PRESIDENCY OF THE REPUBLIC
PRESIDENTIAL COORDINATION COMMISSION OF THE EXECUTIVE BRANCH
POLICY ON HUMAN RIGHTS – COPREDEH
Legal Department

The State of Guatemala submits to the Illustrious Inter-American Commission on Human Rights additional information and comments regarding the Precautionary Measure MC-260-07 and comments to the pleadings submitted by the petitioners in the Petition 1566-07 Communities or villages of the Mam and Sipakapense Maya Peoples in the municipalities of San Miguel Ixtahuacan and Sipacapa both in the department of San Marcos

Ref. P-243-2011/DRDVC/HEMJ/cq

February 21, 2011

The State of Guatemala, through the Presidential Coordination Commission of the Executive Branch Policy on Human Rights respectfully appears and declares before the Illustrious Inter-American Commission on Human Rights (IACHR):

1 SUMMARY OF FACTS

1.1 **Notifications:** The State of Guatemala was notified of the communications by the IACHR through diplomatic channels:

a) January 12, 2011, the pertinent section mentions; "(…) it deems important that the State continue meeting and engaging the precautionary measures with all petitioners, including the Multicultural Centre for Democracy (CDP) and Mr. Carlos Estuardo Loarca Solórzano, as well as the mayors of the Municipalities of Sipacapa and San Miguel Ixtahuacan. Likewise the State must submit the comments that are deemed relevant with regards to the pleadings of all petitioners (…) within 30 days (…) especially with regards to the medical assistance being offered to the allegedly affected persons and the protective measures being provided to the persons opposed to the activities of the company, particularly to Mrs. Diodora Hernandez." (Reference: 1/7/2011-MO-5002166), and

b) January 21, 2011, regarding the communications and pleadings of the petitioners (Mr. Carlos Estuardo Loarca Solórzano – Guatemalan Human Rights Strategic Lawsuit Office and Multicultural Centre for Democracy –CDP-) in regards to petition P-1566-07 and the precautionary measure MC-260-07 (reference: 1?21/2011-RS3280063)

1.2 **Petitioners:** As mentioned in the IACHR communications dated January 12 and 21 of this year, it recognise as petitioners and representatives the following: 1. Carlos Loarca, Guatemalan Human Rights Strategic Lawsuit Office; 2. Multicultural Centre for Democracy (CDP); Municipal mayor of Sipacapa, Delfino Felipe Tema Bautista and 4. Ovidio Joel Domingo Bamaca, Municipal Mayor of San Miguel Ixtahuacan.

1.3 **Petition P-1566-07** Residents of the 13 communities of pueblo Maya of Sipacapa that voted against mining activity of the entity Montana Exploradora de Guatemala, Corporation, in the Community Consultation held on June 18, 2005. The 13 communities allegedly being affected are: Tres Cruces, Escupija, Pueblo Viejo, La Estancia, Poj, Sipacapa, Pie de la Cuesta, Cancil, Chual, Queca, Quequesiguan, San Isidro and Canoj.

1.4 **Precautionary measure associated to the petition:** On May 20, 2010, IACHR ruled in regards to the precautionary MC-260-07 in favour of the 18 Mayan communities (Sipakapense and Mam), Tres Cruces; Escupija; Pueblo Viejo; La Estancia; Poj; Sipacapa; Pie de la Cuesta; Cancil; Chual; Queca; Quesquesiguan; San Isidro; Canoj; Agel; San Jose Ixcaniche; San Jose Nueva Esperanza; San Antonio de los Altos; and Siete Platos in Guatemala: "Based on the history of this case IACHR grants a precautionary measure based on the article 25 (1) and (3) of its Regulations to ensure the life and personal integrity of the Communities of the Mayan People (Sipakepense and Mam) of the municipalities of Sipacapa and San Miguel Ixtahuacan in the Department of San Marcos".

1.5 **Application and term:**

a) In the January 12, 2011 communication, there is a 30 day term setup to submit the comments related to the precautionary measure, the deadline is on February 12, 2011, and

b) The Illustrious Commissions' communication requests the State of Guatemala to submit within one (1) month (by February 21, 2011 at the latest) comments they may deem pertinent in regards to the pleadings provided by all the petitioners in Petition 1566-07 and MC-260-07.

The State of Guatemala also requests a ruling regarding the comments and information submitted by Mr. Carlos Estuardo Loarca Solórzano (Guatemalan Human Rights Strategic Lawsuit Office) with regards to the precautionary measure, understanding that February 21, 2011 is the deadline.

