REPLY OF THE REPUBLIC OF NICARAGUA TO THE COMPLAINT PRESENTED BEFORE THE INTERAMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF THE MAYAGNA COMMUNITY OF AWAS TINGNI
(SUBMITTED OCTOBER 21, 1998)
(Unofficial Translation)

Introduction

In its complaint filed against the Republic of Nicaragua, the Inter-American Commission on Human Rights (hereinafter "the Commission") sustains two basic points or substantive arguments of law:

1. That "the State of Nicaragua has not demarcated the communal lands of Awas Tingni, or of other indigenous communities, and neither has it taken effective measures that assure the right to property of the Community in its ancestral lands." The Commission states that such an omission constitutes a violation of articles 1, 2, and 21 of the American Convention.

2. That "the right to property recognized in article 21 was actively violated by the granting of the concession to the Sol del Caribe S.A. (SOLCARSA) company for the cutting of wood on lands traditionally used and occupied by the Community."

In relation to those points, the Republic of Nicaragua maintains:

I. With respect to the lack of demarcation and titling of the claims of the Awas Tingni Community:

   (a) That there are contractual document signed by the Indigenous Community of Awas Tingni in which it affirms possessing property titles to the claimed communal lands.

   (b) That despite an existing legal framework, the Indigenous Community of Awas Tingni has not addressed a single request for demarcation and titling to the competent governmental authorities.

   (c) That the Republic of Nicaragua has been promoting important initiatives for the titling of communal lands of the Atlantic Coast indigenous communities.

   (d) That the lands claimed by Awas Tingni have not been possessed since ancestral times.

(e) That the lands claimed by the Awas Tingni Community affect the subjective rights of other indigenous communities which hold legitimate communal property titles:

1. The "Six Communities"

2. The Miskito community of "Karatá"

(f) That the lands claimed by the Indigenous Community of Awas Tingni contradict the land claims of other indigenous communities (the "Ten Communities").

(g) That the surface area of the lands claimed by Awas Tingni is not in proportion with the concept of "communal property" or with the number of Community members.

i. Procedural matters

ii. The issue on the merits

II. With respect to the "active violation" of the alleged communal property rights of Awas Tingni, derived from the granting of the logging concession to the commercial entity SOLCARSA:

(a) That the "Forest Use Agreement" signed by Awas Tingni, MADENSA, and the authorities of MARENA does not constitute an event sufficient to prejudge the legitimacy of the communal property claim of Awas Tingni.

(b) That the logging concession granted to SOLCARSA was limited to areas held as national lands.

(c) That the logging concession granted to the commercial entity "Sol del Caribe Sociedad Anónima" (SOLCARSA) did not result in any harm to said Community.

I. Lack of governmental titling of the land claims of the Awas Tingni Indigenous Community

(a) There are contractual documents signed by the Indigenous Community of Awas Tingni in which it affirms possessing property titles to the claimed communal lands.

The main argument of the Indigenous Community of Awas Tingni and of the Inter-American Commission on Human Rights—contained in the complaint filed against the Republic of Nicaragua— consists of the lack of titling of the communal lands claimed by the Community. To that end, they assert that such a situation constitutes a violation of articles 1, 2, and 21 of the American Convention.

As will be shown in this brief, there is a series of specific situations that severely call into question the alleged right of the Community in the particular terms under which the Community claims that right.

To begin with, the fundamental fact that there has not been a single request for titling addressed to the competent authorities should be noted. Similarly, in this brief, the Community's erroneous interpretation is highlighted: that of maintaining the inexistence of a legal framework for the titling of its claimed communal lands, a claim it never asserted. The reality belies the Awas Tingni assertion: there is no lack of regulation of the rights contained in the American Convention, inasmuch as—as will be shown—there is a legal framework providing indigenous communal property titling, as well as the fact that neither has there been any refusal to recognize a right that, simply, has not been requested of the national authorities.

Additionally, there is a series of particular circumstances that place this claim outside of the ordinary ambit of indigenist law. The Republic of Nicaragua calls the attention of the Court, with respect to the Awas Tingni issue, to the fact that it is a small group of indigenous persons, the product of a communal segregation and of successive geographic movements, whose presence in the region has not been sufficiently documented; that, moreover, it is in possession of lands that are not ancestral; that such lands have been partially titled to other indigenous communities or are being claimed by other communities, which maintain being the real ancestral possessors, etc. That is, around this claim there is a complex conflict of interests, due to the concurrence of land claims—of different ethnic groups—that should be the object of careful review by national authorities, and even more importantly, of a delicate process of conflict resolution that produces legal certainty and societal peace.

To this complex relation of "particularizing" facts is added another situation that

sows serious doubts with respect to the propriety of this claim by Awas Tingni: the Community itself, in a contract signed by those claiming to be its legitimate representatives—and in the presence of the Regional Governor of the North Atlantic Autonomous Region (RAAN)—expressly and categorically expressed having been given title by the legitimate authorities of the government.

In effect, on the 26th of March, 1992, the representatives of this Community—exactly the same persons who filed this claim—signed a contract with the commercial entity "Maderas y Derivados de Nicaragua, Sociedad Anónima" (MADENSA), in which they recorded the following clause:

> The Community concedes authorization, as much as legally necessary, to the "Company" so that it may execute a Forestry Management Plan (PMF) in lands of "The Community," "the boundaries of which are defined in Appendix Number 2, according to the property titles legally recognized by the authorities of the Central Government and of the GOVERNMENT OF THE NORTH ATLANTIC AUTONOMOUS REGION. A copy of which are attached as Appendix Number 2-A, so as to make possible the use of the forest resources in a rationally and sustainable manner.[1]

This contract was signed by the Community in order to have access to the profits that could be generated by the MADENSA commercial entity's exploitation of the forest reserves of the area. It is clearly written, it leaves no room for ambiguous interpretation. Awas Tingni affirms having property titles (not just a simple claim), it affirms that those titles are legitimate, extended by authorities equally as legitimate so as to issue them; and, not only does it offer those titles, but it also records that they form an express part of that contract, which the Community signs without reservation.

If those titles exist, and we are going to suppose that the Community has signed the contract in good faith—as the legal order of any country demands—why does the Community now allege never having been titled before the Honorable Inter-American Court? Where are those titles that are not found in any administrative record or registry? If those titles never existed, what value does the word of these indigenous representatives have? How does one interpret their subsequent declarations of will?

(b) Despite an existing legal framework, the Indigenous Community of Awas

[1] Contract for the Integrated Management of the Forest Between the Awas Tingni Community and Maderas and Derivados de Nicaragua, S.A., February 26, 1992, p. 1. See Appendix Number 1. (Emphasis added.)

