

BEFORE READING THE CASE

This year the Inter-American Human Rights Moot Court Competition is opening for review the first translation of the Hypothetical Case (see Rule 7.2). We are opening the period of review as a result of discussions with the coaches during the 2011 Competition. The goal is to highlight any inconsistencies among the three translations of the case, and change them prior to official publication on January 9, 2012.

If you speak more than one of the Competition's official languages, we invite you to carefully read the translated versions. If you notice any major inconsistencies that would significantly affect how the case is interpreted or could be argued, please send us your corrections no later than January 2, 2012. Please limit your comments to only important changes and not preferences of writing style.

To submit a suggestion for change, please email iamoot@wcl.american.edu. Please include the following information:

- 1) Paragraph number of the case where the change should be made.
- 2) Suggested change of language, and what it would replace.
- 3) Reason(s) for the change (if not obvious).

Please note that changes should only be made to the English and Portuguese versions of the text, as the original is in Spanish and reflects the true intent of the author.

Finally, please be aware that the following version of the case is *not* yet the final version. It is your responsibility to revisit the case on January 9th to access the final, official version.

Thank you in advance for your collaboration.

Inter-American Moot Court Competition AU-WCL
2012 Hypothetical Case
CASE OF THE CHUPANKY COMMUNITY ET AL. V. LA ATLANTIS

1. The State of La Atlantis is an island located in the Americas, with a total area of 73,400 km². It has approximately 9 million inhabitants. It is currently a representative democracy, and is divided into 15 provinces. La Atlantis depends primarily on its natural resources. In 2010, the national government made an international commitment to become the first Carbon Neutral Nation in the world by December 21, 2021. Its leading productive activities consist of cattle ranching, fishing, mineral extraction (orichalcum), and tourism. The foreign investment services and construction sectors have grown in recent years. This economic growth has occurred in spite of chronic energy shortages, which results in frequent blackouts in the urban areas and very high electricity prices. Accordingly, the country mainly depends on foreign energy sources. La Atlantis has high mountains and significant river basins. The nation's capital is Tripol, whose inhabitants are predominantly of mixed racial ancestry. Tripol is located on the western coast of the island, where most of the country's economic development has been generated. The eastern part of the country is a tropical rain forest with a vast system of biological diversity, which represents 30% of the national territory. The Motompalmo River, one of the main rivers in the country, is in this eastern region. It runs through a large part of the country, from north to south, flowing out to the island's east coast. The eastern region of the country has the highest rates of poverty and social exclusion among the different ethnic groups and peasant farmers.

2. Prior to the European conquest, there were important indigenous cultures in the region. According to anthropologist Francisco Ortiz, an authority on the subject, the indigenous cultures had important rituals and ways of life that enabled them to maintain a harmonious balance with the earth, its rivers, and its mountains. Those civilizations were subjected to slavery during the conquest. Later, in the 19th century and mid-20th century, there was a national policy of extermination of indigenous peoples. In the 1970s, the government adopted a policy of assimilation which, among other things, involved dividing the communities by means of indigenous territorial conflicts and at times enforcing miscegenation¹ in order to dilute the indigenous bloodline; this gave rise to various inter-community conflicts. Some communities managed to survive those attacks due to the resistance of some indigenous movements and the inaccessibility of their communities.

3. In 1990, a National Reconciliation Agreement was implemented. Accordingly, the 1994 Constitution recognized the right of indigenous peoples to their free determination and development, and recognized their legal capacity. Today, the State of La Atlantis recognizes 11% of the population as indigenous, and has issued official identification documents to them.

¹ The original Spanish text refers to the practice of "*mestizaje*," translated here as miscegenation, which should be understood as government enforced "cross-breeding."

Nevertheless, there is a major controversy with respect to other groups that were divided during the period governed by the assimilation policy.

4. In 2003, La Atlantis opened its markets and signed various free trade agreements with the main trading powers. The constitutional reform of 2008 recognized for the first time the human rights enshrined in the constitution and in the international treaties to which La Atlantis is a party. It also guaranteed to interpret the instruments in the light most favorable to the individual. Pursuant to a decision of the Supreme Court of Justice in case No. 911/2009, all judges must exercise conventionality control² with the American Convention *ex officio*.

