Amici Curiae

Association of Lhaka Honhat Aboriginal Communities

(Nuestra Tierra/Our Land)

v.

The State of Argentina

presented by

The Center for Human Rights and Environment (CEDHA)

&

The Center for International Environmental Law (CIEL)

Honorable Inter-American Commission on Human Rights:

Romina Picolotti, in representation of the Center for Human Rights and Environment (CEDHA), address at Av. Mirador lote Q 27, Comuna Villa Parque Siquiman, cp 5158 Córdoba, Argentina and Durwood Zaelke, in representation of the Center for International Environmental Law (CIEL), address at 1367 Connecticut Avenue, NW, Suite 300, Washington D.C., 20036; respectfully present the following amicus brief in the case of Association of Lhaka Honhat Aboriginal Communities (Nuestra Tierra/Our Land) v. The State of Argentina.

Request to be Considered Amici Curiae

Consistent with the custom of the Inter-American Commission on Human Rights of accepting amicus briefs, CEDHA and CIEL request that the Commission admit this Amici Curiae in support of the international human rights of the people comprising the Lhaka Honhat Aboriginal Communities.

Interests of the Amici Curiae

The Center for Human Rights and the Environment (CEDHA), located in Córdoba, Argentina, is a public interest organization dedicated to the defense and promotion of the environment and human rights, serving as a bridge between these two areas of international law. CEDHA has a novel approach to promoting international environmental and human rights legislation combining the efforts of two growingly interdependent areas of law. CEDHA works with civil society, governments, and academic institutions to raise awareness, increase capacity, and provide resources to address the linkages between environment and human rights, at the national, regional, and international level.

The Center for International Environmental Law (CIEL), located in Washington, D.C. and Geneva, Switzerland, is a public interest environmental law organization founded in 1989 to focus the energy and experience of the public interest environmental law movement on reforming international environmental law and institutions, and on forging stronger and more meaningful connections between the top-down diplomatic approach of international law and the bottom-up participatory approach that has been the hallmark of the public interest environmental law movement. CIEL is part of a growing network of civil society institutions from various parts of the world that are committed to promoting public interest law and sustainable development.

As non-governmental organizations dedicated to the promotion and protection of human and environmental rights, CEDHA and CIEL have closely followed the legal proceedings and discussion concerning the violations of the human rights of the Wichi, Chorote, Chulupi, Toba, and Tapiete indigenous peoples represented by the Lhaka Honhat Association (hereinafter "the Petitioners") caused by the harm to their environment from the road construction project at issue in this case. CEDHA and CIEL have taken a special interest in this case, as they have in the Awas Tingni Mayagna (Sumo) case.

Like the Awas Tingni Mayagna (Sumo) case, this case is poised to set a precedent on the commitment of the Inter-American human rights system to protect the human rights of indigenous peoples in an effective and adequate manner. The particular issue addressed in this brief is the urgent need of these indigenous people to be protected by precautionary measures preserving the status quo while the merits of their human rights claims are considered.

CEDHA and CIEL approach the Commission in the status of Amici Curiae, in support of efforts to encourage an enlightened and proactive role by the Inter-American human rights system in the defense of indigenous peoples' rights, and in support of efforts to further develop the connection between two bodies of law which are inextricably intertwined: international human rights law and international environmental law.

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With the anticipation that this contribution might assist the Commission to reach a just decision for the parties involved with the Lhaka Honhat case, CEDHA and CIEL respectfully request that the Honorable Commission:

1) admit The Center for Human Rights and the Environment (CEDHA) and the Center for International Environmental Law (CIEL), as Amici Curiae for this case;

2) attach this Amicus to the case file; and,

3) adopt the views set forth in this brief.

Summary of the Argument

In analyzing the Lhaka Honhat case, CEDHA and CIEL have anchored their observations on standards and rules applicable to human rights, indigenous peoples, and the environment. These rules and standards are mandated in universal and/or regional international agreements freely entered into by Argentina, general principles in international human rights law and international environmental law, and Argentine constitutional and statutory law.

CEDHA and CIEL contend that there is a recurring pattern throughout the world, including Argentina and other South American states, whereby:

- large-scale development projects are undertaken which result in irreparable environmental harm to lands historically used, occupied, and claimed by indigenous peoples;
- such projects are typically undertaken without prior assessment of their environmental impacts;
- such projects are typically undertaken without prior assessment of their social impacts;
- such projects are typically undertaken without providing adequate and timely information to the parties affected;
- such projects are typically undertaken without prior consultation with the affected indigenous peoples;
- such projects inevitably lead to severe violations of the human rights of the affected indigenous people; and
- the absence of precautionary measures to preserve the *status quo* in these kinds of large-scale development projects produces irreparable environmental and human rights damage.[1]

CEDHA and CIEL further contend that one of the keys to preventing irreparable harm to indigenous peoples under this recurring fact pattern is to utilize recognized legal doctrines and procedural mechanisms in international forums to preserve the status quo while the merits of the underlying claims of these peoples are considered. The environmental impact assessment principle (including the right of affected citizens to participate in environmental decision-making and to have access to environmental information), and the precautionary principle (not allowing environmentally destructive activities to proceed because of

[1] There are numerous examples worldwide of irreparable environmental and human rights damage ocurring in the absence of precautionary measures in large scale-development projects: The Bhopal Case, The Yanomami Case, The Huaroani Case, The Yacyreta Case, The Ache Case, etc.

uncertainty as to the precise extent of harm they will cause) have emerged in international environmental law both as environmental safeguards, and as the legal bases for governments and courts halting environmentally destructive activities.

Application of these principles in the judicial context typically results in the issuance of an injunction prohibiting the environmentally destructive activity from going forward while the merits of the underlying substantive claims are being considered. The environmental injunction remedy, which aims simply at preserving the *status quo*, is no different from the concept of precautionary measures often requested by this Commission, or provisional measures regularly adopted by the Inter-American Court.

While the Commission is considering the merits of the underlying claims in this case, the indigenous peoples risk daily incursions into their way of life, as the construction of the road project that is at the heart of this dispute continues apace. In order for the Commission's ultimate decision on the merits to have any meaning, the indigenous peoples' lifestyle, culture, and very survival must be guaranteed in the interim. This requires invoking the familiar provisional remedy of precautionary measures in the context of an environmental threat to the human rights of an indigenous people. It is the only remedy that guarantees the special protection owed the Petitioners.

Structure of the Amici Curiae

Part I of this brief asserts that the need for "special protection" of indigenous peoples is most acute in cases of threatened irreparable environmental harm, with its inevitable concomitant risk of irreparable harm to the lifestyle, culture, and survival of the indigenous people affected by the environmental harm. Several case studies are reviewed which confirm the existence of this disturbing and recurring pattern of harm and the Commission's recognition of the need for special protection to prevent this pattern from continuing.

Part II argues that international human rights instruments and international environmental law instruments alike establish the right of indigenous peoples to "special protection." In this case, special protection requires the Commission to prevent harm to the human rights of the Petitioners by adopting precautionary measures. By adopting precautionary measures that prevent environmental damage, the Commission can stop the violations of the human rights of indigenous peoples that inevitably result from such damage. Not only have the Petitioners satisfied the threshold requirements for the adoption of precautionary measures, but only through the adoption of precautionary measures can the Commission provide special protection for the Petitioners' enjoyment of their right to life and right to a healthy environment.

Part III argues that in order to adequately protect the Petitioners' human rights, the Commission must use Article 29 of the American Convention, which in turn enables the Commission to incorporate principles and rules of international human rights and environmental law. Part III then argues that pursuant to Article 29b, the Commission must apply certain international instruments which Argentina has ratified, as well as its own Constitutional and statutory enactments. These instruments contain principles and mechanisms specifically designed to protect against the type of harm threatened in this

case. As such, they provide the Commission with invaluable tools both for defining the scope of the obligation of "special protection" to be afforded indigenous peoples such as the Petitioners, and for establishing a procedural approach to implement that obligation. Collectively, these instruments establish the need for precautionary measures in light of Argentina's failures to perform environmental impact assessment, to allow citizen participation in environmental decision-making, and to follow the precautionary principle.

Part IV argues that the appropriate remedy in a case such as this, where indigenous peoples are threatened with environmental harm, where an environmental impact assessment has never been performed, and where the participation of the indigenous peoples in the decision-making process has neither been sought nor allowed, is for the Commission to: a) apply the "precautionary principle" so as to create a presumption of harm arising from the project at issue; and b) request that precautionary measures be taken by the State of Argentina so as to avoid irreparable harm to the Petitioners while the Commission considers the underlying claims of their merits. This is the only remedy that will guarantee the special protection owed the Petitioners

I.

The Need for Special Protection of Indigenous Peoples Is Most Acute When Violations of Their Human Rights Will Result from Irreparable Harm to Their Environment

Both this Commission and the Inter-American Court of Human Rights have had repeated occasion to recognize the need of indigenous peoples for "special protection" of their human rights resulting from environmental harm to lands they traditionally use for their physical and cultural survival.[2]

This need for special protection was also recognized in the Final Report by the U.N.'s Special Rapporteur on Human Rights and the Environment:

> In her review of cases brought to the Human Rights Committee and to the Inter-American Commission on Human Rights by or on behalf of indigenous peoples, the Special Rapporteur is impressed by the fact that *the human rights violations at issue almost always arise as a consequence of land rights violations and environmental degradation and indeed are inseparable from these factors.* (Emphasis added.)[3]

As the following review of specific cases makes clear, when the lands used by indigenous people are subjected to development by others, when participation by the indigenous people in the development decision is not allowed, and when prior study of the environmental impacts of the proposed development is not undertaken, the result is

[2] The legal basis of the entitlement of the Petitioners to "special protection" is described in part II.A. of this brief.

