legal recognition and/or restitution of their ancestral lands, including lands that are currently in private hands, as well as the implementation of a process of prior consultation as indispensable measures to protect those lands from the actions of private third parties. However, the BCTC process has not allowed negotiations on the subject of restitution or compensation for HTG ancestral lands in private hands, which make up 85% of their traditional territory. Since 15 years have passed and the central claims of the HTG have yet to be resolved, the IACHR notes that the third exception to the requirement of exhaustion of domestic remedies applies due to the unwarranted delay on the part of the State to find a solution to the claim. Likewise, the IACHR notes that by failing to resolve the HTG claims with regard to their ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims. Therefore, the first exception to the requirement of exhaustion of domestic remedies applies because there is no due process of law to protect the property rights of the HTG to its ancestral lands.

38. In the opinion of the IACHR, these comments demonstrate the difficulties faced by indigenous peoples when trying to avail themselves of this remedy due to the limited access to the justice system during and following treaty negotiations, which confirms that the treaty negotiation process is not an effective mechanism to protect the rights claimed by the petitioners.

39. The IACHR also considers relevant the experiences of other Canadian indigenous groups described in the *amicus curiae* briefs filed with the IACHR, which show the difficulties they have faced when trying to access the legal remedies that the State contends must be exhausted by

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[8] IA Court H.R., *Case Yakye Axa Indigenous Community*, par. 63; *Case Sawhoyamaxa Indigenous Community*. Merits, Reparations and Costs. Judgment issued March 29, 2006. Series C No. 146, par. 83; and *Case of the Saramaka Peoples*. Preliminary Exceptions, Merits, Reparation and Costs. Judgment issued November 28, 2007. Series C No. 172, par. 178; *Caso Tiu Tojin*. Judgment issued November 26, 2008. Series C No. 190, par. 96. IACHR, Report No. 58/09 (Admissibility), Petition 12.354, Kuna de Madungandi y Embera de Bayano Indigenous Peoples and their Members (Panamá), April 21, par. 37.

[9] Documents included in the case file of this petition.

the HTG in order to obtain recognition and protection of its ancestral lands.[10] The Commission notes that the judgments cited by the State recognize the existence of the aboriginal title, the communal nature of indigenous property and the right to consultation in the Canadian legal system. But, the *amicus* briefs show that none of those judgments has resulted in a specific order by a Canadian court mandating the demarcation, recording of title deed, restitution or compensation of indigenous peoples with regard to ancestral lands in private hands. Not having obtained any legal certainty with regard to their ancestral lands through any of the judgments, those indigenous peoples contend that they have incurred excessive expenses in order to pursue their legal claims which have experienced many delays due to procedural questions and to the various appeals filed by the State, which, the petitioners argue, have resulted in a situation where their lands are left unprotected against the actions of third parties.[11]

40. It bears recalling that the jurisprudence of the inter-American System has clearly indicated that only those remedies that are suitable and effective, if pertinent, to the resolution of the matter in question must be exhausted. Although the State contends that it is possible to exhaust a series of legal remedies, based on the information contained in the case file, there is no evidence to support that claim.

41. It bears pointing out that, the jurisprudence of the IACHR has established that a petitioner may be exempt from the requirement of having to exhaust domestic remedies with regard to a complaint, when it is evident from the case file that any action filed regarding that complaint had no reasonable chance of success based on the prevailing jurisprudence of the highest courts of the State.[12] The Commission notes that the legal proceedings mentioned above do not seem to provide any reasonable expectations of success, because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples, and, therefore, in the case of HTG, those remedies would not be effective under recognized general principles of international law.

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[10] As an example of the effectiveness of those legal remedies, the State makes reference to several judgments regarding indigenous peoples: the case of the *Tsilhqot'in Nation vs. British Columbia*, in which an indigenous people petitioned for the declaration of aboriginal title in an area within the Province of British Columbia and the Supreme Court of the province ruled in favor of the right of those indigenous people to pursue their traditional practices; in the case of *Delgamuukw vs. British Columbia*, the Supreme Court of Canada defines the nature of the aboriginal title which includes occupancy and exclusive use of the land and concludes that the claim of the indigenous people in question be forwarded to the court of first instance for reexamination and to determine whether the indigenous people in question such property right; in the case of *Haida Nation vs. British Columbia*, the Supreme Court ruled that the Province of British Columbia had the obligation to consult with indigenous peoples even before the property rights of an indigenous people had been proven; and in the case of *Wi'litswx vs. British Columbia (Minister of Forests)* the Court of Appeals of British Columbia ruled that the Crown had the obligation to consult with an indigenous people before granting a permit for forestal operations, in a case in which the indigenous people in question requested interim measures to prevent the granting of such license.