5. According to the 2003 National Development Plan, the State pledged to eradicate extreme poverty within the framework of the United Nations Millennium Development Goals, for which it took various actions to foster development through the public and private sectors. As one of the main actions for generating power on the island, the Energy and Development Commission (hereinafter the EDC), a quasi-governmental entity, issued a call for bids from national and foreign companies for the right to build the Black Swan Hydroelectric Power Station. The power station would have an approximate capacity of 500 MW, and would be fed by the Motompalmo River. After a feasibility study was conducted in November 2003, it was decided that the project would be carried out in the middle of the Chupuncué region. This location would allow for the course of the river to be altered, would be more accessible for the construction workers, and would provide appropriately sized areas of land for the project to be built. The EDC estimated that this hydroelectric power station would provide improved electrical power service to the country's main cities, through so-called green energy, and would also benefit the eastern region of the country. Furthermore, it would be one of the key foreign investment projects of the decade, generating numerous industrial benefits for the country.

6. According to the EDC's first report in February 2004, the area in which the project would be undertaken would cover approximately 10 km². On the western side of the Motompalmo River, it would involve the territory of the peasant farming community of "La Loma," inhabited by 75 families, or approximately 240 inhabitants. On the eastern side of the river, it would affect the territory of the Chupanky indigenous community, inhabited by 215 families, or about 620 people.

7. The Chupanky indigenous community belongs to the Rapstan indigenous nation, ancestral peoples from the area who traditionally have settled along the banks of the Motompalmo River. They have been governed by their own customs, practices, and traditions, as well as the cosmivision that identifies them. Additionally, they have developed the Rapstaní

² "Conventionality control" requires judges to review whether domestic laws or practices are compatible with the provisions of the American Convention. To perform this task, judges must take into account the jurisprudence of the Inter-American Court on Human Rights, which is the ultimate interpreter of the American Convention.

dialect as their official language. That community is made up of 58% women and 43% men. In recent decades, it has been established as a patriarchal community in which the main authority is the Council of Elders. The council is comprised by 21 members, the oldest of whom is Gauchan Veloz. Moreover, it has 7 Administrators as intermediate authorities, and 3 Shamans as spiritual authorities. Its ancestral territory covers approximately 10,000 hectares, with irregular and mountainous terrain. Nevertheless, their settlements and way of life are closely tied to the Motompalmo River, which in the Rapstaní language is called “Xuxani.” This river, in addition to being sacred according to their cosmovision, is their means of waterway transportation that connects them to the other Rapstan communities to the north and south. It also connects them to the east coast, where they can access markets to sell their fishing and farming products, as well as their handicrafts. Their diet is primarily based on fishing, hunting, and the planting of seeds on their land. On August 16, 1987 they signed the “Peace Treaty with Nature” together with other indigenous communities in the country. Its long implementation process will conclude on December 21, 2012 with the celebration of “Day One” in their ancestral territory. This is based on the end of the Rapstan Long Count Calendar, which marks their new beginning of convergence with nature.

8. The peasant farming community of La Loma was formed during the 1980s, when the government divided the Rapstan communities and promoted mixed-race marriages. In accordance with the customs of the Rapstan people, the women of the community who had entered into such marriages were expelled from various communities and banned from returning. Those couples settled on the western side of the Motompalmo River and formed their own community. They preserved many of their cultural traditions, which are intrinsically tied to their territory and to life on the Motompalmo River. The Rapstaní women are the guardians of the water tradition, as an element of transformation and communication with their dead. Accordingly, the women of La Loma have preserved the Rapstaní tradition of cremating their dead on the banks of the river and throwing their ashes into the Xuxani for their transmutation, through the ritual of the two suns and the three moons. Nowadays, however, they preserve their dialect only partially; they do not use their traditional clothing, and they have not preserved the production of handicrafts. In addition, they have not retained the traditional forms of hierarchy and organization, as the community is predominantly matriarchal. Under the Decrees of 1985, the State granted the La Loma community official recognition as a peasant farming community, which enabled them at that time to receive government subsidies for barley, pigs, and shoe-making materials.

9. After years of tension, in 2003, the communities of La Loma and Chupanky entered into a collaborative³ agreement for the conservation of, and access to, the Xuxani River.

³ The Spanish text refers to a “good offices” agreement, which can be understood as a voluntary, non-binding agreement.