[3] *See* "Human Rights and the Environment: Final Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur," E/CN.4/Sub.2/1994/9, 6 July 1994. at para. 88; *see generally* A. Durning, *Guardians of the Land: Indigenous Peoples and the Health of the Earth* (Washington, D.C.: Worldwatch, 1993).

invariably environmental damage to the land, severe injury to the health and way of life of the indigenous people, and wholesale violations of their human rights.

A. The Impact of a Road-Building Project on the Yanomani Indians of Brazil

This Honorable Commission was first presented with this fact pattern in the case of the Yanomani Indians of Brazil.[4] The Commission described how a "plan of exploitation of the vast natural resources in and development of the Amazon region" approved by the government of Brazil in the 1960's compelled the Yanomani Indians "to abandon their habitat and seek refuge in other places."[5] Subsequent efforts to mark the boundaries of the area inhabited by the Yanomani took years and had not been implemented.[6]

The penetration of outsiders and development into the Yanomani's traditional areas resulted in "devastating physical and psychological consequences for the indians," including disease, break-up of their social organization, disruption of their culture, displacement from their traditional lands, compulsory transfer to agricultural communities that did not correspond to their customs and traditions, prostitution, and death.[7] The Commission further resolved that the Brazilian government's failure to take "timely and effective measures on behalf of the Yanomani Indians" had resulted in violations of the Indians' human rights. [8]

B. The Impact of Road Building and Other Development Activities on the Indigenous Peoples of the Oriente in Ecuador

This Honorable Commission's examination of the human rights situation in the Oriente in Ecuador was prompted by the filing of a petition on behalf of the Huaorani people which alleged that planned oil exploitation activities within their traditional lands threatened their physical and cultural survival.

The Commission's resulting 1997 "Report on the Situation of Human Rights in Ecuador" concluded that the information made available to the Commission, as well the observations made by the delegation which travelled to the interior, established that the opening of the traditional lands of Ecuador's Amazonian indigenous peoples to oil exploitation and other development activities had resulted in a number of directly attributable harmful consequences. [9]

First among these consequences was the influx of outsiders into the traditional homelands of the indigenous peoples of the Amazon. The oil boom initiated in the interior of Ecuador in the late 1960's led to the construction of a network of roads, used to bring in workers and

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[4] Case No. 7615 (Brazil), March 5, 1985, printed in Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, Oct. 1, 1985.
[5] *Id*. at "Background" para. 2(e).
[6] *Id*. at para. 2(g)(h).
[7] *Id*. at "Considering" paras. 2,10.
[8] *Id.* at "Resolved" para.1.
[9] "Report on the Situation of Human Rights in Ecuador," Chapter IX, Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country, OAS Country Report.

equipment, as well as to construct and service production sites and other facilities, into the heart of what had traditionally been indigenous territory. In this way, oil development opened and exposed the interior in a way that previous development and outside contact had not.

In addition to the non-native workers brought in to build roads and construct and operate facilities, the opening of roads funneled colonists, land speculators, and loggers into indigenous homelands. In the case of the Oriente, this colonization was encouraged by the State, and in fact deemed a national priority. Settlers typically colonize the initial kilometers fronting both sides of a road. In most cases, controls on spontaneous colonization were either non-existent or ineffectual, leading to the result that wide swaths of non-indigenous settlement divided blocks of previously indigenous territory.

Many indigenous inhabitants responded to the initial years of development activity by retreating away from development and further into their traditional areas. It was reported that pursuant to the initial introduction of oil exploitation activities in an area now called Lago Agrio, the last of the indigenous Tetetes were driven away, a circumstance believed to have hastened their extinction as a people. The Cofan were displaced from their traditional homelands and forced to occupy a handful of non-contiguous communities in a portion of their former territory. Although the Cofan had been granted title to some 9000 acres, demarcated accordingly, a road was constructed right through the titled lands.

When the Commission revisited these issues in a 1997 Follow-Up Report on Compliance, it found that additional reports were still being received "that actions causing environmental deterioration continue to occur in the Ecuadorian interior, affecting the full enjoyment of the rights of different sectors of the population," and that "indigenous peoples...land claims have not yet been settled, and that they are still affected by development activities, chiefly through pollution on cultivated land."[10]

C. The 1996 Commission Report on the Indigenous People of Brazil

As part of its 1996 "Report on the Situation of Human Rights in Brazil," the Commission re-visited the human rights situation of indigenous peoples in that country.[11] The Commission concluded that:

> Their cultural and physical integrity, as well as the integrity of their lands are, however, under constant threat and attack by both individuals and private groups who disrupt their lives and usurp their possessions.....Security guarantees that every state should provide for its inhabitants and which, in the case of the Indian peoples of Brazil, require *special protective measures*, are insufficient in terms of preventing and finding a solution to the ever-continuing usurpation of their possessions and rights.....The procrastination and difficulties encountered in recognizing the integrity of the Macuxi people and full ownership of their

[10] Chapter V, "Follow-up of the Recommendations formulated by the Inter-American Commission on Human Rights in its Reports on the Situation of Human Rights in Member States," Section l (Ecuador), at paras. 109,118; in 1998 Annual Report of the Inter-American Commission on Human Rights.
[11] "Report on the Situation of Human Rights in Brazil," Chapter VI, OAS Country Report (1996).

> lands, as well as the establishment of municipalities superimposed on their lands, thus weakening their traditional leadership and structure, are evidence of the inability of the Brazilian state to protect these peoples from invasion and abuse from third parties....The Yanomami[s']... integrity as a people and as individuals is under constant attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration.[12] (Emphasis added.)

D. The Awas Tingni Mayagna (Sumo) Case

Most recently, the Inter-American Commission on Human Rights has been considering the rights of indigenous people faced with human rights violations arising out of environmental harm in the case of *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, Case No. 11577.

In 1994, the Nicaraguan government approved a management plan by a Korean company to harvest timber on Awas Tingni lands. The Awas Tingni, an indigenous people, live off the land, using the forest resources as their primary source of income. They use the land at issue for hunting, fishing, farming religious ceremonies and burial grounds. Yet they were not allowed to participate in the decision and were not asked for their consent.

As in the present case, the Awas Tingni's attempt to have their land claims fully recognized and resolved have not been successful: although the Nicaraguan government was willing to treat the Awas Tingni as a community with some land rights in 1993, this willingness has not been maintained by the government. The Awas Tingni's petition seeks to demarcate and officially recognize the land of the Awas Tingni, and to suspend all permits and management plans until its claims are resolved.

In addition, the Awas Tingni sought provisional measures to put an immediate halt to any harvesting on Awas Tingni lands until negotiations occur. On October 30,1997, the Commission requested the Nicaraguan government to adopt precautionary measures to suspend the concession given to the private company to carry out logging on Awas Tingni lands.[13] The Petitioners are entitled to the same protection, as the threat to their human rights is equally severe.

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As these case studies demonstrate, the need for "special protection" of indigenous peoples is most acute in cases of threatened irreparable environmental harm. Such harm by its very nature is as irreversible and ultimately as life-threatening as the threats to the immediate health and safety of individuals that this Commission is so often asked to protect. As in the *Awas Tingni* case, it is imperative in the present case that the Commission request precautionary measures so as to avoid irreparable harm to the Petitioners while the merits of their claims of human rights violations are being considered. Moreover, without the

[12] *Id*. at Chapter VI (J), para. 82.
[13] On June 4,1998, the Commission filed an application with the Court against the State of Nicaragua.

granting of such relief, the Commission's (and Court's) ability to preserve its jurisdiction over this matter and render effective relief on the human rights claims presented is gravely diminished.

II.

Both International Human Rights Law and International Environmental Law Recognize the Need of Indigenous Peoples for Special Protection, Which Further Requires the Adoption of Precautionary Measures in Order to Protect Their Right to Life, and Their Right to a Healthy Environment

The Commission has long recognized the need of indigenous peoples for "special protection." The Petitioners are indigenous peoples in need of special protection. The Petitioners are guaranteed the right to life, as well as the right to a healthy environment, as will be discussed below. Without special protection, the essential preconditions for their enjoyment of these and other rights do not exist and the purpose of the American Convention will not be served.

In order to achieve special protection for the Petitioners, the Commission should interpret the specific requirements of the American Convention on Human Rights in conjunction with Argentina's obligations under other international instruments recognizing and establishing human rights-related norms, as well as its own constitutional and statutory enactments.[14] These instruments provide the Commission with sound international principles of law and procedural mechanisms which were designed to guard against the very type of harm threatened here, and which provide the means to implement "special protection."[15]

The standard for adopting precautionary measures- the tool that should be used in the first instance to provide special protection- has been met by the Petitioners. The Commission should conclude that because of the well-known pattern of environmental harm leading to violations of the rights of indigenous peoples, as well as the documented threats to the Petitioners' human rights in this case, precautionary measures are required to afford special protection, maintain the *status quo*, and preserve the jurisdiction of the Commission and the Court.

A. The Requiement for Special Protection of Indigenous Peoples

The Petitioners' claim that they are entitled to "special protection" by this Commission as a result of their status as indigenous peoples is supported by the Commission's consistent advocacy for special protection of indigenous peoples in its reports and resolutions, as well as by other international human rights and international environmental law instruments.