1.6 **Reason for the proceeding:** The State of Guatemala submits before IACHR: a) additional information and comments on the Precautionary Measure MC-260-07 and b) comments related to pleadings submitted by all petitioners in the petition (1566-07). In compliance with the obligations and commitments acquired regarding national and international human rights, and in compliance with articles 1, 2, 33, 41 subsection f, 43, 44, 46, 47 and 48 of the American Convention on Human Rights and 23, 25, 26, 27, 28, 29, 30 sections 1, 2, 3, 5, 6 and 7 of the Inter-American Commission on Human Rights Regulations.

2 PRECAUTIONARY MEASURE MC-260-07

Based on articles 25.1, 25.2 and 25.3 of the IACHR Regulation, the State of Guatemala submits additional information and comments regarding the Precautionary Measure MC-260-07.

2.1 Additional information

The State of Guatemala with regards to the IACHR communication dated January 12, 2011 reports:

2.1.1 Engaging the Precautionary Measure with all the petitioners.

a) Regarding the coordination for adoption of the enacted precautionary measure, during 2010, the State of Guatemala held meetings with the initial and the new petitioners;

b) The State of Guatemala, pursuant to its powers, convened on December 16, 2010 a dialogue table with the Municipal Mayors of Sipacapa and San Miguel Ixtahuacan, representatives of the Community Development Council –COCODES- of the 18 beneficiary communities and representative from the competent ministries and executive departments, in order to deal with the situation caused by the mining activity as a whole. As mentioned before to the IACHR Secretariat in the communication dated January 6 Ref: P-20-2011/DRDVC/HEMJ/rv, the dialogue table does not deal exclusively with the precautionary measure or the petition process; however, this forum tries to bring together all the participants in the region, therefore when the right moment comes and based on the schedule, matters regarding the precautionary measure and the petition will be included;

c) The Illustrious IACHR is informed that in continuity of the administrative proceedings suspending mining operations, based on the equal footing principle, on December 14, 2010, a hearing was held on ruling 2784 broadening the scope of ruling 1821 issued by the General Directorate of Energy of the Ministry of Energy and Mines, to the Mayors of Sipacapa and San Miguel Ixtahuacan to hear their comments regarding the basis that justify the grounds to suspend mining operations. (Attached is a non-certified copy of written notices 2049-2010/DRVDC/HM, 2050-2010/DRVDC/HM and of resolution 2784 of the General Directorate of Mines);

d) On December 14, 2010, through written notice Ref. P-2048-2010/DRDVC/HM, attorney Carlos Loarca was notified of the scope broadening of ruling 1821 dated December 10 of the same year by the General Directorate of Mines of the Ministry of Energy and Mines and that a hearing would be held 15 days after the next day of the notification to the mayors, legal representatives of the Mayan Mam and Sipakapense communities of the municipalities of San Miguel Ixtahuacan and Sipacapa. (Non-certified copy is attached);

e) The Municipal Mayors of San Miguel Ixtahuacan and Sipacapa, on January 11, 2011 before the Presidential Commission on Human Rights concluded the hearing convened in the administrative proceedings suspending mining operations, to be submitted to the General Directorate of Mines of the Ministry of Energy and Mines. (Non-certified copy of the related record is attached), and

f) On January 20, 2011, by written notice Ref. P-97-2011/DRDVC/HM/rv, this Presidential Commission on Human Rights, served a copy of the briefs filed by the Municipal Mayors of San Miguel Ixtahuacan and Sipacapa, in which they request the hearing convened within the administrative proceedings suspending mining operations (Non-certified copy of written notice is attached) to be considered concluded.

g) On February 17, 2011 the General Directorate of Mines forwards a detailed report about the latest actions carried out within the administrative proceedings temporarily suspending mining activities, highlighting the requests made by such directorate to the Environmental Management Unit –UGA- of the Ministry of Energy and Mines to obtain copy of the studies of "Assessment of the test conditions and actual water quality at the Marlin Mine" and "Toxic Metals and Indigenous People near the Marlin Mine in West Guatemala: Possible Exposures and Impact on Health", opinion delivered by the Ministers of Environment and Health and Social Welfare about the information supplied by Montana Exploradora de Guatemala, S.A.

Likewise UGA submitted two reports "Assessment of the test conditions and actual water quality at the Marlin Mine and Toxic Metals", requested to COPREDEH (Presidential Commission on Human Rights) to inform if the Illustrious Inter-American Commission on Human Rights –IACHR- had already indicated the exact location of the wells and streams where the alleged contamination exists, at this point the IACHR had not conveyed an answer, however a previous report (Ref. P-1728-2010/DRDVC/HM/RV) showed name and location of some sample locations where the allegedly contaminated or dry wells and streams are situated.