10. In January 2005, the EDC decided to grant the concession for the construction of the Black Swan Hydroelectric Power Station to the Turbo Water company (hereinafter TW), with 40% in state capital and 60% split between Tripoli entrepreneurs and foreign capital. The project was divided into three phases. Phase 1: reach agreements with the owners of the affected territories; Phase 2: drainage and construction of reservoirs; Phase 3: irrigation, testing, and operation.

11. In April 2005, the State issued a declaration of public interest with respect to the project area and made a deposit of 50% of the assessed value of the lots in the La Loma community. In June 2005, the EDC began negotiations with various individuals from the communities of La Loma, and offered to give them alternative agricultural land located in the area west of the river, approximately 25 km from the Motompalmo River. 25% of the property owners from the community of La Loma accepted the offer; the rest of the community rejected it, asserting their cultural ties to the Xuxani River.

12. In November 2005, expropriation proceedings were initiated against the various landowners of the La Loma community before the Seventh Civil Court of Chupuncué (hereinafter “civil court”), for purposes of setting the amount to be paid as compensation. In February 2006, the court issued an order for the immediate occupation of the land declared to be of public interest in La Loma. The community members were dispossessed of the land, and relocated to temporary camps, since they refused to accept the alternative lands.

13. In March 2006, 75% of the dissenting property owners requested before the civil court that they be afforded recognition of the international standards relative to prior consultation procedures and the distribution of benefits. They also requested that environmental impact studies be performed. In its Order 1228/2006 of May 2006, the trial court judge determined that those standards were applicable to indigenous or tribal communities according to the various instruments on the subject, and that the community of La Loma was not entitled to those rights because, according to the Decrees of 2005, it was legally recognized as a peasant farming community. As such, the civil court ordered the appointment of an expert appraiser, who rendered his expert opinion on October 15, 2006. That expert opinion was contested on October 30, 2006 by the representatives of the community of La Loma, on the grounds that they would not agree to sell their lands. At this time, the expropriation proceeding is pending decision, for purposes of setting the appropriate final amount. Nevertheless, some of the members of the community have stated to the newspaper *El Oscurín Pegri* that the living conditions are poor in the temporary camps and that they wish to return to their place of origin and traditions, and that therefore they will accept neither compensation nor alternative lands.

14. With respect to the Chupanky Community, and due to pressure from national and international organizations concerning indigenous peoples’ rights, the State began the prior

consultation process in November 2007. This delayed Phase 1 of the project. Accordingly, the State created an Intersectoral Committee between government authorities and the TW Company with the capacity to reach agreements with the community. The guidelines to be followed were established at the first meeting with the Council of Elders. In accordance with the customs and practices of the community, consultation processes would be conducted with the community's authorities and the male heads of households in the community, and four meetings would be held with those individuals in order to provide them with information on the project and to negotiate its benefits.

15. The Intersectoral Committee offered to grant the consulted individuals alternative land located 35 kilometers from the eastern part of the Montopalmo River, since a large part of their territory would be used initially for the construction of the hydroelectric power station and later flooded with the dam. The alternative land area exceeded the size of their current land, and was of good agricultural quality. In any case, the move from their territory would be done in Phase 3. In addition, in accordance with their traditions, all members of the community over the age of 16 were offered the opportunity to work on the construction of the hydroelectric power station. The committee also offered to have environmental impact studies performed by independent experts. Once the hydroelectric power station was operating, the entire community would be provided with electrical power. They would also be given 3 computers, as well as 8 water wells in their new territory, which would be connected by a direct highway to the river in order for them to visit their deity. In view of those employment opportunities, during the consultation meetings, the majority of the heads of households showed a willingness to cooperate with the project. At the fourth meeting in December 2007, by a majority vote of the consulted individuals, the first Phase of the project was approved and it was agreed to continue with the second Phase. Some Rapstani language interpreters were present during the meetings. The Council of Elders stated verbally to the Committee that once the second stage of the project was concluded they would convene another assembly in order to make a decision about the third stage of the project.

16. On January 15, 2008, the Council of Elders informed the heads of households of the distribution of construction work. In addition, they invited them to extend the call to their wives who wished to take part in the work designated by the TW Company.