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[14] American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) at Article 29. The special applicability of Article 29 to this case is discussed at greater length in Section III B. of this brief.

[15] The specific legal principles and procedural mechanisms will be discussed in part III of this brief.

As early as 1971, citing Article 2 of the American Declaration, this Commission found that indigenous peoples were entitled to special legal protection because they suffered severe discrimination. The Commission called upon the OAS member states "to implement the recommendations made by the Inter-American Charter of Social Guarantees which deals with the protection of indigenous populations." [16]A year later, the Commission adopted a resolution that stated that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states." [17]

In its 1997 Report on Ecuador, the Commission elaborated on the need of indigenous peoples for special protection:

> The situation of indigenous peoples in the Oriente illustrates, on the one hand, the essential connection they maintain to their traditional territories, and on the other hand, the human rights violations which threaten when these lands are invaded and when the land itself is degraded. These themes are of equal importance for the indigenous peoples of the Sierra and coastal regions. For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group.'

Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.[18] (Emphasis added.)

One of the most far-reaching international instruments addressing environmental threats facing indigenous peoples is ILO Convention No. 169, Concerning Indigenous and Tribal Peoples in Indigenous Countries.[19] Articles 4(1) and 7(4) of the Treaty, which was ratified by Argentina on March 7, 2000, contain these similar special protections:

> *Special measures* shall be adopted as appropriate for *safeguarding* the persons, institutions, property, labour, cultures and *environment* of the peoples concerned....

[16] Shelton H. Davis, "Land Rights and Indigenous Peoples: The Role of the Inter-American Commission on Human Rights," Cultural Survival Report 29, 1988, page iv.
[17] Resolution of the IACHR "On the Problem of Special Protection for Indigenous Populations," OEA/Ser.L/V/II.29, Doc. 38 rev.,1972.
[18] 1997 Ecuador Report, *supra* at n. 9, at Chapter IX, *Conclusions*.
[19] June 27, 1989, 28 ILM 1382 (1989).

> Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit. (Emphasis added.)[20]

The requirement for "special protection" in the face of threats to an indigenous people's environment has been expressly recognized in international environmental instruments as well.[21] This will be discussed further below.

Thus, both international human rights instruments (including this Commission's own pronouncements) and international environmental law instruments not only require special

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[20] The distinctive nature of indigenous peoples' relationship to the environment within their ancestral domains is captured in the Proposed Inter-American Declaration on the Rights of Indigenous Peoples, which recognizes "the respect for the environment accorded by the cultures of indigenous peoples of the Americas." Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, Approved by the Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser/L/V/II.90, Doc. 9 rev. 1, September 18, 1995, at *Preamble* para. 3.

The Proposed Declaration explicitly acknowledges "the special relationship" between indigenous peoples and the environment, lands, resources and territories on which they live. *Id*. The preamble also recognizes "that in many indigenous cultures, traditional collective systems for control and use of land and territory and resources... are a necessary condition for their survival, social organization, development and their individual and collective well-being ...". *Id*. at para.5. Article XIII, subsection (5) further provides that "[i]ndigenous peoples have the right to assistance from their states for purposes of environmental protection, and may receive assistance from international organizations."

In the same vein, the draft United Nations Declaration on the Rights of Indigenous Peoples, provides that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1, at Article 25.

[21] For example, the landmark 1992 Earth Summit in Rio resulted in the creation of two historic instruments: the Rio Declaration on Environment and Development (U.N. Conference on Environment and Development Rio de Janeiro, June 13, 1992, U.N. Doc. A/CONF.151/26, hereinafter "Rio Declaration"), which included many emerging principles in the field of international environmental law, and Agenda 21 (U.N Conference on Environment and Development, Rio de Janeiro, June 13, 1992, U.N. Doc. A/Conf.151/26), a comprehensive and detailed blueprint for the future implementation of sustainable development.

Principle 22 of the Rio Declaration recognizes the need for States to support the identity, culture, and participatory role of indigenous peoples in decisions which affect them, while Agenda 21 in particular recognizes the need for special protection of indigenous peoples in the context of environmental concerns:

> In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

Establishment of a process to empower indigenous people and their communities through measures that include:

> (ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate. (Emphasis added).

Id., at Section 26.3 (a)(ii)(e).

protection for indigenous peoples, but recognize that when environmental harm to these peoples' lands is threatened, the threat to their human rights is greatly intensified and their need for special protection becomes mandatory and immediate.

B. Precautionary Measures Are Required to Protect the Right to Life of These Indigenous People as Well as Their Right to a Healthy Environment

The function of the Inter-American Commission in this case is to defend the human rights of the Petitioners. Understanding the contextual complexities of indigenous peoples and their relationships to their land and other natural resources is essential for defending their human rights. This requires an appreciation of the indigenous peoples' symbiotic relationship between life and land.

1. The Right to Life of Indigenous Peoples

The basis of all substantive legal rights is the right to life. This right is not limited to individual human beings. In several resolutions where it has affirmed that not only all individuals but indeed all peoples have an inherent right to life, the United Nations has recognized the collective dimension of the right to life.[22] Safeguarding this fundamental right is an essential condition for enjoying the entire range of civil and political rights.[23]

Wisely, the President of the Inter-American Court on Human Rights affirmed:

> This brings to the fore the safeguard of the right to life of all persons as well as *human collectivities, with special attention to the requirement of survival* (as a component of the right to life) *of vulnerable groups* (*e.g.*, the dispossessed and deprived, disabled or handicapped persons, children and the elderly, ethnic minorities, *indigenous populations*, migrant workers...).(Emphasis added.)[24]

Actions taken by indigenous peoples to defend their right to life have focused on the need to protect traditional territories. Displacement from ancestral domains and damage to the local environment invariably harm the well being of indigenous peoples, and lead to physical harm and the loss of life.[25]

In the case of *Bernard Ominayak & The Lubicon Lake Band v. Canada*,[26] the applicants alleged that the government of the province of Alberta had deprived the Lake Lubicon Indians of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands. The Human Rights Committee found that historical inequities

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[22] *See* U.N. General Assembly, Res. 37/189A, of 1982; *see also* U.N. Commission on Human Rights, Res. 1982/7 of 1982, and Res. 1983/43, of 1983.
[23] B.G. Ramcharan, "The Right to Life," 30 Netherlands International Law Review (1983), p. 301.
[24] A.A. Cancado Trindade, "The Parallel Evolutions of International Human Rights Protection and of Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights," in Revista del Instituto Interamerican de Derechos Humanos, Nro. 13, p. 53.
[25] *See* Ksentini Report, *supra* at note 3, at para. 77; *see generally* A. Durning, *supra* at note 3.
[26] *See* Communication No. 167/1984, Annual Report of the Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, vol. 2, Annex IX, U.N. Doc. A/45/40 (1990), reprinted in HUM. RTS. L.J. 305 (1990).

and certain more recent developments, including oil and gas exploration, were threatening the way of life of the Lake Lubicon Band and were thus violating minority rights, contrary to Article 27 of the ICCPR.[27]

The objective of adopting precautionary measures is to avoid irreparable damage to persons.[28] The Commission has extensive experience with the irreparability of the right to life, and consequently has wisely applied precautionary measures when the right to life is seriously threatened.

The serious threat to the right to life in its collective and individual dimensions in the case of the Petitioners is real and concrete.[29] This threat remains permanent, like Damocles' sword, if the State fails to take positive, adequate and effective measures to protect indigenous territories. Experience repeatedly shows that the failure of States to protect indigenous lands, and prevent incursions by external forces, has hastened the extinction of the indigenous peoples and communities. The overwhelming evidence of these hostile state-sanctioned incursions, and the consequent extinction of indigenous peoples, has driven scholars of indigenous communities and other concerned parties to refer to the problem as being genocidal in nature.[30]

2. The Right to a Healthy Environment

While the right to life and other rights of indigenous peoples have previously been interpreted in a manner that implicitly recognizes a corollary right to a healthy environment, Argentina has gone further and signed the "Protocol of San Salvador" to the American Convention on Human Rights, which gives express recognition to that right:

> Article 11
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> **Right to a Healthy Environment**
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> 1.Everyone shall have the right to live in a healthy environment and have access to basic public services.

[27] Caroline Dommen, "*Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms*," 11 Geo. Int'l Envtl. L. Rev. 1, 24.
[28] Regulations of the Inter-American Commission on Human Rights, Title I, Chapter V, article 29.
[29] For factual information, *see* factual discussion contained in Petitioners' briefs, as well as Section I of this brief, *supra; see also* "Report on Discrimination Against Indigenous Peoples, Investments and Operations on the Lands of Indigenous Peoples, U.N. Commission on Human Transnationals, Sub-Commission on Prevention of Discrimination and Protection of Minorities," 43d. Sess., Agenda Item 13, U.N. Doc. E/CN.4/Sub.2/1991/49 (1991).
[30] *Genocide in Paraguay*, (Richard Arens ed., 1976), pp. 132-71; *Id.* at 165-71 (in the epilogue to this book, Elie Wiesel, a Holocaust survivor, Nobel Peace Prize recipient, and author, concludes that the Ache situation in Paraguay included all of the elements of genocide.); *Id.* at 132-64 (the last chapter, "A Lawyer's Summation," is law professor Arens' closing argument that the government of Paraguay committed genocide against the Ache).

