

## HYPOTHETICAL CASE

### CINE, FELANUMA, et al vs. the State of Esmeralda

#### **I. Background**

1. Esmeralda is a Latin American country, combining urban areas, mountainous zones, rain forests and semi-arid regions. Approximately 70% of the country's 25 million inhabitants live in urban areas. Esmeralda's population includes a sizable number of professionals and a large middle-class. On average, Esmeralda enjoys a significantly more equitable income distribution than other countries in the region, and more secondary and higher education opportunities than its neighbors. The economy is relatively diversified, with an emerging industrial sector and a steady agricultural export industry. The country has been governed by an uninterrupted series of democratic constitutional governments since the 1970s, and its legal system is respected.

2. Although its social and economic policies are advanced and the government provides subsidized public services to low-income families, increasing openness to markets and falling international agricultural prices have adversely affected the economy. This has led to rising unemployment and increasing poverty. It has also undermined the government's ability to continue to subsidize public services. As a result, the social and political situation shows signs of mounting tension, manifested by strikes in the public sector and growing agitation by students, labor unions and organizations of unemployed workers. Tensions have become particularly acute in poorer and marginalized urban areas where living conditions have become increasingly precarious.

3. Faced with these adverse economic developments, the last two governments of Esmeralda have taken steps to improve education, increase credit for low-income housing, and reform the tax system. They have also put in place a comprehensive development strategy for the exploration and extraction of subsoil hydrocarbon resources as a way to increase income to the economically challenged country. One of these development projects is the Santa Ana Project, dealing with the exploration and exploitation of petroleum and gas reserves. According to initial estimates, the Santa Ana Project would provide a substantial boost to the Esmeraldan economy by lowering the price of energy for domestic and industrial use and by providing substantial income from the export of those hydrocarbons. The government of Esmeralda has declared that once completed, the Santa Ana Project would provide a GDP increase of 2% annually for the next ten years, or at least until the resources are exhausted. This economic boom would provide needed income for the State to invest in other sectors of the national economy.

4. The Esmeralda Constitution of 1972 transferred ownership of subsoil resources to the State, reflecting a trend prevalent at the time of securing negotiating advantages with large oil companies by nationalizing subsoil resources. According to the Constitution, the government determines the most suitable means of exploring and developing these resources.

5. In addition, Article 19 of the 1972 Constitution recognizes that the indigenous groups of Esmeralda are native peoples predating the founding of the nation, and acknowledges that their national cultural importance is to be “valued, respected and protected by law.” As a result, the Constitution mandates the government to delineate the boundaries of their ancestral lands, to grant them legal title to these lands, and to guarantee that these lands remain a public good, providing a habitat in which indigenous peoples can exercise their right to self-determination.

6. All international human right instruments ratified by the government of Esmeralda are self-executing. They automatically become part of the Constitution and are incorporated into the domestic law of Esmeralda. Esmeralda has fully ratified all instruments of the Inter-American System, including the 1985 American Convention on Human Rights and the 1995 San Salvador Protocol on Economic, Social and Cultural Rights. Esmeralda has accepted the mandatory jurisdiction of the Inter-American Court. It has also ratified the major universal treaties and covenants on human rights, including Convention 169 of the ILO concerning Indigenous and Tribal Peoples in Independent Countries.

## **II. The Indigenous Peoples of Esmeralda: Background**

7. Roughly 12% of Esmeralda's inhabitants are indigenous with the majority living in towns and village communities in forest areas. The following section provides more detailed information on the inhabitants of these areas.

### **A. The Lanta People**

8. The Lanta people are one of the oldest groups residing in what is today known as Esmeralda. They have developed a relatively sophisticated culture in this rain forest habitat. European conquerors had little use for their lands, so when clashes broke out with Lanta warriors, they preferred not to subdue the natives directly. Later, in the 20th century, the Lanta suffered serious abuse and exploitation at the hands of rubber and lumber companies which were developing the region. Although the Lanta continue to be essentially a hunter-gathering people engaged in subsistence farming, the normal ties they established with the government of Esmeralda enabled them to be recognized and to acquire collective land rights in 1985. Working with the Lanta people, the Esmeralda government provides bilingual primary schooling as well as basic health care services to the Lanta communities, including access to a regional hospital. In terms of quality and resources, however, the health and educational services provided to the Lanta are far inferior to those in urban areas. Finally, the Lanta communities have set up their own justice and law enforcement arrangements, with the Esmeralda national authorities stepping in only when third party interests, whether public or private, are at stake.