Tingni has not addressed a single request for demarcation and titling to the competent governmental authorities.

In its preliminary exceptions brief—filed 19th August of the current year—the Republic of Nicaragua showed the existence of a legal framework to provide the titling process of the country's indigenous communities, which has had—until now—as competent authority to deal with these matters, the Nicaraguan Institute of Agrarian Reform (INRA). This legal framework was established by Law Number 14, know as the Amendment to the Agrarian Reform Law, of 11 January, 1986.[2]

In accordance with article 31, it states that:

> The State will dispose of the necessary lands for the Miskito, Sumo, Rama, and other ethnic groups of the Atlantic region of Nicaragua, with the objective of elevating their standard of living and contributing to the social and economic development of the Nation.

Therefore, it cannot be validly maintained that—under Nicaraguan law—there has been a legislative silence that impedes the claiming of a right recognized by the Political Constitution. There is a legal framework that was not used by the Awas Tingni Community. As will be seen in Section C of this brief, this omission was deliberate, with the intent of not recognizing—as a consequence of a condemning international judgment—the subjective rights, expectations, and interests of other persons inhabiting the area.

Similarly, it was pointed out in the preliminary exceptions brief that the law in question remains in effect, notwithstanding the fact that the powers originally conferred to the Ministry of Agricultural and Livestock Development and Agrarian Reform (MIDINRA)—to administer the titling process of the communal indigenous lands—had been assumed by the Nicaraguan Institute of Agrarian Reform.

More recently, and due to the entry into effect of Law 290, "Law of Organization, Competencies, and Procedures of the Executive Power" (Gazette No. 102, of 3 June, 1988), INRA came to be an administrative agency (decentralized organization) of the Agricultural, Livestock, and Forestry Ministry, a situation that did not affect the effectiveness of the above-cited Law Number 14. In effect, article 50, section 9, of Law Number 290 states that:

> Decree 39-91, "Organic Law of the Nicaraguan Institute of

[2] Appendix Number 2.

> Agrarian Reform," is hereby derogated, being converted into a decentralized entity of the Ministry of Agriculture and Livestock (MAG). The MAG will assume administration of the articles in effect of Law 14, "Law Amendment to the Agrarian Reform," published in The Gazette No. 8, of 13 January, 1986, and the articles in effect of Law 209 published in The Gazette No. 227, of 1 December, 1995 that are to be dealt with by the Nicaraguan Institute of Agrarian Reform (INRA). Its assets will be administered without settlement by the Ministry itself.[3]

Similarly, it was stated that this legal framework was not recognized—voluntarily or involuntarily—by the Indigenous Community of Awas Tingni; that the Community did not address a single request for titling to the competent authorities of the INRA, and, instead, filed an ambiguous and obscure request with the Regional Council of the North Atlantic Autonomous Region (RAAN) so that it would help it to fill the supposedly existing normative void in the matter.

In effect, recall the communication, dated March 1996, that the Community was to have directed to the authorities of the Regional Council of the RAAN, in which they request of that regional entity:

> The Awas Tingni Community hopes that the Regional Council can help to fill this void in accordance with the relevant constitutional norms.[4]

With this writing presented to the Regional Council, the Community hoped to obviate the indigenous titling procedures that the Central Administration authorities have as competent authorities, in addition to creating confusion or conflict of competencies between this and the Regional Governments of the Atlantic Coast, which—according to the Autonomous Statute of the Atlantic Coast Regions of Nicaragua[5]—only have the authority to settle border conflicts between indigenous communities (article 23, section 4), not being competent to settle land conflicts when these conflicts involve indigenous, municipal, national, and individual interests.

From this obscure and ambiguous claim, uncertain as far as its request, erratic as far as the legal framework, directed to an organization incompetent in the matter, etc., the Community brought an *amparo* remedy before the Supreme Court of

[3] Appendix Number 3; the underline is ours.
[4] Appendix Number C.13 of the Commission's Complaint before the Inter-American Court of Human Rights, Case of the Mayagna Sumo Indigenous Community of Awas Tingni against the Republic of Nicaragua, 4 June, 1998.
[5] Law Number 28, published in The Gazette, Official Daily Number 238 of 20 October, 1987.

Justice (7 November, 1997, ruling pending), claiming to deduce "administrative silence" and state responsibility before the RAAN Regional Council's lack of resolution, diverting with it attention to the fundamental issue: that it has not filed a single request for the titling of its supposed ancestral lands to the competent authorities, established in Law Number 14, Amendment to the Agrarian Reform Law.

(c) The Republic of Nicaragua has been promoting important initiatives for the titling of communal lands of the Atlantic Coast indigenous communities.

The republic of Nicaragua has stated in its earlier brief that, notwithstanding the absence of a request for titling of the communal lands (by this Community), it has been promoting transcendental initiatives in the legal treatment of titling of indigenous communities, consisting of:

1. The contracting (December 1996) of a consultancy financed by the World Bank for and preparation of a complete, comprehensive diagnostic study of the totality of indigenous communities existing in the area as well as of their land claims: although the results of that study (presented in June 1998) are in the process of being studied and approved by the competent national authorities, it is anticipated that they will constitute a referential framework of great utility in the process of evaluating the claims that may come to be presented or that the State unofficially promotes.

It is important to emphasize that in the terms of reference that were presented to the consultants in this project, the Government of Nicaragua referred the case of the communities of Awas Tingni and Tuburus, respectively.[6]

It should be kept in mind that many of the communal land claims are in conflict with either claims presented or that other indigenous communities could present (including the property interests of third parties: individuals, municipalities or the State itself), reason for which the casuistic and empirical treatment—that Awas Tingni asserts—could lead to situations of conflict with third persons, incorporating additional elements of complexity to the problem of titling.

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[6] Appendix A: Terms and References of the Contract of Services of Consultancy Number 084-96, "General Diagnostic Study on Land Tenure of the Indigenous Communities" of 2 December, 1996, states on page 15: "The universe of the diagnostic study will be composed of Misquito, Sumu, Rama, Garífuna, and Creole communities of the Autonomous Regions, including urban communities indicated in these Terms of Reference. Exhibit A presents a detailed listing of those communities." Likewise, Exhibit I, Appendix A: Universe of Study, details the communities which are the object of study, including, as stated earlier the communities of Awas Tingni and Tuburus. See Exhibit Number 5.

2. The preparation of a bill that regulates the Regime of Communal Property of the Indigenous Communities of the Atlantic Coast and BOSAWAS (the latter, a natural reserve located in the RAAN and the bordering department of Jinotega): This legislative initiative, presented by the President of the Republic the 13th of October, constitutes a transcendentally important initiative in that its objective is to completely resolve the problem of titling claims of the indigenous communities for their communal properties, in this way perfecting the existing legal framework.[7]

That document, prepared over months by an large number of centralized and decentralized institutions, constitutes an initial proposal, a basic document, to—with it as point of departure—lead the National Assembly to a broad consultation process with the different sectors of civil society (indigenous communities, farmers, coastal population, etc.), with a view to its ultimate enrichment.