> 2. The States Parties shall promote the protection, preservation, and improvement of the environment.[31]

Argentina has also expressly recognized the right to a healthy environment in Article 41 of its Constitution:

> *Todos los habitantes gozan del derecho a un ambiente sano, equilibrado, apto para el desarrollo humano* y para que las actividades productivas satisfagan las necesidades presentes sin comprometer las de las generaciones futuras, y tienen el deber de preservarlo. El daño ambiental generará prioritáriamente la obligación de recomponer, según lo establezca la ley.
> *Las autoridades proveerán a la protección de este derecho, a la utilización racional de los recursos naturales, a la preservación del patrimonio natural y cultural y de la diversidad biológica, y a la información y educación ambientales*.
> Corresponde a la Nación dictar las normas que contengan los presupuestos mínimos de protección, y a las provincias, las necesarias para complementarlas, sin que aquellas alteren las jurisdicciones locales.
> Se prohibe el ingreso al territorio nacional de residuos actual o potencialmente peligrosos, y de los radiactivos.[32] (Emphasis added.)

As will be discussed in part III.A. of this brief, by virtue of Article 29 of the American Convention, Argentina is bound to enforce this right.

This express recognition of the right to a healthy environment in the Inter-American system reflects the general trend in human rights and environmental law to recognize the right to a healthy environment.[33] Despite stylistic variations, each articulation of the right to a

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[31] O.A.S. Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights, "Protocol of San Salvador," 28 ILM 156, 161 (1988).

[32] "All individuals have the right to a healthy and harmonious environment, conducive to human development and to productive activities that satisfy present needs without compromising future generations; and have the duty to preserve the environment. Environmental damage generates the priority and obligation to repair, according to law.
The authorities will provide the protection of this right, the rational utilization of environmental resources, and the preservation of natural and cultural patrimony, biological diversity, and environmental information and education.
The Nation will dictate the norms that contain the minimum budget for the protection, and to the provinces the necessary norms to complement these, without altering local jurisdictions.
Dangerous, potentially dangerous, or radioactive wastes are prohibited from entering national territory." (Author's translation.)

[33] The right to a healthy environment has been included in many other national constitutions and statutory schemes around the world, and has been recognized in a growing number of national judicial decisions. *See* Annex III to the 1994 Ksentini Report, *supra* at note 3.

Further support for the right to a healthy environment is found in the Final Report of the U.N. Special Rappateur on Human Rights and the Environment, *supra note 3*, (discussing the legal foundations of a right to a "satisfactory" environment); Article 24 of the African Charter on Human and Peoples Rights, 21 I.L.M. 58 (1982) (providing that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."); Article 28 of the draft United Nations Declaration on the Rights of Indigenous Peoples, *supra*, (recognizing the right of indigenous peoples to "protection of the total environment... of their lands...as

healthy environment contains the same identifiable core: the right to an environment that supports physical and spiritual well-being and development.

* * *

As incursions into indigenous territory increase, the symbiotic tie between life and land for the Petitioners becomes more and more self-evident. The continuous advance of the state project implicates the degradation of the environment and threatens the Petitioners' right to life and right to a healthy environment.

Enforcement of these rights requires that Argentina take adequate measures to protect the Petitioners' environment. This Honorable Commission has an invaluable mechanism to defend the human rights of the Petitioners: precautionary measures**.** Not to adopt precautionary measures in this case will allow irreparable damage to the human rights of the Petitioners. If this occurs, the Commission will have then failed to realize its affirmative duty to provide the Petitioners with special protection and to defend their human rights.

C. Precautionary Measures: Requirements for Admissibility and the Standard of Proof

Precautionary measures are a mechanism established under Article 29 of the regulations of the Commission to permit it to discharge its function to "promote the observance and defense of human rights".[34] Under Article 29, precautionary measures may be requested by the Commission in urgent cases in order "to avoid irreparable damage to persons."

The requirement for admissibility of precautionary measures is that there be sufficient preliminary evidence to support a presumption of the truth of the allegations of a situation of sufficient seriousness and urgency that irreparable harm to persons could result.[35]

The evidence about the harm need only be preliminary; enough to support a presumption of the potential harm. For example, in the *Reggiardo-Tolosa* case,[36] two children of a married couple (who were themselves victims of a forced disappearance) were held in custody by a member of the paramilitary group during the dictatorship period, who

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well as to assistance for this purpose from States and through international cooperation"); Article XIII(1) of the Proposed Inter-American Declaration on the Rights of Indigenous Peoples, *supra*, (recognizing "the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being."); Title I, Article 2, para. 9, Proposal for a Basic Law on Environmental Protection and the Promotion of Sustainable Development, Document Series on Environmental Law No. 1, UNEP Regional Office for Latin America and the Caribbean, Mexico, D.F., 1st. Ed., 1993 (providing within its Governing Principles the "right of present and future generations to enjoy a healthy environment and decent quality of life.…").

[34] Regulations of the Inter-American Commission on Human Rights, Title I, Chapter I, article 1.1.

[35] Thomas Buergenthal, Dinah Shelton, *Protecting Human Rights in the Americas, Cases and Materials*, NP Engel, Publishers, 4th ed., 1995, pp.250/264.

[36] IACHR, *Reggiardo-Tolosa* Case (Provisional Measures Requested by the Inter-American Commission on Human Rights in the Matter of the Republic of Argentina), Order of the President of the Court of November 19,1993; 1993 Annual Report of the Inter-American Court of Human Rights, OAS/Ser.L/V/III.29, doc.4, January 10, 1994, pp.95-99.

abducted them and falsified their real identities. The real family asked the national courts to transfer the children from the member's home, and the case came to the Commission. While the case was pending, the Commission asked the Court to order provisional measures to provide without delay for the placement of the minor children in a foster home under temporary custody and to arrange for them to receive appropriate psychological treatment until the issue of their delivery to their legitimate family was settled.

In its petition to the Court, the Commission stated that "the case history of the minors presents a *prima facie* case of imminent danger to their mental health," despite the absence of a psychologist's expert opinion about the harm alleged. The case history by itself was sufficient to support the presumption of irreparable harm.

In the present case, the Petitioners have satisfied these requirements for the adoption of precautionary measures.

First, in their own submissions, the Petitioners have set forth factual allegations that easily support a presumption of harm to them if the road construction project is allowed to proceed.

Second, as demonstrated in the part I of this brief, the Commission has ample experience of its own with cases where environmental harm inevitably leads to the violation of the human rights of indigenous people. This case is unfortunately no different.

Third, as will be described in detail in part III of this brief, specific principles of national and international human rights and environmental law have been established in recognition of the need to prevent the very types of human rights/environmental harm threatened here. These principles provide the Commission with specific tools to evaluate the existence of irreparable harm in this case, including specific standards of proof.

The need for the Commission to adopt these principles is especially compelling in a case such as this where indigenous people are the injured parties, and where the overarching principle of "special protection" mandates a particularly high level of legal protection for the Petitioners. Under the particular circumstances of this case, adoption of these international principles and standards is the only way the Commission can fulfill its obligation to provide "special protection" to the Petitioners.

The Commission itself has suggested the very type of precautionary approach advocated here. In its 1997 "Report on the Situation of Human Rights in Ecuador," discussed above, the Commission stated:

> Given that the protection of the rights of indigenous individuals and communities affected by oil and other development activities *requires that adequate protective measures be put in place before damage has been suffered*.... the Commission recommends that the State take the measures necessary through the INDA and other agencies to restrict settlers to areas

> which do not infringe upon the ability of indigenous peoples to preserve their traditional culture. (Emphasis added.)[37]

The Commission emphasized that the protection of the rights of indigenous people affected by environmental threats requires that adequate protective measures be put in place in a timely fashion: before damage has been suffered. In other words, the Commission itself has linked the "special protection" due indigenous peoples with the precautionary principle and other environmental law principles discussed in detail later in this brief. Precautionary protection through the adoption of precautionary measures is the only way to ensure "special protection" of the rights of indigenous peoples.

III.

Both International Human Rights Law and International Environmental Law Principles Support the Use of Precautionary Measures in this Case

A. Article 29 Requires the Commission to Take into Account Contemporary Development of International Laws

Article 29 of the American Convention wisely articulates a mechanism that enables the American Convention to adapt itself to the evolution of international law, including the adoption of new concepts and trends. On this matter, the Court in its consultative opinion number one stated:

> A certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the Convention. ... Special mention should be made in this connection of Article 29[38], which contains rules governing the interpretation of the Convention, and which clearly indicates an intention not to restrict the protection of human rights to determinations that depend on the source of the obligations.[39]

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[37] *Id*. at pages vi, 115-16.

[38] American Convention, *supra* at note 14, at Article 29, which reads as follows:
No provision of the Convention may be interpreted as:
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature have.

[39] I/A Court H.R.," Other Treaties " Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982, Inter-Am.Ct.H.R. (Ser. A) No.1 (1982), para. 41.

This integrative role of Article 29 has been described by Judge Rodolfo E. Piza Escalante of the Inter-American Court of Human Rights as:

> ... the need to interpret and integrate each standard of the Convention by utilizing the adjacent, underlying or overlying *principles in other international instruments, in the country's own internal regulations and in the trends in effect in the matter of human rights*, all of which are to some degree included in the Convention itself by virtue of the aforementioned Article 29, whose innovating breadth is unmatched in any other international document. (Emphasis added.)[40]

It is particularly important to emphasize the special relevance that Article 29b.has to this case. The indigenous nature of this case, and the enormous irreparable environmental damage and resulting violations of human rights, require the Commission to consider other international legal instruments as well as the Constitution and laws of Argentina in order to provide adequate and effective "special protection" to the Petitioners.