9. The Lanta people comprise 30 village communities of approximately 2,500 members. Ten of these village communities are in the area designated for the Santa Ana Project; six are situated on the shores of the Santa Ana River and the rest along its tributaries.

10. Each community has its own traditional form of government, with the leaders meeting twice a year as the General Assembly, the central governing body of the Lanta people. Although

individual village communities enjoy a high degree of autonomy from the General Assembly, it is through the General Assembly that the Lanta's dealings with the outside world, and specifically the government of Esmeralda, are handled. Although the lands were collectively deeded to the Lanta reservation in global recognition of the Lanta people in 1985, each village community is distinctly recognized by the General Assembly and by the State and holds claim to its own portion of the reservation. All boundaries are mutually agreed to by the different communities and duly recorded with the General Assembly and with the National Registry of Indigenous Lands and Territories.

## **B. The Numa People**

11. According to most research, the Numa were originally part of the Lanta but they chose to break off because of internal divisions in the 1970s. The Numa settled on government land bordering the east side of the Santa Ana River, a designated "protected natural reserve<sup>1</sup>," where traditionally the whole Lanta people (including those nowadays called Lanta after the separation) would sporadically venture to gather food, hunt and perform their annual pilgrimage to the holy mountain. The Numa currently comprise 15 communities with a total population of approximately 800 people. Six of these communities have settled in the area adjacent to the site directly controlled by the Santa Ana Project. The Numa Council is the Numa's governing body. Although its responsibilities are similar to those of the Lanta General Assembly, the Numa Council acts more informally: it does not meet regularly, it does not keep official records and all decisions require consensus. Because the Numa have not been officially recognized as a "people," this Council has not been officially recognized by the State. The government, however, periodically sends representatives to the Numa Council meetings to discuss issues of common interest.

12. In 1995, administrative proceedings were initiated to recognize the Numa people. During the proceedings, the government argued that the Numa were an offshoot of the Lanta who had seceded in the 1970s and were therefore not entitled to be officially designated a "people." Although it acknowledged that the Numa people had previously lived on the current Lanta reservation, the government argued that in the 1970s the Numa settled onto government land east of the reservation designated as a "protected natural reserve". The government also pointed out that during this period three small communities of non-indigenous farmers had settled in that area of the Santa Ana River. The government further argued that in 1985, when the Lanta were given legal title to their reservation, the Lanta General Assembly had accepted its boundaries as suitable for the survival of the Lanta people and their cultural and social advancement. These proceedings have advanced slowly and have been frequently delayed by requests from both the government and the Numa people for more studies and research.

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<sup>1</sup> According to Esmeralda law "protected natural reserves are the continental and/or marine spaces of the recognized national territory, established and legally protected by the State as such because of their importance for the conservation of the biological diversity and other values associated with the cultural, scenery and scientific interests, as well as for its contribution to the sustainable development of the country...The regulated use and the profiting from the resources located in them, or the determination of the restriction of such direct use, may be permitted. The State must guarantee and value the presence of the human being at the protected natural reserves, its social processes, its individual and collective necessities, as well as the respect towards the traditional use by the indigenous communities in that environment, in harmony with the objectives and goals of its creation."

### **III. Protection of Indigenous Peoples' Rights in Esmeralda**

13. In accordance with the Esmeralda Constitution, Law 555-76 was enacted in 1976 granting specific rights to indigenous peoples and establishing government procedures for recognizing and protecting those rights. Pursuant to this law, the concept of an "indigenous people" is defined as "a group of individuals originating from, and identifying themselves with, a native people. They must share a common culture, have their own language, and should historically reside on ancestral lands maintaining their own institutions and traditional forms of government."