17. On January 20, 2008, 23-year-old Mina Chak Luna, a member of the community who had participated in the United Nations Permanent Forum on Indigenous Issues, mobilized 13 other women to demonstrate against the project, forming the group called the "Rainbow Warrior Women." In its protest, held in a surrounding area outside the project, this group claimed that the women of the community had not been consulted, and therefore the process was invalid and discriminatory. They requested a meeting with the company's Project Director, who refused to meet with them. They subsequently sent a communiqué to the Intersectoral Committee to request a meeting. In official letter CI-2008, the committee replied that, because it is based in Tripol and

had concluded its duties in the consultation process, it would not have the opportunity to visit the community in the next 6 months, but that it would evaluate their petition.

18. On February 30, 2008, the Ministry of the Environment and Natural Resources (hereinafter MENR) designated the organization Green Energy Resources to conduct the environmental impact studies with the participation of independent experts on the subject. The MENR supervised and certified those studies. According to the MENR, the results of the May 14, 2008 report were favorable to the project, mainly in terms of the benefits of the generation of electrical power for the communities. However, with respect to the environment, it specified that the hydroelectric dams could cause minor geological damage, changing the ecosystem in the region, and producing some sediments in the water that are not harmful to human beings. As for the social aspect, it specified that, due to the adjacent communities' relationship with the river, it would be advisable to secure direct access road from their alternative lands in order for them to hold their rituals. The MENR sent a true and accurate copy of the study to the Chupanky Community.

19. The jobs with the company began on June 20, 2008. The company hired 89 qualified individuals with experience in the construction of hydroelectric power stations through individual employment contracts. In addition, they offered 350 positions to members of the community. They designated 7 divers and 215 masons, who were offered wages of US \$4.50 per day. More than 100 women were offered the jobs of collecting and cooking the food for their husbands and other company personnel, as well as cleaning the area and washing the workers' clothes, for US \$2.00 per day. During the first 2 months, everyone was assigned a 9-hour workday, with 1 hour for lunch. Later, however, due to the demands of the job, the men's workday was extended to approximately 15 hours a day.

20. According to a medical report requested by the Rainbow Warrior Women and published in the newspaper *El Oscurín Pegri*, on November 16, 2008, due to a lack of specialized, good quality equipment, 4 of the divers reported problems stemming from decompression syndrome. This resulted in their partial disability. They were additionally able to document that 50 masons had expressed their discontent with the exploitative working conditions imposed by the TW Company and the continuous increase in working hours without overtime pay, which has adversely affected their traditional way of life. Some women indicated that they had different work schedules each day for when to provide meals to the workers, and once that work was done, to do the respective cleaning work, and that this had adversely affected their family dynamics. Several people reported that fishing in the area was disturbed, and because of that they were concerned about river travel and the celebration of Day One.

21. Mina Chak Luna continued protesting against the company. She and the Rainbow Warrior Women, together with new members of the community of La Loma led by Lupe

Gamboa, went to Tripoli on December 10, 2008 to complain before the EDC and the MENR of the irregularities on the part of the TW Company. They indicated that there had been acts of discrimination against women, in both the consultation process and in the execution of the project, as well as forced labor to the detriment of members of the community. They also warned of other environmental and social harm that had not been considered in the Environmental Impact Study and that are always involved in these types of hydroelectric projects. On December 13, 2008, they managed to get a meeting with the deputy director of the EDC and a MENR employee, who indicated that they would study the issue and, if appropriate, forward the matter to the proper authorities.

22. In light of the evidence gathered by Mina Chak Luna, on December 20, 2008, the Council of Elders decided to convene a general community assembly to hear from all of the members of the community. At that meeting it was decided to veto the continuation of Phases 2 and 3 of the project, based on the various irregularities. The TW Company and the Intersectoral Committee were notified of this decision on December 25, 2008. The company reacted forcefully, refusing to stop its activities, and threatening to fire all of the indigenous employees and sue them for breach of contract. The company claimed in the media that millions of dollars had already been invested in the project. From that point forward, the company increased its demands on the local workers. It also conducted proceedings before the pertinent authorities with the aim of removing the Chupanky Community to the alternative lands as soon as possible and replacing its workforce.

23. On January 9, 2009, the Council of Elders, through the non-governmental organization “Morpho Azul,” filed an administrative claim before the EDC on behalf of the community to request the cancellation of the project. The claim alleged defects in the concession contract and other irregularities in the consultation process and project execution contrary to international standards. It also alleged adverse effects on the environment. The claim was denied on April 12, 2009 on the grounds that the community had been informed and had approved of the project, and therefore there was no basis on which to order its suspension.