In the Advisory Opinion No. 5, the Inter-American Court held:

> 51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:
>
> If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation with the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character.
>
> It is true, of course, that it is frequently useful, -and the Court has just done it- to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach

[40] Inter-Am.Ct.H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, (Ser. A.) No. 4 (1984), para.2,3, and 6.

> should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.
>
> 52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Subparagraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.
>
> Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

As a criterion to resolve potential conflicts between two or more human rights provisions, the *pro homine* criterion forces the application of the provision that establishes a human right in a manner that is most comprehensive and most favorable to the individual, while the provision that establishes restrictions must be applied in the narrowest manner. Thus, Article 29 serves at the same time as both a criterion to resolve potential conflict between international human rights provisions, and as a rule for the interpretation of the rights established in the American Convention.

Since the adoption of the American Convention, specific rights in international law pertaining to indigenous peoples have been developed: in addition to the right to life, the right to a healthy environment, the right to information, and the right to participate in decision-making in matters affecting indigenous peoples. Argentina has ratified some of the treaties containing these rights, and is therefore bound by those instruments. All of these rights have been furthered at the international levels by the development of various legal principles and procedural mechanisms, including environmental impact assessment (EIA) and the precautionary principle. In addition, Argentina itself has adopted Constitutional and statutory protections in these areas which it must obey pursuant to Article 29.

Article 29-which is mandatory in this case- similarly requires the adoption of the trends in effect in international law concerning the violation of these closely related rights. Thus, to more fully delineate Argentina's responsibilities to afford the Petitioners special protection, resort must be had to the body of international environmental law that has developed over the past several decades, as well as to various human rights instruments, which collectively require governments to allow affected indigenous peoples information and participation concerning development matters which affect them. This is especially true where that law

has developed not simply in response to threats to the land inhabited by indigenous peoples, but in response to the resulting threats to the health and survival of the indigenous people themselves as well.

This approach is appropriate for another reason as well: it is consistent with the Commission's holding that indigenous peoples are entitled to "special protection."

Under the American Convention, the states parties assume a dual undertaking: to both respect and ensure the rights recognized in the Convention.[41] A state complies with the obligation "to respect" the rights protected by the Convention by not violating these rights. This undertaking extends to any government measure or state action by any official or authority at any level of government.

But the obligation "to ensure" these rights encompasses a substantially broader obligation. It implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Convention, including the removal of governmental obstacles to the enjoyment of these rights. In holding that indigenous peoples require "special protection," the Commission is referring in part to an extension of the state's obligation to respect and ensure the rights of indigenous peoples under the Convention. In particular, it points to the need to adopt relevant international legal principles and mechanisms developed both in human rights law and environmental law and require their observance by the states parties.

As will now be discussed, a more detailed examination of these rights and legal mechanisms through which they are exercised reveals that without prior environmental impact assessment, and without the participation of the affected people, a presumption of environmental harm must arise and require that any project that poses the threat of irreparable harm to an indigenous people be halted at least until such participation and impact assessment take place.

[41] *Supra* at note 14, at Article 1.1.

B. The Duty to Assess Environmental Impacts when Indigenous People Are Affected by the Proposed Development Project, Is a Principle of Both International Human Rights Law and International Environmental Law that Has Been Violated by Argentina and Requires the Application of Precautionary Measures in this Case

1. The Mandatory Nature of Environmental Impact Assessment

Environmental impact assessment (EIA) is the process for examining, analyzing and assessing proposed activities, policies, or programs to integrate environmental issues into development planning and maximize the potential for environmentally sound and sustainable development. The EIA process should ensure that before granting approval, the appropriate governmental authorities have fully identified and considered the environmental effects of proposed activities under their jurisdiction and control. This has not taken place in the present case, despite the demands of the Petitioners.

As discussed above, EIA has emerged as both a legal principle and a procedural mechanism which recognizes that human rights can be violated if significant projects affecting the environment are undertaken without prior study and assessment of the risks they pose. Many international instruments, institutions, and over sixty countries now require some form of EIA. Consequently, under Article 29 of the Convention, resort must be had to the various international instruments mandating and delineating the scope of EIA, as well as Argentina's own environmental laws.

ILO Convention No. 169, which Argentina has ratified and by which Argentina is bound, recognizes the special need for EIA in the context of environmental decisions affecting indigenous peoples:

> Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.[42]

Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which Argentina has ratified and by which Argentina is bound, similarly provides that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[43]

[42] ILO Convention, *supra* at note 19, at Article 7(3).
[43] U.N.G.A. Res. 2200A (XXI) (Dec. 16, 1966), 21 U.N.G.A.O.R. Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 99 U.N.T.S. 171.

In its General Comments to Article 27, the U.N. Human Rights Committee elaborates on this right:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. *The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.* (Emphasis added.)[44]

EIA is certainly a "positive legal measure of protection" in this regard. In its absence, it is impossible to give meaning both to indigenous peoples' right to pursue "such traditional activities as fishing or hunting," and their right to "effective participation... in decisions which affect them."[45]

The EIA principle is expressly established in Argentina's environmental laws concerning exploration and exploitation of hydrocarbons (Resolution SE No. 105/92), dam construction (Law no. 23.879), protected federal areas (Resolution APN No.16/9), and in the federal Toxic and Dangerous Residues Law (Law no. 24.051). In a few provinces in Argentina, including Buenos Aires, there are additional statutes that establish the EIA principle. Moreover, Article 75 inc. 17 of the national Constitution requires the government to ensure the participation of indigenous peoples in the administration of their natural resources and other interests which can affect them.[46] This case surely falls within that requirement.

Argentina's obligation to carry out EIA in connection with the road and related construction project at issue can be further understood by consideration of other international instruments and judicial cases that elaborate on the concept. For example, the 1994 Ksentini Report notes the critical role EIA plays in vindicating human rights concerns in the context of development decisions:

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[44] *Id*. at General Comment 23, para. 7.

[45] In the *Miskitos* report, the IACHR expressly mentioned Article 27 of the ICCPR, and held that in its view, for an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the rights set forth by the American Convention on Human Rights, since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity. IACHR, "Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin," OEA/Ser.L/V/II.62, Doc. 10 rev. 3, 29 Nov. 1983, at 81.

[46] Artículo 75, inciso 17

" Reconocer la preexistencia étnica y cultural de los pueblos indígenas argentinos.
Garantizar el respeto a su identidad y el derecho a una educación bilingüe e intercultural; reconocer la personería jurídica de sus comunidades, y la posesión y propiedad comunitarias de las tierras que tradicionalmente ocupan; y regular la entrega de otras aptas y suficientes para el desarrollo humano; ninguna de ellas será enajenable, transmisible ni susceptible de gravámenes o embargos. Asegurar su participación en la gestión referida a sus recursos naturales y a los demás intereses que los afecten. Las provincias pueden ejercer concurrentemente estas atribuciones. "

> It is important that participation in the environmental context be meaningful - a question of quality of the participation and whether it is timely. Environmental destruction is not easily undone. People must be able to prevent environmental harm. As a minimum, people have the right to receive notice of and to participate in any significant decision-making regarding the environment, especially during the process of environmental impact assessments and before potential damage is done.[47]

Numerous international environmental treaties recognize the critical role of EIA and mandate its use in a variety of contexts.[48] States are increasingly recognized to be under a general obligation to assess the environmental impacts, *inter alia*, in their national laws addressing environmental impacts. For example, the Rio Declaration states:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment, and are subject to a decision of a competent national authority.[49]

Thus, the Rio Declaration suggests that EIA is required for public projects presenting significant environmental impacts regardless of where they are expected to occur.[50]

While EIA is increasingly used as a specific mechanism to implement the goals of global environmental treaties, part of the purpose in these global treaties is simply to ensure that specific environmental impacts are included and given full consideration in the normal course of implementing domestic EIA laws. This has not been done by Argentina in the present case.

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[47] 1994 Ksentini Report, *supra* at note 3, at para. 220.

[48] *See*,*e.g*. Climate Convention, Article 4(1)(f); Law of the Sea Convention, Art. 206; World Charter for Nature, Principle 11(c). Similarly, EIAs have become common requirements for certain international financial institutions, particularly those that support development projects that could affect the environment. *See* The World Bank's Operational Directive 4.01, para. 2 (October 1991) on Environmental Assessment (EA) for the Bank's international lending activities; as well as procedures adopted by the Agency for International Development, the Overseas Private Investment Corporation, and the Export-Import Bank.

[49] Rio Declaration, *supra* at note 21, at Principle 17.

[50] *See also* UNEP Governing Council Decision: Goals and Principles of Environmental Impact Assessment, UNEP/GC.14/17, Annex III, June 17,1987; EEC Council Directive: Assessment of the Effects of Certain Public and Private Projects on the Environment, Dir. No. 85/337, June 27,1985; WCED Legal Experts Group, Article 5.

2. Cases Requiring the Equivalent of Precautionary Measures in the Absence of Prior Environmental Impact Assessment

A. Case Law from Argentina

Argentina itself has applied the EIA principle contained in its national law in at least one case. In *Schroeder*[51], a federal Court of Appeals nullified a public contract to build a toxic residue plant in the Province of Buenos Aires because of the lack of previous EIA evaluating the potential pollution of underground rivers. The court applied the EIA principle based on both Article 41 of the Constitution, and the Toxic and Dangerous Residue Law, 24.051. The court halted the activity complained of by granting amparo injunctive relief, which is the functional equivalent of the precautionary measures sought in this case.