14. Pursuant to law 555-76, all "indigenous peoples are entitled to government recognition and to the lands and territories where they have settled and labored to derive the resources necessary for their social, physical and cultural survival." The law provides that "the government, working with the indigenous peoples, shall adopt all measures necessary to safeguard their rights and preserve the natural resources required for their survival and advancement."

15. This law also outlines procedures for consultations on any program, project, plan or measures which could affect the rights of indigenous peoples, in observance of the provisions governing consultations set forth in Convention No. 169 of the ILO.

### **IV. Facts of the Case**

16. According to geological studies carried out in the 1970s, the rain forests near the Santa Ana River may contain large oil and natural gas deposits. As previously mentioned, these deposits are in an area which is home to two indigenous groups, the Lanta people, which have held title to clearly demarcated territory since 1985, and the Numa people, which are currently attempting to reclaim their lands but are as yet unrecognized as a "people."

17. The 1995 Law for Development of Hydrocarbon Resources sets forth a process for implementing all projects of this type and establishes the following broad procedures:

A. Phase One: the government invites domestic and international bidding on a contract to explore and develop hydrocarbon resources, and identifies a site for oil and gas prospecting and eventual production.

B. Phase Two: Once the selection process has been finalized, the company or group of companies awarded the contract prepares an environmental and social impact assessment (ESIA), as well as a technical exploration and production plan. The ESIA must describe how and when exploration and production will take place. It should explain all expected outcomes and identify measures to minimize any adverse effects to the areas, to safeguard the rights of the affected communities and to protect the environment. This information is submitted to the Ministry of Development and Energy (MIDSEEN).

C. Phase Three: Once the ESIA has been submitted by the company(ies) awarded the contract, public and private organizations will have four (4) months to review and comment on the ESIA to MIDESEN.

D. Phase Four: At the end of this review period, and keeping in mind the positions of the various institutions and organizations involved, MIDESEN will decide, on behalf of the government, whether to endorse the ESIA and to allow the selected companies to go forward with exploration and production.

E. Phase Five: Following approval of the ESIA, the Company will perform seismic prospecting on the site to determine the size of the underground deposits. Once this is known, the most technically suitable location for drilling can and will be determined.

F. Phase Six: Once the location of the oil field has been determined and the production sites have been identified, a work site will be built. Camps and oil drilling rigs will be erected, storage and refining equipment will be built and the right-of-way for the oil and gas pipeline will be opened.

18. In May 1998, the National Energy Plan was signed into law. By virtue of this law, several hydrocarbon projects and specifically, the exploration and development of the Santa Ana River basin were identified as being in the national interest.

19. The Santa Ana Project is set on a quadrilateral site with a total area of 100,000 square hectares: 50 kilometers in the east-to-west direction and 20 kilometers from north-to-south. The Santa Ana River is the primary means of transportation in the area because natural obstacles and the protected status of the area have prevented construction of access roads. The portion of the site located on the western side of the river partially overlaps the land of the indigenous reservation and the eastern side includes part of the lands claimed by the Numa people that are part of the larger natural reserve.

20. Pursuant to the 1995 Law for the Development of Hydrocarbon Resources, seismic prospecting will be performed on the site. Once the oil field is located, the size of the area required for operations and production will be considerably reduced. According to estimates, about 1,000 hectares will be needed, i.e., 1 percent of the total area of the site (300 hectares for oil rigging equipment, 600 hectares for the main camp, storage facilities, and refining equipment, and another 100 hectares for the right-of-way required for the pipeline). The oilrigs and part of the right-of-way will be on indigenous territory or lands under dispute. The main camp will be built on the portion of the site which is government-owned and contiguous to the Lanta reservation along the Santa Ana River. The river will provide the main access route for transporting the equipment needed for exploration and construction work.

21. The pipeline will reach the Atlantic coast, extending across an area of semiarid savanna to supply oil and gas to major cities, with a section near the headwaters of the Santa Ana River intended for exports.

22. The terms and conditions of the bidding will include a series of requirements covering issues of a technical nature, completion deadlines, environmental concerns and the rights of affected communities and specifically those of indigenous communities.