The information submitted by COPREDEH regarding the allegedly contaminated wells and streams was delivered for its analysis to the Ministry of Health and Social Welfare, as well as, the Ministry of Environment and Natural Resources. Finally the Deputy Minister of Health and Social Welfare submitted "Report of Vital Statistics and Epidemiological Surveillance San Miguel Ixtahuacan, department of San Marcos" (official notification Ref. DVA/mp-231-2011), which describes causes of morbidity and general situation along the area surrounding Marlin Mina. With regards to this Report the Deputy Minister of Energy and Mines requested to the Ministry of Health and Social Welfare to specify "if the causes of such morbidity in the population of the communities surrounding the mine are generated by mining activity or not" (non-certified copy of the updated report is attached).

2.1.1.1 Comments

The State of Guatemala thanks the Illustrious Commission for its ruling to include as petitioners the Mayors of the Municipalities of Sipacapa and San Miguel Ixtahuacan, both from the department of San Marcos, as well as the legal status o the other petitioners.

The State also takes into consideration the recommendation of the Illustrious IACHR to meet and engage the precautionary measure with all the petitioners, but it also request in exercise of the principle of good faith that should prevail in the dispute, the good offices of this mechanism of protection of rights to invite Mr. Carlos Loarca from the Office of Strategic Litigation Human Rights in Guatemala to set aside his negative attitude in participating in local forums that the State may set up in order to effectuate the precautionary measure. The previous request is due to the fact that Mr. Lorca pointed out that :"(…) we don't agree with any kind of negotiation (…)" (Attached is a Non-certified copy of email delivered by Dr. Yuri Melini to the presidency of COPREDEH dated January 30, 2011, according to the communication from attorney Carlos Loarca Solórzano).

2.1.2 Medical attention being provided to individuals allegedly injured

The State of Guatemala reiterates the request made in its communication dated October 25, 2010 Ref. P-1,770-2010/DRVC/hemj, in a public hearing before the IACHR on the occasion of the 140º period of sessions in sub-section 4 Execution of Precautionary Measure, page 15, second paragraph, in which: "(…) the State respectfully requests to the IACHR its good offices before the representatives of the beneficiaries to obtain the identification, individualization and determination of each one of the members of the communities, to carry out the health policy and programs in the 18 communities of Sipacapa and San Miguel Ixtahuacan, especially because it is essential to have the consent and participation of each one of the residents and overcome the groundless fear and mistrust towards the State health services which has lead to violent acts in some cases against medical doctors and public health specialists."`

Likewise in the aforementioned report, in sub-section 2 comments from the State to the petitioners, page 6, paragraph second, mentions :"(…) the petitioners provide the statement of Mrs. Adilia Macario of San Miguel Ixtahuacan, about the health ailments of her husband due to mining work; in this regard the State of Guatemala provides medical and laboratory services for the appropriate exams and treatments."

2.1.2.1 Comments

So far the State doesn't have the particulars of the petitioners or beneficiaries' in the matters requested to proceed with the appropriate assistance and medical care to the persons allegedly affected; it only develops the epidemiological profile plan under the supervision of the Ministry of Health and Social Welfare. Accordingly, there is full compliance with the precautionary measure ordered, even extending the limits of persons to benefit from it even without the requested information.

Within the commitments of corporate social responsibility of Marlin I mine, under the administration of Montana Exploradora, S.A., it's in the process of receiving the Permanent Care Centre –CAP- from the Ministry of Health and Social Welfare being built by the company in San Miguel Ixtahuacan with an approximate value of 16-million Quetzals, to which the State will provide with medical personnel, nurse aides and laboratory, medical and surgical supplies and medicines amongst other things.

2.1.3 The protective measures that would be provided to the persons opposed to the company mining activities, in particular to Mrs. Diodora Hernandez

a) Protection to the persons opposed to the company's' activities: The State of Guatemala reiterates that the information included in sub-section 4, Execution of the Precautionary Measure, page 15, paragraph 4º of the state report submitted October 25, 2010 in the public hearing on monitoring measures before the IACHR, on the 140º session states: "The State of Guatemala needs to point out that the beneficiary representatives have limited the action of the State in the execution of the precautionary measure to guarantee life and physical integrity of the members of the 18 Sipakapense and Mam communities, because they have made this process conditional on suspending the current arrest warrants".