B. The Bluefin Tuna Cases

The *Southern Bluefin Tuna cases*[52] in the Law of the Sea Tribunal resulted from a disagreement between Australia and New Zealand, on the one hand, and Japan, on the other, that arose within the framework of the Convention for the Conservation of Southern Bluefin Tuna (CSBT Convention). Using an experimental fishing program, Japan had exceeded its previously agreed limit for southern Bluefin tuna (SBT). SBT is a highly migratory stock that is harvested by nationals of all three states.

The CSBT Convention, which went into effect in 1994, is institutionalized in the Commission for the Conservation of Southern Bluefin Tuna, which establishes a total allowable catch (TAC) and its distribution by national allocations. This case was the first in which the Tribunal acted on a request for provisional measures under paragraph 5 of Article 290.[53]

By deciding to prescribe provisional measures despite its assessment of the scientific evidence as inconclusive, the Tribunal apparently considered the standard of preventing "serious harm to the marine environment," which is set forth in Article 290(1). The order of the Tribunal is an acknowledgment of the precautionary principle. The provisional measures prescribed by the Tribunal closely follow those indicated by the International Court of Justice in orders in its two 1972 *Fisheries Jurisdiction* cases, where its goal was to prevent "irreparable prejudice" to the respective rights of the parties.[54]

C. Cases from the United States

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[51] Cámara Federal Contencioso administrativo, Sala III, *see*, "La Ley, t.1994-E, p. 449.
[52] Found at URL http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm.
[53] This section provides that provisional measures may be issued if the tribunal "considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires." The standard for provisional measures specified in Article 290(1) is "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment."
[54] 1974 WL 1 (I.C.J.).

A vast number of cases from the United States, where EIA was first developed as a legal principle, involve the granting of injunctions under environmental laws for failure to first assess environmental impacts and in order to prevent the risk of irreparable harm occurring before consideration of the merits of the underlying claims. Many of these cases involve road construction projects. And in many of the cases involving harm from road construction projects, the harm sought to be avoided pales in comparison to the harm to human life alleged in the present case, yet the project at issue was nonetheless enjoined.

Examples of road projects enjoined for failure to assess environmental impacts include: construction of a four mile segment of highway that threatened damage to eleven acres in an eight hundred acre urban park,[55] a highway project that threatened "one little hill and one beaver pond,"[56] creation of an interchange on an existing highway,[57] and paving and re-configuring a four mile stretch of gravel road in a rural area.[58] Certainly the present road construction project warrants no less strict treatment.

One road construction case from the U.S. courts merits particular attention. In *Sierra Club v. Coleman*, environmental groups brought suit against the United States government over the proposed construction by the latter of the "Darien Gap highway," a portion of highway to be constructed through Panama and Colombia to link the Pan American highway system of South America with the Inter-American highway. The case has important parallels with the present case.

The initial environmental impact assessment noted the possibility that the construction might result in the "cultural extinction" of the Choco and Chuna indians living in its path. Similarly, in the present case, while an environmental impact assessment has not even taken place, the State of Argentina has already acknowledged in a report that the road construction project at issue could produce harm to the culture and subsistence way of life of the Petitioners.

The *Sierra Club* court was persuaded that the government had failed to adequately consider the impact of the highway on the peoples living in its path, or the feasibility of alternative routes that might eliminate the risk of such harm:

> [It is indispensable for the statement to discuss at least the relative environmental impacts of other land routes...Such a discussion of the environmental impact of alternate routes will also allow FHWA to discuss more fully the impact of the road upon the lives of the Choco and Cuna Indians, and the opportunities which alternate routes may present for

[55] Monroe County Conservation Council, Inc. v. Volpe, 472F.2D693(2nd cir. 1972).
[56] *Conservation Socy. of Southern Vermont, Inc. v. Volpe*, 343 F. Supp. 761, 767 (D. Vt. 1972); reversed on other grounds, but not as to need for prior EIS for this project in *Conservation Socy. of Southern Vermont, Inc. v. Secretary of Transp.*, 531 F.2d 637 (Second Cir. 1976).
[57] *West v. Secretary of the DOT*, 206 F.3d 920 (Ninth Cir. 2000).
[58] Patterson V. Exxon, 415 F.Supp. 1276(D.Neb. 1976).

> avoiding the "cultural extinction" so casually predicted by the Assessment for those tribes as a result of the Atrato route.[59]

Both the present case and the *Sierra Club* case involve road construction projects threatening harm to very undeveloped environments relied on by indigenous peoples. In a subsequent ruling in the case, the trial court in *Sierra Club* underscored the need for environmental impact assessment under such circumstances:

> In the present case, the defendants propose to build the first major highway through a region until now almost wholly undisturbed by any encroachment of modern civilization, an area by all accounts constituting an ecosystem virtually unique to the world. A more paradigmatic example of the need for thorough and strict application of the requirements of NEPA [the United States' EIA law] could hardly be found...

On appeal, the U.S. Court of Appeals for the D.C. Circuit unequivocally held that the government was required to prepare a thorough environmental impact assessment, given that indigenous peoples were threatened with harm by the development project:

> We emphatically reject the assertion by the Government that something less than a thorough discussion is required because the Indians represent only a small fraction of the Panamanian population, especially since the Government's first environmental impact assessment indicated that the Indians faced possible cultural extinction.[60]

D. The Duty to Allow Citizen Participation Under International Environmental Law and the Right to Participate in Government Under Article 23 of the American Convention Have Been Violated by Argentina and Require the Application of Precautionary Measures in this Case

The second requirement of the EIA principle is that before governments grant approval to development projects, affected citizens must have the opportunity to understand the proposed project and express their views to decision-makers. This concept is the environmental law analogue to Article 13 of the American Convention on Human Rights, which guarantees citizens the right to seek and receive information from the government, and Article 23, which articulates the right to participate in government, as do Articles 20 and 24 of the American Declaration of the Rights and Duties of Man. Argentina is of course bound by these provisions of the American Convention and the American Declaration.

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[59] Id at 56.

[60] *Sierra Club v. Adams*, 578 F.2d 389, 396 (D.C. Cir. 1978). While the appellate court vacated the injunction on the basis that the government had subsequently adequately studied and considered such possible consequences, more importantly, the court agreed whole-heartedly with the District Court as to the necessity of assessing those possible impacts prior to construction. *Id.*

The Commission's 1997 "Report on Ecuador" found that these very rights were violated when oil development on the lands of the Huaorani people was undertaken without first considering their right to information concerning the project and their right to participate in decision-making concerning the project:

> In the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.
>
> Access to information is a prerequisite for public participation in decision-making and for individuals to be able to monitor and respond to public and private sector action. Individuals have a right to seek, receive and impart information and ideas of all kinds pursuant to Article 13 of the American Convention. Domestic law requires that parties seeking authorization for projects which may affect the environment provide environmental impact assessments and other specific information as a precondition. However, individuals in affected sectors have indicated that they lack even basic information about exploitation activities taking place locally, and about potential risks to their health. The Government should ensure that such information as the law in fact requires be submitted is readily accessible to potentially affected individuals.
>
> Public participation in decision-making allows those whose interests are at stake to have a say in the processes which affect them. Public participation is linked to Article 23 of the American Convention, which provides that every citizen shall enjoy the right "to take part in the conduct of public affairs, directly or through freely chosen representatives," as well as to the right to receive and impart information. As acknowledged in Decree 1802, while environmental action requires the participation of all social sectors, some, such as women, young people, minorities and indigenous peoples, have not been able to directly participate in such processes for diverse historical reasons. Affected individuals should be able to be informed about and have input into the decisions which affect them.
>
> * * * *
>
> The Commission recommends that the State implement the measures to ensure that all persons have the right to participate, individually and jointly, in the formulation of decisions which directly concern their environment. The Commission encourages the State to enhance its efforts to promote the inclusion of all social sectors in the decision-making processes which affect them.
>
> * * * *

> Finally, as the right to participate in decision-making and the right to effective judicial recourse each require adequate access to information, the Commission recommends that the State take measures to improve systems to disseminate information about the issues which affect them, and to enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.
>
> * * * *
>
> Such protection further requires that the State take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival. "Meaningful" in this sense necessarily implies that indigenous representatives have full access to the information which will facilitate their participation. [60]

ILO Convention No. 169, by which Argentina is bound, specifically provides for participation of indigenous peoples in environmental decision-making:

> In addition, [indigenous peoples] shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly...
>
> The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.[61]

As noted above, Article 41 of Argentina's Constitution, by which Argentina is bound pursuant to Article 29 of the Convention, establishes the right to a healthy environment. Article 41 of Argentina's Constitution further provides that the state has the obligation to protect this right, including the obligation to protect the right to access to environmental information.

Article 29 of the Convention again requires resort to other international law instruments to help delineate the full extent of these participatory rights. These other instruments, which show a clear evolution of the law recognizing these rights in the environmental context, will now be considered.

Article 27 of the ICCPR, which Argentina has ratified and by which Argentina is bound, clearly requires the participation of indigenous peoples in environmental decision-making.[62]

The 1994 Ksentini Report has described the critical nature of public participation in the environmental decision-making process:

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[60] *Supra* at note 9, at Chapter VIII, *Conclusions* and *Recommendations*, and Chapter IX, *Recommendations.*
[61] ILO Convention, *supra* at note 19, Articles 7(1) and 15(1).
[62] *Supra* at note 43, at General Comment 23, para. 7.