## **V: Project Stages and Developments**

### **A. Submission of Bids and Consultations**

23. The bidding process for the Santa Ana Project complies with all applicable laws. In June 2000, the contract is awarded to the Intertropic Group (hereinafter “the Company” or “Company”), a private group of Esmeralda companies with ties to international companies in the hydrocarbons sector.

24. Working closely with this group of companies, the Esmeralda government immediately initiates consultations with the various affected communities and specifically with the indigenous groups. The first round of consultations are held with the three principal indigenous associations: CINE (Confederacion Indígena Nacional de Esmeralda), a national confederation of regional federations; LILANTA (the League of Lanta Communities), representing two-thirds of all Lanta communities; and FELANUMA a joint Lanta and Numa Federation comprised of half of all Lanta communities (including some also affiliated with LILANTA), and most Numa communities. These regional and national federations are technical and lobbying organizations (civil society organizations) and are not part of the structure of traditional authorities. Each indigenous village community, the Numa Council or the General Assembly can join or not join different federations.

25. In addition, briefings and consultations are held with the various village communities on an individual basis. These meetings are organized by the authorities of the various villages of the Lanta and Numa communities, and the participants include representatives from the Lanta General Assembly. While making strong declarations regarding the need to respect indigenous rights and habitat, the Lanta General Assembly is open to negotiation with the Government and the Company representatives with regards to the Santa Ana Project. The Numa Council has a more hostile attitude toward the Project but it has not been able to achieve consensus about how to deal with the project. It generally supports the actions of the FELANUMA.

26. During meetings with the various community leaders, including Lanta General Assembly and Numa Council representatives, government officials introduce the Company representatives, explain the purpose and the scope of the consultations and hold discussions. Company representatives describe the scope of the project in general terms. They discuss the jobs to be completed, the safeguards they intend to put in place, any temporary damage or permanent changes to the surrounding habitat that the project will cause, as well as procedures for compensation for damages related to land use, installation of the pipeline, construction of camps, and any temporary damage to hunting and fishing, and to the forest and water resources.

27. Attendance at these briefings is open to the public, and community leaders preside over the meetings and present the position of their communities. Representatives and experts from

CINE, LILANTA and FELANUMA are present at each of the meetings. During the meetings, members and leaders of the indigenous groups frequently object to the proposals on the grounds that they are harmful to their activities and ways of life. Alternative locations for the pipeline and other options are discussed with company experts and government officials.

## **B. Approval of Environmental and Social Impact Assessments (ESIA)**

28. In March of 2001, the Company finalizes the ESIA's required by law (in some cases incorporating proposals made during the public consultations). They then submit the ESIA's to MIDESEN and make them available to the public. As prescribed by law, during the four month period for review and comment, NGOs, government agencies and the public may comment and raise objections.

29. As the details of the Project begin to emerge, strong opposition begins to build among certain indigenous organizations, environmentalists and human rights activists intent on blocking approval of the project. These efforts are led by CINE, FELANUMA and a group of forest activists. The majority of the remaining organizations decides against assuming a confrontational stance and remains hopeful that negotiations between the Company and the government will be successful.

30. CINE, FELANUMA and the forest activists argue that the bidding process is premature because the government is not effectively prepared to ensure the rights of indigenous groups adversely affected and endangered by the exploration and production activities of the Santa Ana Project. Furthermore, they argue that the Project will cause irreparable damage to a pristine ecosystem and hence cause equally irreparable damage to the indigenous communities that have settled there. They also claim that the economic development of subsoil resources on their lands violates their rights to self-determination and to property, and to preservation of their territories and creates numerous risks threatening their very existence. They propose postponing the approval process and not going forward with the Project until the government has negotiated with all affected indigenous peoples, reached an agreement on developing subsoil resources, taken measures necessary to ensure their rights, and put in place an effective means of protecting the environment.

31. In August 2001, one month after the end of the four-month review period, the government approves the ESIA's and its recommendations for Project implementation, thus enabling exploratory seismic testing to begin.