[11] The IACHR takes note of the *amicus* brief filed by the Wet'suwet'en People, one of the peoples party to the case of *Delgamuukw* cited by the State, where it is pointed out that the judgment in this case defined what an aboriginal tile is, but ordered that the court of first instance reexamine the indigenous peoples' claim. The judgment did not rule on the merits of the case, the recording of title deed to the lands requested by the indigenous people. The Commission points out that this case lasted more than 15 years and cost the indigenous peoples involved over $14 million, and due to the lack of financial resources they have not been able to continue litigation in the courts. The authors of the brief point out that in the meantime, the State and third parties continue to exploit the natural resources in the ancestral lands of those indigenous people.

Likewise, the *amicus* brief filed by the Tsilhqot'in People, whose case was also cited by the State, explains that, in their case, the judgment handed down by the Supreme Court addresses their right to their traditions but does not decide on the existence of their aboriginal title due to procedural matters. According to the brief, their people have spent more than $15 million in 24 years of litigation and responding to appeals without having won the recognition of their property rights or the protection of their ancestral lands against the actions of third parties.

[12] IACHR, Tracy Lee Housel, Report No. 16/04, Petition 129-02 (Admissibility), February 27, 2004, par. 36.

42. Therefore, the IACHR considers that with regard to legal remedies to obtain the declaration and protection of the aboriginal title, the exception to the requirement of exhaustion of domestic remedies applies because the remedy does not constitute an effective protection of the right alleged by the petitioners.

43. With regard to remedies under the Heritage Preservation Act, the interim or interlocutory measures that may be granted against violations, and to legal actions under the provisions of the Canadian Charter of Rights and Freedoms, the IACHR notes that those remedies are not suitable because they cannot be used to comprehensively and permanently protect all HTG ancestral lands from the actions of third parties because their purpose is not to recognize the HTG's property rights to those lands or the obligation of the State to provide restitution. Therefore, the petitioners are not obligated to exhaust those remedies.[13]

2. **Deadline to lodge the petition**

44. Article 32(1) of the Rules of Procedure of the Commission establishes that for a petition to be admissible, it must be lodged within a period of six months from the date on which the alleged victim was notified of the final judgment exhausting the domestic remedies. Article 32(2) of the Rules of Procedure of the Commission establishes that, "in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

45. In the present case, the Commission ruled *supra* on the applicability of the exception to the requirement of exhaustion of domestic remedies. Taking into consideration that for over a decade, the petitioners have taken part in a process of political negotiation for the purpose of protecting the same rights alleged in their petition to the IACHR, as well as the letters, complaints and administrative actions used by the members of the HTG to prevent, on certain occasions, the granting of licenses; and also considering the evolution and continuity of the alleged situation, and the date on which the petition was filed with the IACHR, the Commission considers that the petition was lodged within a reasonable period of time. Therefore, the requirement regarding the deadline to lodge the petition has been met in accordance with the provisions of Article 32 of the Rules of Procedure of the Commission.

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[13] It appears evident from the information provided by the parties, including the *amicus curiae* briefs filed, that remedies such as complaints for lack of prior consultation, the process to obtain interim or interlocutory measures, and the Heritage Preservation Act are ineffective in permanently resolving the claims of the HTG and of other indigenous groups because those remedies must be filed each time a request for a permit or license is made that could impact their ancestral lands that are in private hands.