It is important to emphasize that it is the most ambitious body of law that has existed in the area, in that it will completely regulate a multiplicity of situations, ranging from the accreditation of the existence of indigenous communities, the accreditation of its authorities, administrative procedures for the filing of titling requests, a multi-disciplinary diagnostic study of them, to the establishment of conflict resolution mechanisms, third-party claims, etc. This legal framework, once in effect, as will be pointed out, will perfect the pre-existing legal framework contained in the cited Law Number 14, Amendment to the Agrarian Reform Law, that has been the legal framework under which the indigenous communal property titling process has developed.

The availability of these instruments (complete diagnostic study and perfected legal framework) will facilitate the decision making process and, even more importantly, will bring a framework with greater legal certainty that will allow the State to title the indigenous communal lands without generating conflictive situations by the possible non-recognition of the property claims of all interested actors.

And, keeping in mind the multiplicity of communal property claims—as well as the claims of third parties—the competent national authorities cannot allow themselves to "blindly" initiate a titling process, ignoring the subjective rights or the possible claims of interested parties, creating an unmanageable situation of

[7] See Exposition of Reasoning and text Bill of Organic Law Regulating the Communal Property Regime of the Indigenous Communities of the Atlantic Coast and BOSAWAS, presented by the president, Dr. Arnoldo Alemán Lacayo, to the National Assembly. Appendix Number 6.

social conflict.[8]

(d) That the lands claimed by Awas Tingni have not been possessed since ancestral times.

When first reflecting on the historic documentation that supports the existence of the Indigenous Community of Awas Tingni, it comes powerfully to one's attention to point out that, until a very late date (the 1990s of this century), there was not any documentary evidence of the existence of that Community. No action of accreditation by its authorities or *Síndicos*, no communal action, etc., absolutely nothing.

The first public appearances of this Community occur at the time of the logging concession granted to the commercial entity MADENSA, with the objective of obtaining beneficial commercial inroads derived from the exploitation of the forestry resources of the area, scene of its purported "ancestral presence." And specifically, it is the actions before a governmental institution (the Ministry of the Environment and Natural Resources, MARENA) that lacks the special capabilities of dealing with indigenous issues, as well as competencies to judge the existence and legitimacy of Awas Tingni's claims.

The absolute historical silence with respect to this Community is a relevant piece of information that cannot be ignored, because it brings reasonable grounds for the conclusion that it is a group that detached itself from an indigenous "mother" community and that claims for itself separate and independent title to lands that it has not ancestrally possessed.

The very document presented by the Inter-American Commission of Human Rights, entitled "Awas Tingni, an Ethnographic Study of the Community and its Territory," whose main researcher is Doctor Theodore Macdonald,[9] confirms the earlier interpretations:

1. The Ethnographic Study of the Awas Tingni Community does not refer to any historic documentation; it is constructed on simple oral accounts of the supposed members of the Community without showing any evidence of consultation with the dwellers of the neighboring areas (that can have claims on the same lands claimed by Awas Tingni). In this way, it eliminates "inconvenient" testimony and gives a partialized history, tailored to the interests of the Community. The Court should not lose sight of the weakness

[8] Appendix Number 9, presented in the preliminary exceptions brief illustration of the complexity and interlacing of the existing claims in the area.

[9] Appendix Number C.3 of the Commission's complaint before the Inter-American Court of Human Rights, Case of the Mayagna Sumo Indigenous Community of Awas Tingni against the Republic of Nicaragua, 4 June, 1998.

of this purported "historic reconstruction," neither of "the source" of the same, which is the same individuals that are asserting claims against the State; nor of the fact that the study in question does not use any consultation or interviews with persons from outside of the Community, unjustifiably injurious to the neighboring indigenous populations that might belong to other ethnic groups.

2. The inexistence of any documentation, the compilation of partial and fragmented testimony are not the only weaknesses of this strange document presented by the Commission. Note that the document starts from the 1940s of this century when the Community occupied a settlement—Tuburus—from which it would later move to the east. When did they arrive at that Tuburus settlement? Were the lands uninhabited? Did they really look into whether the lands they occupied in Tuburus were claimed by other ethnic groups? Was the situation, which could have arisen due to the presence of inhabitants with ancestral roots on the area, ever looked into? And later, when the Awas Tingni Community moved onto the lands it is now claiming, did they really look into whether they were uninhabited? Were people from outside the Community interviewed? The document simply concludes that there were no such inhabitants, inasmuch as it is based on the exclusive testimony of the interested party.

Let us look at some excerpts of Macdonald's study to, later, compare them against the testimony of the inhabitants whose "history" was not taken into consideration. Macdonald says:

> It has been concluded that these uses have been carried out continuously since at least the times in which the members of the community resided in their ancient settlement of Tuburus until the present (page 2, second paragraph).
>
> In addition to the mythology, there is a recorded oral history by the members of the Awas Tingni Community, who occupied a communitarian settlement called Tuburus until the 1940s (page 8, second paragraph).
>
> When asked why they left Tuburus, they gave two answers. Some stated that they left for periods during the most active time of Sandino and his troops (1929-1933), what they call the time of the bandits and rebels. According to them, the communitarian life was so interrupted that many of them went for long periods to live in isolated mountain homes. But these movements were temporary dispersions, not permanent movements (page 8, third paragraph).

> There was an almost total abandonment of the area, between 1940 and 1945 (the dates are not exact because people gave responses like "I left before getting married" or ". . . when I was that girl's age"). The reasons were the continuous incidents of contagious diseases . . . The elders said that in 1945 Pastor Danery Downs, noting that many of the people were dying of these diseases, suggested that the people move downriver to the shores of the Awas Tingni river or *caño*, in a region in which there were no inhabitants. Some came in groups and others came later" (pages 8 and 9).[10]

The earlier accounts are contradicted by the Miskito indigenous community known as "Ten Communities" in the document that is appended to this complaint reply brief.[11]

In that document, the Ten Communities maintain that they are the ancestral possessors of those lands to the point that, when the Mayangna [sic] community of Awas Tingni settled in the *caño* of the same name (in 1945), they requested and obtained the express consent of the Miskito communities of the region to settle in that area. Such a request is evidence of the non-ancestral character of that possession, if not also the "precarious" nature of Awas Tingni's possession, subject from the start to the consent of the original possessor of those lands.