## **VI. Administrative and Legal Actions**

32. In October 2001, CINE, FELANUMA and the group of forest activists file an administrative petition with MIDESEN requesting that approval of the ESIA's study for the Santa Ana Project be revoked and that the approval process be closed on the grounds that: a) exploration and development of oil resources will permanently undermine the rights of the indigenous people that reside there and cause irreparable damage to their property; b) the non-recognition of the Numa people and the failure to draw clear boundaries and grant them legal

title to their lands will infringe upon the exercise of their rights as it relates to the Project and its impact: c) the ESIA's should never have been approved because the consultations were arranged hastily and prematurely, preventing the indigenous communities from being properly prepared to tackle such unfamiliar and complex issues. On December 10, 2001, the Ministry denies the petition and endorses the ESIA's.

33. In February of 2002, the CINE, the FELANUMA and the group of forest activists take the case to Esmeralda Federal Court on the basis of the evidence presented at the administrative hearing and the relevant points of law, claiming the Esmeralda Constitution, Law 555-76 on Indigenous Rights and the legal framework for consultations, as well as the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and Convention No. 169 of the ILO concerning Indigenous and Tribal Peoples have all been breached.

34. In addition to presenting the arguments made during the administrative proceedings, the group reiterates its claim that the government cannot award a contract to develop oil resources pending a decision regarding the recognition of the Numa territories. They therefore request the Federal Court to grant this recognition judicially, claiming the Numa people are being denied just treatment and due process of law, and that the government has delayed the process for over three years despite the repeated demands of Numa representatives. They further argue that granting a right-of-way for a pipeline in the Santa Ana River basin would give settlers access to secluded indigenous land in protected forests. This would threaten the physical and mental well-being of the native inhabitants and endanger the habitat of those territories claimed by the Numa.

35. They also request that the judge immediately issue an injunction to prevent the government agencies responsible for the Project from going forward with the Santa Ana Project pending a ruling on the merits of their case. On April 10, 2002, the judge denies this request for an injunction. After the brief legal proceedings customary in these types of cases, the judge rejects the entire suit on September 18, 2002.

36. The decision rejecting the whole claim is appealed to the Court of Appeals. On October 30, 2002, the Court of Appeals grants the request for an injunction blocking the award of the Santa Ana contract until the administrative procedures for recognizing the Numa people is complete. The Court of Appeals also decides in favor of the claimants, revoking the approval of the ESIA's on the grounds that the recognition of the Numa people should have been resolved before initiating the consultation and approval process, to preserve the eventual right of the Numa people to full participation. They also order the formal recognition of the Numa people.

37. The government appeals this decision to the Supreme Court. Before the Supreme Court, government officials claim that construction in no way interferes with the process of recognition of the Numa people and the subsequent demarcation of boundaries. They add that, given the lack of evidence that the Santa Ana Project will endanger the lives or the welfare of village communities, work should proceed. Doing otherwise, they claim, would infringe upon the government's right to develop subsoil resources and deprive the general public of the benefits of the project. They argue that the Project will particularly benefit the large urban population of Esmeralda, who are big consumers of oil and gas and many of whom have limited resources.



They argue that the Project will also foster a resurgence in the industrial sector, creating jobs, and therefore reducing the political, social and economic tensions plaguing the country. Finally, the Government argues that the alleged inconvenience caused by the Project to such a small percentage of the population is justified, given its positive outcomes for the majority of the citizenry.

38. The Supreme Court rules in favor of the Government, confirming the ruling of the Federal Court, and overruling the Court of Appeals decision. In its ruling, however, the Supreme Court acknowledges that the Constitution and the law guarantee protection for the lands and habitat of indigenous peoples and provide for compensation and restitution in the event that the Project causes unnecessary damage. Nonetheless, the Supreme Court adds that claiming that this threat exists before the Project is begun is speculation because at no time did the government, or the companies involved, fail to recognize either the indigenous peoples' rights or the need to safeguard them. In addition, the Supreme Court overturns the decision of the Appellate Court, which ordered the formal recognition of the Numa people, on the grounds that the matter must be decided by the Executive branch and that there is no evidence of noncompliance with procedures established for that purpose. In addition, they recognize that the Numa participated in the consultations with advice and counsel from Federation experts.