In the specific case of HTG, the petitioners argue that those remedies have been ineffective. For example, the petitioners say that in 2004, a group of elders from the Penelakut Community filed an administrative challenge under the provisions of the Heritage Preservation Act to prevent the granting of a permit to a private business to discharge waste water on a private lot where an old cemetery where their ancestors were buried was located. In the case of the *Penelakut First Nation Elders v. British Columbia (Regional Waste Manager)*, [2004] B.C.E.A. No. 34, the administrative court for the environment ruled that the elders had not provided enough evidence to show that in order for them to be able to continue their religious practices, the discharge of waste water had to be stopped. The petitioners point out that the elders have not been able to appeal that decision because of their lack of financial means. In any event, it is obvious that this remedy does not permanently guarantee the property rights of the HTG and that it would have to be filed every time a permit is granted for land located within the territory claimed by the HTG.

It is also noted that, with regard to the petition lodged in July 2009 by the Cowichan Indigenous People against the permit granted for the area known as the Paldi Development, *supra* par. 22, this type of recourse is also limited to one specific permit and it would not solve the totality of the HTG territorial claim.

3. Duplication of proceedings and international *res judicata*

46. Article 33 of the Rules of Procedure of the IACHR establishes that for a petition to be admissible, the subject of the petition or communication must not be pending in another international proceeding for settlement or be substantially the same as one previously studied by the Commission or by another international organization.

47. It is not evident from the case file that the subject of the petition is pending in another international proceeding for settlement, nor that it is substantially the same as one previously studied by the Commission or by another international organization.

48. Therefore, the Commission concludes that the requirements established in Article 33 of the Rules of Procedure of the Commission have been met.

4. Characterization of the alleged facts

49. For purposes of admissibility, the Commission must decide whether the alleged facts may constitute a violation of rights under the provisions of Article 27 of the Rules of Procedure of the Commission, or if the petition is "manifestly groundless" or "out of order" as established in the same article. The criterion for evaluating these requirements is different from the one used to decide on the merits of a petition. The Commission must carry out a *prima facie* evaluation in order to determine whether the petition establishes the basis of the, possible or potential, violation of a right protected by the Declaration, or of the actual violation of rights. This evaluation constitutes a preliminary analysis that does not imply prejudgment on the merits of the case.

50. The Commission will focus its analysis on the following allegations made by the petitioners: 1) the State has not set boundaries, demarcated, or recorded the title deed to the ancestral lands of the HTG; 2) the State has granted licenses, permits and concessions within its ancestral lands without prior consultation; 3) the State has not provided restitution for the ancestral lands the HTG lost involuntarily and that were transferred by the State to private third parties; and 4) this has resulted in the destruction of the environment, natural resources, and of the sacred sites used by the alleged victims.

51. With regard to the allegations about the lack of demarcation and legal recognition of the lands of the HTG, of the licenses and concessions granted without prior consultation within HTG territory, and of the lack of restitution for the loss of ancestral lands, the IACHR notes that they tend to characterize alleged violations of Article XXIII of the American Declaration.

52. With regard to the allegations that the presumed violations mentioned above are the result of the discrimination suffered by the alleged victims because of their ethnic background, the IACHR notes that they tend to characterize the alleged violation of Article II of the Declaration.

53. With regard to the destruction of the environment, natural resources, and sacred sites of the HTG and the impact on its culture and its way of life, the IACHR notes that they tend to characterize alleged violations of Articles XIII and III – the latter in virtue of the principle *iura novit curia* – of the American Declaration.

54. Therefore, the Commission considers that the requirements established by Article 27 of its Rules of Procedure have been met.

V. CONCLUSIONS

55. The Commission concludes that it is competent to examine the allegations of the petitioners and that the petition is admissible with regard to alleged violations of Articles II, III, XIII and XXIII of the American Declaration in accordance with the provisions of the Rules of Procedure of the Commission.

56. Based on the foregoing arguments in fact and in law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the allegations contained in the petition with regard to Articles II, III, XIII and XXIII of the American Declaration admissible.

2. To forward this report to the petitioners and to the State.

3. To continue with the analysis on the merits of the case.

4. To publish this report and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 30th day of the month of October, 2009. (Signed): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Sir Clare K. Roberts, Paulo Sérgio Pinheiro and Paolo G. Carozza, Commissioners.

The undersigned, Santiago A. Canton, Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 47 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

Santiago A. Canton
Executive Secretary