> 217. The right of popular participation in its various forms ranks high in importance for promoting and protecting human rights and the environment. The basic right to popular participation is provided for in article 21 of the Universal Declaration of Human Rights and a number of international instruments. The United Nations system has long recognized the importance of popular participation in the protection of the environment, especially evident in the 1972 Stockholm Declaration, the 1975 United Nations work on popular participation in development, See *Popular Participation in Decision Making for Development*, United Nations publication, Sales No. E.75.IV.10 (1975)., the 1992 Rio Declaration and Agenda 21, and 1993 Vienna Declaration and Programme of Action.
>
> 218. The Special Rapporteur stresses that popular participation is closely related to the rights to education and information: without education about the environment and without access to relevant information on issues of concern, popular participation is meaningless.
>
> Participation must include the right to oral and written commentary. People must also be able to participate in follow-up projects and in ongoing monitoring of environmental situations. To prevent damage or to provide relief if damage has already been done, people must also have the right to seek effective remedy in or violations, including violations arising from a failure to allow effective participation.
>
> 221. Although many people are prevented from participating in decisions, there is a growing national and international trend, including at the international funding institutions, to allow the participation of individuals and groups in all stages of activities involving the environment.[63]

The draft United Nations Declaration on the Rights of Indigenous Peoples, also recognizes this participatory right:

> Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. [64]

The Proposed Inter-American Declaration on the Rights of Indigenous Peoples similarly states:

> Indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it.[65]

[63] 1994 Ksentini Report, *supra* at note 3, at paras. 217-21.
[64] *Supra* at note 20, at Article 19.
[65] *Supra* at note 20, at Article XIII(2).

One of the first major international environmental documents to make public participation a central objective of EIA was the 1982 World Charter for Nature, which states:

> All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.[66]

The 1992 Rio Declaration as well recognizes a right to participation:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on... activities in their communities, and the opportunity to participate in decision-making processes.[67]

Principle 22 of the Rio Declaration is specifically directed at the need for providing participatory rights to indigenous peoples in environmental decision-making:

> Indigenous peoples and their communities...have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and *enable their effective participation* in the achievement of sustainable development. (Emphasis added.)

Recent international environmental instruments almost uniformly mandate including affected persons in the planning process. Chapter 8 of Agenda 21 is largely devoted to ways to ensure participation by affected individuals in development projects, while Chapter 26 directly urges specific application of these principles in the case of projects affecting indigenous peoples. The latter provides that indigenous people:

> may require in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas.[68]

The Beijing Declaration[69]; Articles 2(6) and 3(8) of the 1991 ECE Convention on Environmental Impact Assessment[70]; the 1992 Convention on Biological Diversity[71]; the 1993 Council of Europe Convention on Damage Resulting from Activities Dangerous to the Environment[72]; the 1994 Desertification Convention[73]; and the Convention on Access

[66] Adopted by 111 countries in U.N.G.A. RES 37/7, U.N. Doc. A/RES/37/51, 22 I..L.M. 455, at Principle 23.
[67] Rio Declaration, *supra* at note 21, at Principle 10.
[68] Agenda 21, *supra* at note 21.
[69] Beijing Declaration, A/Conf.177/L.5/Add.15, 14 September 1995.
[70] 30 I.L.M. 802 (1991).
[71] 31 I.L.M. 818 (1992), at Article 14.
[72] 150 European Treaty Series (1993).

to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (UNECE Convention)[74] all reflect the same goals of facilitating participation in the decision-making process by affected persons.[75]

In light of the application of Article 29 of the American Convention to this case, the right to information and the right to participate in government- already consecrated in Articles 13 and 23 of the Convention - should be integrated with the evolution of international human rights and international environmental law in this matter. The Petitioners have the right to participate in decisions concerning the exploitation of their natural resources.

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[73] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, UN G.A.D. A/AC.241/15/Rev.7, 33 I.L.M. 1328 (1994), at Article 5.

[74] UN Doc. ECE/CEP/43 (April 21, 1998).

[75] International instruments dealing with the right to development have also recognized the critical role of citizen participation. For example, Article 1 of the 1986 United Nations General Assembly "Declaration on the Right to Development," which defines the "right to development," recognizes universal public participation as essential for the expression of the right:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Declaration on the Right to Development, G.A. Res. 41/128, Dec. 4, 1986, reprinted in *Human Rights: A Compilation of International Instruments*, Vol. I (Second Part), Universal Instruments, United Nations, New York, Geneva, 1994, p. 548.

Similarly, the preamble to the Declaration states:

> Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom ...

The role of public participation as a necessary means for achieving sustainable development was first clearly identified the following year by the World Commission on Environment and Development in *Our Common Future*, also known as the Brundtland Commission Report. It found that:

> In the specific context of the development and environment crisis of the 1980s, which current national and international political and economic institutions have not and perhaps cannot overcome, the pursuit of sustainable development requires... a political system that secures effective citizen participation in decision making.

"Our Common Future," The World Commission on Environment and Development, Oxford University Press, Oxford, New York, 1987, p. 65.

The Brundtland Commission identified "effective participation" as a necessity for achieving sustainable development. It referred particularly to the significance of participation in promoting sustainable development by specific groups of the public, including indigenous peoples and NGOs. *Id*. at 12, and 115-116 ("[The]... traditional rights...[of indigenous people]... should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas"); *Id*. at p.328 ("In many countries, governments need to recognize and extend NGOs' right to know and have access to information on the environment and natural resources; their right to be consulted and to participate in decision making on activities likely to have a significant effect on their environment; and their right to legal remedies and redress when their health or environment has or may be seriously affected").

The right to participate, however, was not complied with by Argentina when it developed the road and related construction project without first consulting the Petitioners or allowing them to participate in the decision-making process. Due to the failure to comply with international laws on participation, there is an urgent need to ensure that Argentina halts the construction of the road and related project which threatens the way of life and fundamental human rights of the Petitioners.

E. The Precautionary Principle of International Environmental Law Has Been Violated by Argentina in this Case and Requires the Application of Precautionary Measures

The precautionary principle is an emerging principle of international law that requires anticipating and avoiding environmental damage before it occurs, especially where failure to do so would result not only in environmental degradation, but in human rights violations as well.

Principle 15 of the 1992 Rio Declaration is the most widely accepted elaboration of the precautionary principle in international environmental law:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[76]

Numerous international environmental law instruments both before and after Rio have endorsed the precautionary principle. *See* Annex I.

In essence, the precautionary principle shifts the burden of proof from those threatened by an environmentally destructive project, such as the Petitioners, to those who want to proceed with the activity and who are more fairly required to make a showing that the project will not result in the threatened harm. This is especially true where the proponent of the project, as here, has not performed environmental impact assessment and has not even allowed participation by the affected peoples.

The precautionary principle may thus be seen as the environmental law analogue to the concept of precautionary measures employed by this Commission: when threats of

[76] Rio Declaration, *supra* at note 21. As explained in greater detail in Annex I, the precautionary principle was first explicitly introduced into international law in the North Sea Ministerial Conference and was included in the Final Declaration of the Second International North Sea Conference in 1987. The principle was repeated at the Third North Sea Conference in 1990, and the principle was eventually included in the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). Declaration of the Third International Conference on Protection of the North Sea, March 7-8, 1990, reprinted in I YEARBOOK OF INTL ENVTL L. 658, 662-73 (1990)); *see* Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 2(2)(a), Sept. 22, 1992, reprinted in 32 I.L.M. 1069 (1993) (entered into force March 25, 1998).

irreparable harm to persons and/or environments are posed, prudence dictates "erring on the side of caution" and preventing the threatened action until full consideration of the underlying issues can take place.

The principle must be integrated with other legal instruments pursuant to Article 29 of the Convention in assessing Argentina's human rights violations and the resulting need for precautionary measures. Both as a legal principle aimed at avoiding harm to human rights, and as a legal mechanism for preserving the *status quo* while the merits of underlying human rights claims are considered, the precautionary principle squarely applies to the facts of this case.

IV.

The Appropriate Remedy

The road construction project (and associated development) at issue in this case threatens the Petitioners with irreparable harm to their environment, and resulting irreparable harm to their lifestyle and very survival. The precautionary principle teaches that where such threats exist, lack of full certainty of knowledge of the outcome of such threat should not be used as an excuse to prevent environmental degradation.

There are additional factors strongly compelling the adoption of the precautionary principle in this case. Environmental impact assessment has become a virtual *sine qua non* of environmental decision-making in the context of significant development actions posing a threat of harm to the environment. None was prepared in this case. Worse still, the input of the Petitioners was not sought by the government of Argentina in reaching its decision to build a road and related construction projects on the very land that the Petitioners have traditionally used for thousands of years, and to which they assert legal title in this and other proceedings. In other words, none of the ordinary safeguards for informed environmental decision-making have been implemented by the State of Argentina.

A salutary approach that adequately recognizes the importance of these concerns, and the risks posed by ignoring the threat of harm, is to invoke an evidentiary presumption of unacceptable harm in the absence of a showing to the contrary. Such an approach has been adopted in a number of cases and international environmental treaties, as discussed above.