## **VII. Proceedings Before the Inter-American System**

39. The petitioners (CINE, FELANUMA, and the forest activists) file a case before the Inter-American Commission of Human Rights. In particular, they claim the State of Esmeralda is in violation of:

- Articles 5 and 21 of the American Convention on Human Rights, Articles XI and XIII of the American Declaration of the Rights and Duties of Man, as well as Articles 10 and 11 of the Protocol of San Salvador on Economic, Social and Cultural Rights as they relate to the rights of all affected indigenous peoples to the underground natural resources located on the affected indigenous lands, and the damages to their habitat, their personal integrity and lifestyle;
- Articles 1, 16, 23 and 25 of the American Convention, with respect to the lack of adequate participation of all affected indigenous peoples in the approval process, and the inadequacies of the consultation and approval process of the ESIA's;
- Articles 3 and 23 of the American Convention as it relates to the lack of timely recognition of the Numa people, and the failure to demarcate and grant them legal title to their lands prior to the implementation of the Project.

40. Furthermore, they argue that the rights of the affected indigenous peoples as embodied in Convention No. 169 of the ILO have been breached, and that said Convention must be used to interpret the scope for using the instruments of the Inter-American System in cases involving the rights of indigenous peoples. In particular, they allege that Articles 5, 6, 7, 13, 14, 15 and 16 of ILO Convention 169 as it relates to the nature and spirit of the consultation process, as well as to indigenous peoples' rights to decide their priorities for development (Articles 6 and 7), the rights

on their ancestral lands, territories and natural resources (Articles 13-16), and the protection the State shall provide to indigenous peoples (in particular Article 5) have all been violated.

41. Petitioners also allege that the State of Esmeralda is obligated to implement its plans and projects within the context of Inter-American political commitments, and that therefore the implementation of the Santa Ana Project violates the principles of the Inter-American Democratic Charter as it relates to the protection and advancement of the rights of indigenous peoples.

42. Presupposing that the Numa will be recognized, the petitioners request that the Commission issue provisional measures to halt all project-related activities until such recognition is officially given, and that suitable means and measures have been identified, in cooperation with the indigenous peoples potentially affected by the Project, to safeguard these rights and to provide compensation and award damages to ensure they benefit from the Project.

43. In March 2003, the Commission declares the case admissible, and makes itself available to both parties as they negotiate a friendly settlement. After an unsuccessful bid for friendly settlement, in its session of September 2003, the Commission issued its Article 50 Report on the Merits, stating that:

- The State of Esmeralda has violated Article 21 of the American Convention, Article XIII of the American Declaration, and Article 11 of the San Salvador Protocol with respect to the rights to the underground natural resources in indigenous lands, and the damages to their habitat, their personal integrity and lifestyle.
- The State of Esmeralda has violated Articles 1, 23 and 25 of the American Convention with respect to the lack of adequate participation of all affected indigenous populations in the process of approval, and the inadequacies of the process of the consultation and approval of the ESIA's.
- The State of Esmeralda has violated Articles 3 and 23 of the American Convention with respect to the recognition of the Numa people and the failure to demarcate and grant them legal title to their lands prior to the implementation of the project.

44. The Commission also gives the State of Esmeralda sixty days to redress the situation, suspending the approval of all previously approved work of the Santa Ana Project until the above violations are redressed. In December 2003, after the State of Esmeralda fails to respond to the Article 50 Report, the Commission submits the case to the Inter-American Court of Human Rights, which accepts it and requests the government to respond. The Court sets a hearing date in May 2004 to hear oral arguments in the case.

45. In its resolution of March 2003, the Inter-American Commission of Human Rights also urged the Government to adopt the provisional measures requested by the petitioner. In its presentation to the Court, and given that the Government has not responded to that request, the Commission urged the Court to order the provisional measures in this respect. The Court decides to postpone consideration of this request until after the hearing.

46. Finally, the Rules of Procedure of the Inter-American Commission that entered into force on May 1, 2001 and the Rules of the Inter-American Court of Human Rights that entered into force on June 1, 2001 apply in this case.

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