Without prejudging the legitimacy of this claim of the "Ten Communities"—over the lands claimed by Awas Tingni—the existence of this assertion—together with the earlier observations made on the Macdonald document—allows formulation of the following conclusions:

1. The presence of Awas Tingni in the locale of the same name goes back to the 1940s; therefore, its presence does not constitute the conditions necessary for "ancestrality" postulated by indigenist law. Furthermore, this land claim is being strongly contested by the Miskito community known as the Ten Communities, who maintain being the real ancestral possessors of the area, to the point that—in 1945—they gave their consent to Awas Tingni to settle in the area as a "daughter Community." That is, as part of the Miskito Community, and not as a separate and independent entity. In legal terms, what the "Ten Communities" maintain in their document is that there was no occupation of "no man's land" (by Awas Tingni), as neither was there a cession of property rights by the "Ten Communities," neither could adverse

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[10] The underlining is ours.

[11] Note of 12 September, 1998, from the Ten Communities to Dr. Virgilio Gurdián, Director of the Nicaraguan Institute of Agrarian Reform. Appendix Number 7.

possession operate against them, because Awas Tingni's possession is a "precarious" possession, that recognized as its legitimate owner the real ancestral possessors of those lands.

2. Further, the "Ethnographic Study" provides no information on the historic origin of Awas Tingni's presence in Tuburus (that is, the "original" settlement from which they moved in 1945). And it does not do so inasmuch as this presence was not itself ancestral; if we are to be governed by the conventional and legal meaning of the term. The same testimony and indigenous oral accounts—to which the Commission attributes irrefutability—indicate that this Community of Awas Tingni "broke off from the Sumo or Mayagna Community of Musawás, located in the Waspuck river in Mina Bonanza." In that regard, please consult the above-mentioned document sent by the "Ten Communities."

3. And, at the bottom of the issue, what the "Ethnographic Study" of Macdonald shows is that, with the passage of time, the Awas Tingni Community became separated from its "mother" community and has been moving from the west to the east, over a distance of approximately forty miles. <u>This triple phenomenon of fractionalization of ancestral communities, geographic migration of the emerging subgroups, and subsequent claim to property title (in lands that do not qualify as "ancestral" lands and that can be claimed by other ethnic groups that do in fact qualify as such) suggests a complex and delicate scenario</u>. From there precipitated unilateral solutions that, in dealing with an individual land claim, ignore the subjective rights, expectations and interests of third parties, and that are not advisable. The problem is further complicated, if it is pointed out that—agreeing on the area—there are property interests of other, non-indigenous parties: individuals, municipalities, or state institutions. This would constitute a problem which would best be resolved by the State, through the competent authorities, and through an administrative procedure that involves diagnostic studies and consensus among the affected or interested parties, in such a way as to duly contemplate the interests of however many claimants there could be of those lands.

4. What was Awas Tingni's intent in departing from this approach—that involves diagnostic studies, consultation, and consensus among all interested parties? For what reason did Awas Tingni not even present its request for title to the competent government authorities? Why did it turn directly to the Inter-American Commission? What was the purpose of its ambiguous request to the RAAN Regional Council—an organization lacking the competence to title indigenous land? Definitively, what the Awas Tingni Indigenous Community intended was to surprise the Inter-American Court of Human Rights (in the same way it did the Commission), in presenting an

abstract situation (absence of title of indigenous community ancestral lands), but hiding the fact that there had been no request for titling, that internal Nicaraguan legal procedures have been avoided, that lands that are not ancestral are being claimed, and that—through the mechanism of international legal pressure—ignorance of third party interests in the area that could have a better right of possession, is intended.

(e) The lands claimed by the Awas Tingni Community affect the subjective rights of other indigenous communities which hold legitimate communal title.

The non-recognition of the subjective rights of third parties—following from the Awas Tingni Indigenous Community's assertion—becomes more than evident if it is pointed out that, in the vast surface area claimed by this Community, there are other indigenous communities in partial possession of those lands, including in possession of legitimate titles of communal property granted by the State. Such are the cases of the "Six Individual Communities of the plain North of the Coco River" (hereinafter the "Six Communities"), and of the indigenous community of "Karatá."

1. <u>The "Six Communities."</u>

In the area claimed by Awas Tingni—exclusively and to the exclusion of others—there are indigenous communities that have already been titled by the State. Although the official documentation refers to them as the "Six Communities"—suggesting by that that it is a single entity—in reality they are individual communities that were titled as such by the State in the 1970s. Specifically, these communities—all of Miskito origin—are: MIGUEL BIKAN (511 inhabitants); WISCONSIN (1,018 inhabitants); ESPERANZA (200 inhabitants); FRANCIA SIRPI (2,870 inhabitants); SANTA CLARA (1,080 inhabitants); and TASBA PAIN (1,086 inhabitants).

These Communities were titled by the Nicaraguan Agrarian Institute (IAN, the predecessor to MIDINRA and INRA), within the framework of a project identified as TASBA RAYA. In relation to that project, the "General Diagnostic Study on Land Tenure of Indigenous Communities of the Atlantic Coast" (prepared by consultants financed by the World Bank) states that:

> The '70's was the period of beginning, peak, and decline of the Tasba Raya Project. Despite its short life, this project represents until now the greatest expression of dynamism of the agricultural economy in the area's history. During that period, Tasba Raya's production of tubers, musáceas, and basic grains was able to satisfy the demand of the Waspán and Bilwi

> municipalities. This initiative was possible because in the initial phase, the project received support from the Somoza government and the French Embassy with respect to health services, road infrastructure construction, technical assistance, bank credit and the handing over of title, in the agrarian reform version, by the Nicaraguan Agrarian Institute (IAN) in quantity of 50 blocks per family . . . .[12]

Macdonald's Ethnographic Study partially recognizes the existence of these inhabitants of Miskito origin. In effect, on pages 36 and 37 of that document, Macdonald makes reference to the Miskito communities of LA ESPERANZA AND SANTA CLARA, ignoring the rest of the cited communities. However, it comes to one's attention that that very Ethnographic Study admits to the existence of a harmonious relationship between Awas Tingni and these Miskito communities with respect to land use. Further, the Ethnographic Study admits that the Awas Tingni Community does not use a good portion of the lands it claims because these are occupied (and titled) by the Miskito communities. Let us look at the relevant paragraphs of that Study:

> Although previously there have been problems relating to the land (especially when the new inhabitants felled coconut trees on their arrival), La Esperanza and Santa Clara seem to have established themselves without any major problem. While the researcher was in the area, the Miskito as well as the Mayangna [sic] showed more preoccupation about the presence of a Korean logging company that was interested in setting itself up in the area, than for inter-ethnic problems of these indigenous communities.
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> Briefly, the relations with the communities already located in the left bank (north) of the River seem to be more cordial, even when there is a notable Miskito attitude of superiority. The fact that the members of Awas Tingni Community do not currently use the major portion of this side for its crops, indicates a sense of territorial acceptance of the Miskito.

