

HYPOTHETICAL CASE

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

I. Background

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

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

3. Faced with these adverse economic developments, the last two governments of Esmeralda have taken steps to improve education, increase credit for low-income housing, and reform the tax system. They have also put in place a comprehensive development strategy for the exploration and extraction of subsoil hydrocarbon resources as a way to increase income to the economically challenged country. One of n f s 8 (a) y e

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

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

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

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

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

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

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

VI. Administrative and Legal Actions

32. In October 2001, CINE, FELANUMA and the group of forest activists file an administrative petition with MIDESEN requesting that approval of the ESIA's study for the Santa Ana Project be revoked and that the approval process be closed on the grounds that: a) exploration and development of oil resources will permanently undermine the rights of the indigenous people that reside th

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

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

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

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

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