24. On April 28, 2009, they brought their claim before the Court for the Judicial Review of Administrative Acts, which handed down a judgment on August 10, 2009. That judgment held that, based on the Constitution and the application of international treaties, the consultation met the established requirements. It further held that the indigenous communities did not have the right to veto this project, citing the *Case of the Saramaka People v. Suriname*. In addition, it ruled based on the principle of *pacta sunt servanda* that the community had accepted the project and must see it through to its final stage. It also maintained, citing the *Case of Yatama v. Nicaragua*, that the consultation process was conducted in accordance with the community’s customs and practices, through which the community itself designated its authorities. It added that the alleged discriminatory practices against women were, in turn, the responsibility of the

community itself and the result of its autonomy and free determination as a people. In relation to compliance with the American Convention, it held that their customs and practice must be taken into account, consistent with the Reparations Judgment in the *Case of Aloeboetoe et al. v. Suriname*. It indicated with respect to the employment claims that the competent authority was the employment authority or, if appropriate, the mechanism provided for in the Free Trade Agreement on the issue.

25. On September 26, 2009, the community filed a petition for a constitutional remedy before the Supreme Court of Justice, requesting the suspension of the project based on the detrimental effects on the physical and cultural integrity of the Chupanky and La Loma communities. The Supreme Court denied the petition on the grounds that the various competent authorities complied with the requirements established under the law and under the international standards. It added that the cultural integrity asserted in the claim is not recognized as an autonomous right in the case law of the Inter-American Court.

26. On May 26, 2010, a petition was submitted to the Inter-American Commission on Human Rights. The representatives of the alleged victims claimed violations of Articles 4.1, 5.1, 6.2, 21, 22, 23, 8, 25 and 26 of the American Convention on Human Rights (ACHR) and of the obligations contained in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Pará") to the detriment of the members of the Chupanky and La Loma communities. They also requested that reparations be ordered with an indigenous and gender perspective.

27. In its September 1, 2010 submission of observations to the IACHR, the State of La Atlantis alleged that those rights had not been violated, and that the State had acted properly, in accordance with domestic and international legal provisions, at all times applying the provisions most favorable to the individual and monitoring compliance with the American Convention. The State decided not to file preliminary exceptions.

28. On March 9, 2011, the Commission issued its report on admissibility and merits (Report 969/2011). The IACHR found violations of Articles 1.1, 4.1, 5.1, 6.2, 21, and 25 of the American Convention on Human Rights (ACHR) to the detriment of the members of the Chupanky Community, and violations of Articles 5.1, 21 and 25 to the detriment of the members of the community of La Loma. It recommended that the State of La Atlantis implement various comprehensive reparations measures for both communities, taking into account their cultural characteristics. In addition, pursuant to Article 25 of its Rules of Procedure, the IACHR requested that the State adopt precautionary measures in order to halt the company's work on the project until a decision is issued on the merits.

29. Once the period for compliance with the recommendations and request for precautionary measures had elapsed, pursuant to Article 35 of the Regulations of the Inter-American Court, the

Inter-American Commission on Human Rights brought the *Case of the Chupanky Community et al. v. The State of La Atlantis* before the Inter-American Court on October 4, 2011. In addition, in order to protect the inter-American public interest, it requested that the Court recognize not only the members of the community as victims but also the indigenous community itself as a victim. Finally, based on Article 63.2 of the Convention, the IACHR requested that the Court adopt provisional measures for the benefit of the Chupanky Community, in order to suspend the project until the Court issues its decision in the case.

30. On November 11, 2011, the Court admitted the Commission's report and forwarded it to the parties for them to submit their arguments. It set the hearing date for May 25, 2012, during its Extraordinary Session in Washington, DC, to hear the arguments of the representatives of the victims and the State regarding the merits and reparations in the instant case.

31. With the Constitution of 1994, the State of La Atlantis ratified the main regional and universal instruments on the subject. The 2008 amendment on human rights included the principle that the Constitution must be interpreted in a manner consistent with constitutional norms and the international human rights treaties ratified by the State. On January 1, 1995 it accepted the contentious jurisdiction of the Inter-American Court of Human Rights. It has also participated actively in universal and regional human rights bodies since the 1990s, promoting the environmental and sustainable development agenda in the region.