For what reason, in its claim before the Inter-American Commission, and now before the Court, did the Awas Tingni hide the existence of these communities located on the lands it claims? For what reason, if there was acceptance of the presence of those ethnic groups—as Macdonald accepts—was there an intent not

[12] Central American and Caribbean Research Council—CACRC—Hale, Charles R.; Gordon, Edmund T.; Gurdián, Galio C.: *General Diagnostic Study on the Land Tenure of Indigenous Communities of the Atlantic Coast, Final Report.* Consultancy Number 084-96. Austin, Texas. *Bluefields and Puerto Cabezas, Nicaragua 1998*. Page 154.

to recognize their real rights? Can the State satisfy the demands of Awas Tingni—over lands that are not ancestral and in dismeasured proportion to the number of its inhabitants—without knowledge of the titles granted to other communities? In what condition would the acquired rights of those Miskito Communities be left?

Attached is a letter written by the Leader of the Tasba Raya Indigenous Communities (or "Six Communities"), in which he states how the Awas Tingni claims affect their lands that have been granted and titled to them by the State.[13]

2. The Miskito Community of "Karatá."

Another community affected by Awas Tingni's claims is that made up by the indigenous peoples of Karatá. That Community, belonging also to the Miskito ethnic group, has been titled since 1916, when it Misquitia Titling Commission was established.[14]

As the attached letter shows—sent by the General Coordinator of the Karatá Indigenous Community— and in the registry certificates that protect their property title, Awas Tingni's land claim—if formalized—would affect the subjective rights of the Karatá indigenous peoples, inasmuch as it would encompass a large part of the lands that were adjudicated to them at the beginning of the current century.

In this case, Awas Tingni's land claim (at least in the surface area they are suggesting) would yield to the ancestral presence of the Karatá indigenous peoples.[15]

(f) The lands claimed by the Awas Tingni Indigenous Community contradict the land claims of other indigenous communities (the situation of the "Ten Communities").

It has been demonstrated that Awas Tingni's presence in the locale of the same name is recent; that it is not of an ancestral nature; that it resulted from a pattern of fractionalization of the Mayangna [sic] communities and of successive movement from west to east. It has also been demonstrated that there exists indigenous communities—belonging to other ethnic groups—in the areas claimed by Awas Tingni; that these communities hold a greater right of possession of these lands (or a large part of them) in view of their ancestral presence (Karatá

[13] Appendix Number 8.

[14] Information on the activity carried out by the Titling Commission can be found in Appendix Number 11 of the documents accompanying the preliminary exceptions brief.

[15] Note of 11 September, 1998, from Mr. Rodolfo Spear Smith, General Coordinator of the Karatá Indigenous Community, Puerto Cabezas, RAAN, to Mr. Virgilio Gurdián, Minister of the INRA.

Community) or of its holding of a legitimate property title (the very situation of the Karatá Community and of the "Six Communities"). Let us take up again the situation of the "Ten Communities," anticipated under heading "C" of this brief.

On these "Ten Communities," the "General Diagnostic Study on Land Tenure of the Indigenous Communities of the Atlantic Coast" tells us in pertinent part that:

> The history of the formation of the block appears linked to the initial period of the application of the Harrison-Altamirano Treaty agreements in 1917. In this period it was an odyssey for the communal leaders to sail to Bluefields in their fragile *cayucos* to process their land title where the Office of the Property Public Registry was located. In an assembly, representatives of the 10 communities opted to go together in one single boat.[16]

That group of leaders, on arriving in Bluefields, also demanded block title to the land, obtaining 10,000 hectares for agricultural purposes in the forest and another 10,000 hectares for livestock in the plains. Since then, 80 years have passed and that agreement has only been partially complied with. The actual title to the Community only includes the 10,000 hectares in the plains for livestock, while the other 10,000 hectares for agriculture is still pending title.

Since then, the Ten Communities have stayed in block (page 125 of the cited document).

It is important to emphasize—based on the same diagnostic study of the World Bank consultants—that these "Ten Communities" have grown to twenty-one communities, arriving at an approximate population of 26,890 inhabitants of essentially Miskito origin. Based on this growth, they now claim titling not only of the remaining 10,000 hectares (derived from the Titling Commission resolution at the beginning of the century), but also a total of 338,300 hectares (pages 123 and 124 of the cited document). And it is precisely in this claimed area—whose justiciability must be resolved by the State—where a substantial part of the lands claimed by the Mayangna [sic] Community of Awas Tingni are located.

Without in any way prejudicing what the State may decide in relation to the Ten Communities' title request, nor in any way prejudicing which of those claims has

[16] Central American and Caribbean Research Council—CARC—Hale, Charles R.; Gordon, Edmund T.; Gurdián, Galio C.: *General Diagnostic on Land Tenure of Indigenous Communities of the Atlantic Coast. Final Report.* Consultancy Number 084-96. Austin, Texas. *Bluefields and Puerto Cabezas, Nicaragua 1998*. Pages 123-130. See Appendix Number 10.

a firmer legal basis,[17] a simple numeric comparison between the inhabitants of the "Ten Communities" (26,890 persons) and of Awas Tingni (around 600 persons), vis-à-vis the extension of the lands claimed by each one of them, "Ten Communities (338,300 hectares) and Awas Tingni (between 180,000 and 120,000 hectares), suggests a disproportionate claim on the part of the latter.

(g) The surface area of the lands claimed by Awas Tingni is not in proportion with the concept of "communal property" or with the number of Community members.

In previous pages, a series of *sui generis* situations, which, duly contemplated, should persuade the Inter-American Court to submit the communal land titling claim presented by the Awas Tingni Community to a very special analysis. In effect, there is a series of reasons for which the situation is not quite that asserted by the Awas Tingni Community, characterized by a supposed petition for titling of ancestral lands, to which government authorities paid no attention.

i. Procedural matters.

The Awas Tingni Community, in addition to having not exercised its right of petition (to request title to its claimed lands), has carried out an exercise notoriously deficient in this right with respect to contesting the logging concession granted to the lands it claims:

1. To start, remember that when the administrative procedure of granting the logging concession was still pending resolution and the MARENA authorities made the notice public for third parties to contest, the Awas Tingni Community did not formulate any objection to the granting of that concession.[18] According to the legal order of any country, this situation constitutes an act of consent.