The Center for Human Rights and Environment and The Center for International Environmental Law urge this Commission to adopt the following rule to be applied in this case: when a development project posing the risk of irreparable harm to the environment and to the human rights of an indigenous people is undertaken without prior environmental impact assessment and without the participation of the affected people, precautionary measures will be requested. Such a rule is entirely consistent with the Commission's standard and rationale for adopting precautionary measures: where a *prima facie* case of irreparable harm is established, a presumption of harm arises and mandates the adoption of precautionary measures.

V.

Conclusion

This Commission has a unique opportunity to begin to address indigenous peoples' human rights, recognizing the special relationship indigenous peoples have with their land and resources, and in so doing protecting and promoting the basic human rights of indigenous peoples in an adequate and effective manner.

The Petitioners have thoroughly documented their claims of harm to their environment, and to them as a people, that continue to plague them and can only grow worse as the road and related project continues. The Center for Human Rights and Environment and the Center for International Environmental Law and firmly believe that there is ample support in two closely related bodies of law-international human rights law and international environmental law- for the proposition that meaningful protection of an indigenous peoples' rights can only be provided when meaningful protection of the environment on which they depend is similarly provided. While the Petitioners' human rights and land tenure claims are pending, it is imperative that this Honorable Commission request precautionary measures to halt further construction, lest any resolution on the merits be a meaningless formality.

Respectfully submitted,

_____ Date_____

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Annex I: Support for the Precautionary Principle in International Law

The precautionary principle was first explicitly introduced into international negotiations in the North Sea Ministerial Conference and was included in the Final Declaration of the Second International North Sea Conference in 1987. The principle was repeated at the Third North Sea Conference in 1990, and the principle was eventually included in the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). Declaration of the Third International Conference on Protection of the North Sea, March 7-8, 1990, *reprinted* in I YEARBOOK OF INTL ENVTL L. 658, 662-73 (1990)); *see* Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 2(2)(a), Sept. 22, 1992, reprinted in 32 I.L.M. 1069 (1993) (entered into force March 25, 1998).

The Vienna Convention on the Ozone Layer (1985), UNEP Doc. IG.53/5, 26 I.L.M. 1529 (1987), and its Montreal Protocol (1987), Montreal Protocol on Substances that Deplete the Ozone Layer, preamble, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1550 (1987), also provide important examples of the precautionary principle. The Montreal Protocol's preamble explicitly stated that Parties to this protocol are "determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations." The Protocol and its subsequent revisions are frequently viewed as taking a precautionary approach, because they adopted strict policy measures despite uncertainty existing at the time regarding the risks and dangers posed by the destruction of the ozone layer.

By 1990, the principle was also appearing in regional declarations and treaties. In Europe, in addition to the North Sea Conferences noted above, the Bergen Ministerial Declaration on Sustainable Development in the Economic Commission for Europe Regions, stated:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of envirormental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Bergen Declaration on Sustainable Development in the ECE Region, para. 7, May 16,1990, UN Doc. A/CONF.151/PC/10), *reprinted in* 1 YEARBOOK OF INT'L ENVTL L. 424,431 (1990).

Early the following year, over fifty African countries negotiated the Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, which calls for the implementation of the precautionary principle:

> Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, *inter alia*, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution through the application of clean production methods, rather than the pursuit of permissible emissions.

30 I.L.M. 775 (1991), Art. 4 (3)(F).

In Asia, the 1991 Ministerial Conference on the Environment of the United Nations Economic and Social Commission for Asia and the Pacific invoked the precautionary principle: "[I]n order to achieve sustainable development, policies must be based on the precautionary principle." Report of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) Ministerial Meeting on the Environment, Bangkok, Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Appendix 2, p.8, Oct. 15-16, 1990.

By 1992, the UN Conference on Environment and Development (UNCED) significantly furthered the consensus around the precautionary principle. As noted above, Principle 15 of the Rio Declaration was adopted. In addition, UNCED delegates also invoked the precautionary principle in both the Biodiversity Convention, Convention on Biological Diversity, art. 1, 31 I.L.M. 818 (1992), at preamble, and the Climate Change Convention. United Nations Framework Convention on Climate Change, 31 I.L.M. 849 (1992), Article 3(3).

Agenda 21 also invokes the precautionary principle in several contexts. For example, Chapter 35, which addresses "science for sustainable development," provides the following formulation of the principle:

> In the face of threats of irreversible environmental damage, lack of full scientific understanding should not be an excuse for postponing actions which are justified in their own right. The precautionary approach could provide a basis for policies relating to complex systems that are not yet fully understood and whose consequences of disturbances cannot yet be predicted.

Agenda 21, at Introduction to Chapter 35.

The importance of the precautionary approach is subsequently re-affirmed in Chapter 17 (protection of the marine environment), Chapter 18 (water pollution), and in Chapter 35 (interaction between the sciences and decision-making).

Since UNCED, the precautionary principle has continued to appear in international treaties and declarations. In 1993, for example, the European Union officially adopted the

precautionary principle as a basis for all community environmental policy. Article 130r(2) of the Treaty Establishing the European Economic Community, as amended by the Treaty on European Union. As a "constitutional" document of the European Union, the Maastricht treaty will guide future adoption of EU environmental policy.

Since the early 1990s many European regional agreements have also included the precautionary principle, including the ECE Transboundary Watercourses Convention, Convention on the Protection and Use of Transboundary Watercourses and Lakes, Helsinki, art. 2(5)(a), March 17, 1992, 31 I.L.M. 1312 (1992), the Baltic Sea Convention, 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, Art. 3(2), April 9, 1992, and the North East Atlantic Convention. North East Atlantic Convention, *supra*, at Art. 2 (2)(a) (incorporating the same language as the Baltic Sea Convention). Several of the protocols to the Convention on Long-Range Transboundary Air Pollution also specifically invoke the precautionary principle. Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, preamble, June 25, 1998, UN Doc. EB.AER/I 998/2 (not yet in force). *See also* Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, preamble, June 14, 1994, UN Doc. EB.AIR/R.84, *reprinted in* 33 I.L.M. 1542 (1994) (not yet in force); Protocol to the Convention on Long-Range Transboundary Air Pollution on Heavy Metals, preamble, June 25, 1998, UN Doc EB.AIR/1998/1 (not yet in force).

Although the text of the 1973 Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES) did not explicitly invoke the principle, in 1994 the Conference of the Parties explicitly endorsed the principle. In fact, at the Ninth Meeting of the Conference of the Parties to CITES, the parties adopted a resolution that incorporates the precautionary principle in the procedure for listing species in need of protection. According to the resolution:

> RECOGNIZING that by virtue of the precautionary principle, in cases of uncertainty, the Parties shall act in the best interest of the conservation of the species when considering proposals for amendment of Appendices I and II;
>
> RESOLVES that when considering any proposal to amend Appendix I or II the Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of the conservation of the species.

Resolution of the Conference of the Parties, Criteria for Amendment of Appendices I and II, Ninth Meeting of the Conference of the Parties, Fort Lauderdale (USA), November 7-18, 1994, Com. 9.24. *See also* James Cameron & Juli Abouchar, "The Status of the Precautionary Principle in International Law," in *The Precautionary Principle And International Law: The Challenge Of Implementation*, at 49 (David Freestone & Ellen Hey eds.) (Kluwer Law International:, The Hague, 1996).

Finally, since 1995, fifty-nine countries have signed the Straddling Stocks Agreement, which addresses the problem of fish stocks that are highly migratory or straddle the jurisdiction of more than one State. Stocks of these fish, including for example tuna and swordfish, are currently heavily overfished by commercial fishing fleets using destructive gear or techniques. Because of their highly migratory nature, the populations and depletion rates of these fisheries are shrouded in uncertainty. The Straddling Stocks Agreement aims at the long-term conservation of straddling fish stocks. Among other things, the Agreement establishes principles to guide States in implementing the Agreement, including (in Article 6) the precautionary principle. UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 5(c), Aug. 4, 1995, UN Doc A/CONF. 164/38, *reprinted in* 34 I.L.M. 1542 (1995) (not yet in force). The Straddling Stocks Agreement has twenty-four parties and needs thirty before it enters into force.

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>
> RESOLVES that when considering any proposal to amend Appendix I or II the Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of the conservation of the species.

Resolution of the Conference of the Parties, Criteria for Amendment of Appendices I and II, Ninth Meeting of the Conference of the Parties, Fort Lauderdale (USA), November 7-18, 1994, Com. 9.24. *See also* James Cameron & Juli Abouchar, "The Status of the Precautionary Principle in International Law," in *The Precautionary Principle And International Law: The Challenge Of Implementation*, at 49 (David Freestone & Ellen Hey eds.) (Kluwer Law International:, The Hague, 1996).

Finally, since 1995, fifty-nine countries have signed the Straddling Stocks Agreement, which addresses the problem of fish stocks that are highly migratory or straddle the jurisdiction of more than one State. Stocks of these fish, including for example tuna and swordfish, are currently heavily overfished by commercial fishing fleets using destructive gear or techniques. Because of their highly migratory nature, the populations and depletion rates of these fisheries are shrouded in uncertainty. The Straddling Stocks Agreement aims at the long-term conservation of straddling fish stocks. Among other things, the Agreement establishes principles to guide States in implementing the Agreement, including (in Article 6) the precautionary principle. UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 5(c), Aug. 4, 1995, UN Doc A/CONF. 164/38, *reprinted in* 34 I.L.M. 1542 (1995) (not yet in force). The Straddling Stocks Agreement has twenty-four parties and needs thirty before it enters into force.