2. Once the logging concession was granted to the SOLCARSA company, the Awas Tingni Community was equally passive in not making use of the *amparo* remedy within the time limit established by Nicaraguan domestic law. A grave omission, absolutely imputable to the party seeking recourse, which, with its negligent silence, forfeited the possibility of judicial review of the

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[17] Awas Tingni maintains that since the 1940s it came into possession of "no man's land;" in turn, the "Ten Communities" maintain that this possession is based on a mere tolerance because the Ten Communities are the real ancestral possessors of those lands.

[18] The daily newspapers "La Prensa" and "El Nuevo Diario," both having national circulation, published at the request of Kumkyung Co. Ltd., of which SOLCARSA is a subsidiary, for forest management and use, stating that whoever had the right to oppose that request should do so. Both newspapers published this notice the 17, 18, and 19 of May, 1995. See Appendix Number 11.

administrative decisions of the Government with respect to the concession.

3. Subsequently, and by means of an amparo action through the de facto procedure, it contested the mentioned judicial decision denying the amparo action, but it did so negligently, by not requesting suspension of the contested administrative act. This resulted in a situation that required the Supreme Court of Justice to limit itself to narrowly reviewing the claim as presented by the claimant (Principle of Narrow Judicial Review).
4. While the decision on the amparo action through the de facto procedure was still pending, and having the opportunity to contest the logging concession granted to the SOLCARSA company via an action for unconstitutionality, it did not bring that action either, establishing another hypothesis for negligent exercise of its right of petition (if it is appropriate to speak of any exercise of this right). The Community had to depend on the action of a third party to obtain what it --because of its own stupidity/clumsiness-- was unable to obtain. In this sense, remember what was said in our preliminary exceptions brief: "the obligation to exhaust domestic legal remedies falls exclusively on the petitioner, who, is neither benefited nor cut off from his procedural obligation, by the actions brought by third parties" (page 10).

Successive omissions and negligent acts with respect to procedure do not measure up to the conduct that a party should manifest for the materialization of its procedural claim. Simply, and with respect to the contestation of the logging concession granted to the SOLCARSA company, the Awas Tingni Community did not request nor was it able to request its right.

In this context, the Inter-American Commission's attitude of considering that domestic legal remedies had been exhausted is incomprehensible, and <u>the excessive zealousness of the Commission cannot bring it to supplant deficient and faulty claims by the party taking recourse in its domestic remedies.</u>

With respect to the exercise of the right to petition—for the titling of its communal lands—Awas Tingni's conduct is even more remiss. There has literally not been a single petition for title of those lands. The brief that the Awas Tingni Community was to have written to the RAAN Regional Council (much later than the Inter-American Commission's precipitated intervention) was not directed to the competent authority, and neither did it state with any precision the claim or petition. Requesting that the Regional Council "help it" to replace a normative vacuum is such an absolute ambiguity as to equal an absence of a procedural claim.[19]

[19] Remember our cite in the Preliminary Exceptions Brief of the Argentine treatise author, Santiago Sentís Melondo, who, referring to procedural claims said: "What is asked for is what is claimed, or what is claimed is what is asked for. . .The claim is what the actor

On the other hand, it is an erroneous legal assessment of Awas Tingni to maintain that there is a legal void in Nicaragua law that impedes the titling of indigenous communities. Pursuant to Law Number 14, or the Amended Law of Agricultural Reform, titling of numerous indigenous communal lands was carried out,[20] and this same legal framework is that still in effect.

This peculiar procedure has brought even the national authorities to wonder whether, with such a twisted way of presenting the issue, Awas Tingni—in addition to wanting to provoke a conflict of competencies among governmental agencies—wanted to create the "fiction of a land title petition," the government's inattention of which would induce international tribunals to hurry their intervention in the case, in a proceeding in which the property interests of third persons with legitimate rights or claims over the lands claimed by Awas Tingni would be ignored.

ii. The issue on the merits.

With respect to the issue on the merits and without renouncing the statement that there has been no petition for title before the competent national authorities,[21] the Republic of Nicaragua maintains that the Indigenous Community of Awas Tingni is not accompanied in law with respect to the terms asserted by its complaint; concretely, in respect of the surface area claimed.

And a series of factors evidences the disproportionate character of the communal land claims of this indigenous Community:

1. Firstly, notice is hereby given that in the extension of land claimed, there are other communities holding legitimate property titles that cannot be arbitrarily ignored by the State (situations of "Six Communities" and of the "Karatá Community"). In the same manner, there are other Communities that allege ancestral possession (situation of "Ten Communities"), that—upon confirmation—situates them in a privileged situation to claim title to those lands.

2. The above observation leads to emphasis of the non-ancestral character of the lands claimed by Awas Tingni, a situation which—without prejudice in any way to the justiciability or legitimacy of its claim of communal lands—cannot be ignored by the State.

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claims, what he wants to obtain, and consequently, what he asks for." Page 32.

[20] The list of twenty-nine property titles granted to different indigenous communities on the Nicaraguan Atlantic Coast can be found in Appendix Number 11 of the Preliminary Exceptions Brief.

[21] A fact to which the Republic of Nicaragua assigns transcendental relevance.

3. In the same manner, the necessary relationship must be between the number of members of the Community, and the surface area claimed cannot be ignored by the State. Awas Tingni is a community of very few persons (they say around six hundred persons), resulting from a fragmentation that has moved geographically at different times, that claims lands that are not ancestral in nature and that—partially—belong to other communities that hold legitimate titles or that claim them by alleging real ancestral possession. In that context, claiming a grant of an area of around 150,000 hectares is a disproportionate, absurd, and irrational claim. That area goes beyond—in absolute terms—the subsistence needs of the members of the Community, and all that, based solely on a fanciful and partialized "Ethnographic Study" that did not take into consideration the physical presence of other communities.

4. Moreover, the Awas Tingni Community does not even have the number of members it says it has. A recent official census of the area situates the "locale" or village of Awas Tingni as part of the Miskito Community of Francia Sirpi, with a population consisting of 576 persons, of which only 327 are—in reality—Sumos or Mayangnas [sic].[22]

   In effect, that document reveals that forty-three percent of the alleged population of Awas Tingni does not belong to the Sumo or Mayangna [sic] ethnic group, being of Miskito origin, or Mestizos, or "Spanish." The simultaneous physical presence of these persons does not necessarily presuppose a sense of "belonging" to the Awas Tingni Community. They would have to be consulted as to whether they effectively consider themselves to be a part of this Community and, thus, part of its titling claim; or whether, to the contrary, they consider themselves the ancestral possessors of this land with a separate, independent, and, maybe, preferential right over it. As has been stated above, many elements must still be documented to determine the right of each party, the legitimacy of the claim, and the preferential right that may include.

II. Active violation of the alleged communal property rights of Awas Tingni, derived from the granting of the logging concession to the commercial entity SOLCARSA

(a) The "Forest Use Agreement" signed by Awas Tingni, MADENSA, and the MARENA authorities does not constitute an

[22] As stated in Communication Number DSDG-RMS-Crono-014-10-98, of Ms. Rosario Meza Soto, General Assistant Director of the National Institute of Statistics and Census, dated October 8, 1998, addressed to Mr. Fernando Robleto Lang, Secretary of the Presidency. See Appendix Number 12.

event sufficient to prejudge the legitimacy of the communal property claim of Awas Tingni.

The Awas Tingni Community, as well as the Inter-American Commission on Human Rights, have asserted finding in the "Forest Use Agreement among the Awas Tingni Community, Maderas y Derivados de Nicaragua Sociedad Anónima (MADENSA), and the Ministry of the Environment and Natural Resources," signed June 13, 1994, an early recognition of the legitimacy of Awas Tingni's communal property claim. That claim loses sight of one fundamental matter:

That, in accordance with Law Number 14, Amendment to the Law of Agrarian Reform—the same that, as we have seen, constitutes the legal framework for the titling of indigenous communal property—the competent state institution to receive indigenous title claims, evaluate them, administer resulting conflicts, and to issue the respective property titles is the Nicaraguan Agrarian Reform Institute (INRA), today an agency of the Ministry of Agriculture, Livestock, and Forestry (MAF).

Consequently, the actions of MARENA—because of its lack of competence in the matter—cannot be cited to claim recognition of the legitimacy of any claim of indigenous titling. The precipitation or flippancy of MARENA cannot be invoked to dispossess the INRA (or now the MAF) of the competencies it has been conferred by law.

(b) The logging concession granted to SOLCARSA is limited to areas held as national lands.

The Republic of Nicaragua maintains that the logging concession granted to the "Sol del Caribe Sociedad Anónima" (SOLCARSA) company was comprised solely of lands held as national lands; therefore, the granting of the concession did not constitute "any active violation"—as the Commission erroneously maintains—of the supposed right to property that the Indigenous Community of Awas Tingni alleges.

To understand the above assertion, it is necessary to give some history on what the indigenous communal property titling process has been in the Atlantic Coast and the resulting problems facing national authorities:

In that sense, it must be pointed out that, since the process of titling on the Atlantic Coast began—with the work of the "Titling Commission of the Misquitia (1915-1920)—and later, with the titling processes of the National Agrarian Institute (IAN), of the Ministry of Agriculture and Livestock Development and Agrarian Reform (MIDINRA) and the Institute of Agrarian Reform (INRA), the governmental policy and practice has been to leave "corridors" or "zones of

national property" between the titled indigenous communities. This policy, exists with the objective of not cutting the State off from its Atlantic or Caribbean coasts, and to be able to have national lands at its disposal in order to carry out infrastructure construction in the public interest (roads, power lines, etc.).

Recently, and as a consequence of the population growth of the indigenous communities or as a consequence of their fractionalization, they have increasingly been pressuring to increase the surface area of the lands they have been traditionally using and occupying. This phenomenon creates conflicts of interests inasmuch as, as a result of this claimed area increase, the communities claim lands that, in turn, are claimed by other communities or that are a part of the "national land corridors" that the State wants to maintain between each community.

In this specific case, the national authorities of MARENA granted a logging concession—through a public procedure—in a portion of the land held as a "national land corridor." That is, in an area surrounded by indigenous communities that were titled at different times, as is the case with the Karatá Communities, Eighteen Communities or Block One (to the north), Ten Communities (to the east) and the Six Communities of the Tasba Raya Project (to the west); being incorrect, therefore, the Community's and Inter-American Commission's assertion that the concession affected communal indigenous lands. The exactness of the above assertion is demonstrated by the fact that none of these communities contested the granting of the land concession, precisely because they were conscious of the fact that it fell in a part of the national land corridor between them.

The Awas Tingni Community, it has already been shown, is composed of a small number of persons who separated from larger communities and moved geographically at different times, occupying lands over which they have not had "ancestral use," afterwards asserting claims of communal lands over an area so disproportionate that, were they to prevail, would affect not only the totality of the area held as a "national land corridor" (completely contained in their claim), but also the areas titled to the neighboring indigenous communities or the areas claimed by them, as a consequence of its current interest in increasing its titled surface area.

Stated in other terms: in the national land area or corridor (in a portion of which the State—legitimately—granted a logging concession), a small indigenous community (Awas Tingni) comes forward, claiming for itself the totality of the surface area, affecting with that claim the State and the peripheral indigenous communities that would lose not only the area that would increase its titled surface area, but also the titled surface area itself.

In this way, the smallest community of all, the recent arrival, intends to

appropriate the entire area, affecting the State and the surrounding indigenous communities, claiming, additionally, the "active violation" of its right because of the granting of the forest concession. As if this were not enough, they surprise the Inter-American Commission and induce it to assert claims against the logging concession granted to SOLCARSA (that, in addition to being unjusticiable, were not duly requested, as has been shown), as well as titling claims (that the Awas Tingni Community has not even exercised, if we were to give any value to the ambiguous and confusing petition to an otherwise incompetent organization).

For all of the above reasons, it can be asserted that, if there is an "active violation" of some property right, this would not be due to the granting of the logging concession in question, but rather—to the contrary—it would originate in the claim to lands that the Awas Tingni intends disproportionately and exorbitantly to carry out.

(c) The logging concession granted to the commercial entity "Sol del Caribe Sociedad Anónima" (SOLCARSA) did not result in any harm to said Community.

In its complaint brief, the Inter-American Commission makes ambiguous references to the supposed harm to the forest produced by the concession granted to SOLCARSA, claiming that this issue would have some relevance in the case *sub-judice* [sic]; more concretely, allowing the inference that harm to the forest was produced to the detriment of the Awas Tingni Community with respect to which the State would have to grant reparation. (Pages 45-47.) Subsequently, in its Request for Relief, it specifically requests that the Honorable Inter-American Court, *inter alia*:

> *3. Pay compensatory and equitable damages for the pecuniary and moral harm that the Community has suffered for the lack of specific state recognition of its rights to land and natural resources and for the concession to SOLCARSA.*[23]

The Republic of Nicaragua considers that there is an inconsistency in the Commission's brief, specifically as relates to the explanation of the facts and the obligation to repair their supposedly detrimental effects.

The Republic of Nicaragua does not understand how the Commission can categorically request the reparation of supposed material damages caused to Awas Tingni (as a consequence of the granting of the concession) and, in the same explanation of the facts, recognize that "it is not clear" as to whether the forest was harmed in the areas claimed by Awas Tingni.

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[23] The underlining is ours.

In effect, the Commission says in section 137 of its complaint:

> The extent to which the SOLCARSA logging operations came onto the traditional lands of Awas Tingni is not clear. A report by MARENA, dated August 5, 1997, says that SOLCARSA had still not begun to cut wood within the area of the concession. On the other hand, according to a statement by an Awas Tingni leader of June 11, 1997, he and other members of the Community in months prior saw various trees marked for cutting and already cut down within the southern part of the land claimed by the Community that is in the area of the concession.[24]

If the Inter-American Commission itself recognizes that it is not certain with respect to the existence of harm to the forest which is to the economic detriment of the Awas Tingni Community, this lack of conviction is not transferred to its request for relief, in which it asks—without reserve—that the State of Nicaragua be condemned to repair a harm, the existence of which "is not clear."

It continues its ambiguous explanation, stating that:

> In any case, there are indications that SOLCARSA's logging operations caused harm to the forests and rivers that sustain the indigenous communities in the area, and that, on arriving at these lands used and occupied by the Awas Tingni Community, in particular, they could have caused harm to this Community's forests.[25]

That is to say, the Inter-American Commission loses its perspective on this issue and, in its haste to determine pecuniary responsibility against the State of Nicaragua, it concludes that—"in any case"— this harm was caused to third parties that are not a part of this case as they have not brought any claim against the State, failing to recognize, once again in this case, the secondary nature of international jurisdiction. At the end of its explanation, it once again takes up Awas Tingni's case and again evidences its lack of conviction—as far as the facts are concerned—by using the vague and imprecise language that the logging concession granted to SOLCARSA "could have caused harm to this Community's forests." On this basis, the Government of Nicaragua does not understand how the Commission can emphatically request, and without any evidence, the

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[24] The underlining is ours.

[25] Section 138 of the Commission's complaint before the Inter-American Court of Human Rights, *case of the Mayagna Sumo Indigenous Community of Awas Tingni v. the Republic of Nicaragua*, June 4, 1998.

reparation of harm to the forest caused to the Awas Tingni Community as a consequence of state authorization.

The SOLCARSA company, in effect, caused harm to the forest in the Cerro Wakambay area, which was diligently sanctioned by the governmental authorities, as the Commission itself admits in its footnotes on page numbers 75 and 76, of page 45 of its complaint brief (section 138). Fines that amounted to considerable sums of 50,000 and 1,000,000 (fifty thousand and one million córdobas, respectively).

Further, these fines were based on illegal logging carried on outside of the area of the logging concession granted to that company. That is, on the actions of the SOLCARSA company that constituted administrative infractions and that had no basis and origin in the concession granted by the State. Therefore, the State cannot be made responsible for an action that did not originate with governmental permission (license, contract, concession, etc.).[26] This unilateral action of the SOLCARSA company was sanctioned by a fine of one million córdobas, as shown in Ministerial Resolution Number 02-97 adopted by MARENA, dated May 16, 1997, presented by the Commission itself in its Appendices to the complaint.

To purport that the State of Nicaragua should be made responsible for SOLCARSA's action outside the terms of the concession would be unjust and arbitrary. Having demonstrated extreme diligence in the sanction of such conduct, the State of Nicaragua cannot be made responsible for the harm inflicted by the SOLCARSA company, which, as shown, carried out illegal logging outside the area of the logging concession, acting under its own authority.

On the other hand, and with respect to the area that was concessioned by the State to this company, it is important to emphasize that there was never any logging activity initiated that was attributable to the concession granted to SOLCARSA.[27] The company only carried out marking activities in the concessioned area, without this becoming logging in the proper sense of the word. Therefore, the granting of the concession did not have, nor could it have, any detrimental effect for the simple reason that it was not followed by any logging activity.

In conclusion, the vagaries and in inconsistencies of the Commission in asking that the State of Nicaragua be obligated to provide reparations to Awas Tingni for harm, the existence of which the Commission itself calls into question; the

[26] The Ministry of the Environment and Natural Resources—MARENA—in its communication of September 11, 1998, informed that the fine of one million córdobas applied to the SOLCARSA company for illegal logging in areas not included in the concession granted to that Company. See Appendix Number 13.

[27] As indicated by the Ministry of the Environment and Natural Resources, MARENA. See Appendix Number 14.

evidence that that harm to the forest did not take place in the area concessioned by the State; and the evidence that the SOLCARSA company did not initiate the logging activities under the concession, constitute solid and sufficient reasons to dismiss this reparations petition by the Inter-American Commission. If there were harm caused to the forest, it was not caused as a product of the concession granted to SOLCARSA. It was by actions of individuals, alien to any governmental permission as proven by the severe sanctions to which they were subjected.

IV. Evidence

To support the arguments made in this brief, pertinent documents are attached as appendices, as immediate proof. However, a list of evidence is offered for presentation at a later and appropriate time.[28]

V. Conclusions

In answering the complaint brought by the Inter-American Commission of Human Rights, on the case of the Mayangna [sic] Indigenous Community of Awas Tingni before this Honorable Tribunal, the State of Nicaragua has demonstrated:

1. That there has been no violation of articles 1, 2, 21, and 25 of the American Convention of [sic] Human Rights.

2. As far as the accusation that Nicaragua has not titled the Indigenous Community of Awas Tingni:

    2.1 That since the period of the titling of Mosquitia in 1915, the State had a legal framework and competent agency to receive requests for communal property demarcation and titling from indigenous communities.

    2.2 That the Awas Tingni Community has presented a claim disproportionate to the surface area claimed.

    2.3 That the documents presented by Awas Tingni, supporting the ancestral use and occupation of the lands that they claim, are insufficiently probative.

3. As far as the active violation of the alleged communal property rights of Awas Tingni, due to the granting of logging concession to the SOLCARSA commercial entity, it is shown:

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[28] Appendix Number 15.

3.1 That the "Forest Use Agreement" signed by Awas Tingni, MADENSA, and the MARENA authorities, does not constitute an event that prejudges the legitimacy of Awas Tingni's communal property claim.

3.2 That the logging concession granted to the commercial entity "Sol del Caribe Sociedad Anónima" (SOLCARSA), was indisputably given on national lands.

3.3 That there was no harm to the forest in the area concessioned to the SOLCARSA company.

VI. Petition

For all the reasons explained and shown in this document, its conclusions and evidence, in my capacity as Agent of the Republic of Nicaragua, I respectfully request:

1. That the State be declared not responsible for the violation of articles 1, 2, 21, and 25 of the American Convention on Human Rights.

2. That the petition for reparation for harm to the forest attributed to the concession granted to the SOLCARSA company be declared unjusticiable.

3. That the costs incurred by the Government of the Republic of Nicaragua in this case be recognized.

Edumundo Castillo Salazar

Agent of the Republic of Nicaragua