Notwithstanding the aforementioned, since June 25, 2010, perimeter protection has been provided to the benefiting communities and the offices of the Multicultural Centre for Democracy (CPD), based on Quetzaltenango.

b) Regarding the situation of Mrs. Diodora Hernandez: Since October 6, 2010 the State of Guatemala, through the National Civil Police, has been providing personal protection with two agents in the manner and form reported in the communication before the IACHR on October 25, 2010.

2.1.3.1 Comments

The State of Guatemala wishes the IACHR to take note that the security and protection of rights to life and personal integrity to the beneficiaries of 18 Maya, Mam and Sipakapense communities have been guaranteed, despite the lack of collaboration from Mr. Loarca, initial representative of the petitioners and beneficiaries of the precautionary measure. In that sense Judge Manuel Ventura is quoted by Augusto Mario Morello and Enrique Vescovi states: "The persons that will have protection should be individualized so the State can provide such protection" (1).

(1) Morello, Augusto Mario and Enrique Vescovi "Provisional and Protective Measures in the American System of Human Rights", Mexico 1st Edition Inter-American Institute of Human Rights 1996. Page 177

In relation to this measure, a series of factual and legal considerations can be put forward:

1. First of all it must be mentioned that the State must adopt the necessary measures to guarantee life and physical integrity of the persons under its jurisdiction, not by rule of the precautionary measure granted in the proceedings, but as a state policy (2).This is illustrated by the case of Diodora Antonia Hernandez Cinto and her family.

2. In any event, this concrete measure deserves a number of considerations in light of the regulation and case law of IAHRS (Inter-American Human Rights System):

a. The State of Guatemala is aware that it is common practice for the protection bodies of the Inter-American Commission of Human Rights to grant this type of measures to the communities, based on the principle that the target group may be the same persons who, although have not been individualized, may be identified according to objective elements (3). Which means, that the beneficiaries should at least be "identifiable and determinable" (4). Therefore, Guatemala is not going to object a priori the request of this specific measure in favour of the 18 beneficiary communities. However, the State wishes to point out that during its development specific points have arisen that have a direct effect on it and require a review by the IACHR.

b. In fact, and by virtue of the procedural status of this precautionary measure, it should be noted that:

i. The petitioners have not individualized the specific addressees of this measure, as it has been done in similar cases where the measures fall on the communities (5);

(2) Remember that by requirement of the American Convention the State assumes general obligations of respect and guarantee without discrimination to all people under its jurisdiction. The IACHR mentions that "(e) article 1.1 is essential in determining whether a violation of human rights under the Convention can be attributes to a State party. Indeed, that article charges the State Parties obligations respect and guarantee fundamental, so that any impairment of rights recognized in the Convention that may be attributed under the rules of law international action or omission of any public authority constitutes an act attributed to the State assumes responsibility in the terms set forth in that Convention". See in the IACHR Case Baena Ricardo and others vs. Panama. Reparations and Costs. Ruling on February 2, 2001. Series C No 72, par. 176.
(3) Hector Fernandez Ledesma, The Inter-American Human Rights Protection: Institutional and Procedural Aspects, IIHR (Inter-American Institute of Human Rights), San Jose; Costa Rica; 2004, page 532.
(4) IACHR, Matter Belfort Isturiz and others. Interim Measures about Venezuela, IACHR Resolution on April 15, 2010. Matter of the Peace Community of San Jose de Apartado. Interim measures about Colombia. IACHR Resolution on November 24, 2000, seventh considering; Matter of Judicial Capital El Rodeo I and El Rodeo II, Provisional Measures about Venezuela.. IACHR Resolution on February 8, 2008, twenty first considering, and subject of the Peace Community of San Jose Apartado. Provisional measures about Colombia. IACHR Resolution on November 17, 2009, sixth conclusion.
(5) Just to note by way of example the provisional measures in the case of the Community of San Jose Apartado, where the Inter-American Commission on Human Rights (IACHR) had to submit individualization parameters of the addressees of the requested measures to the Inter-American Court of Human Rights (Court, Resolution dated November 24, 2000, Provisional Measures requested by IACHR about Colombia. Case of the peace Community of San Jose de Apartado, paragraph 9, sub-sections a, c, I, j, k and n)

ii. It hasn't been specified or duly verified any act that may lead to assume the existence of any threats to the life or physical integrity of members of the mentioned communities that may justify these exceptional measures, and
iii. As it was confirmed by the IACHR in a public hearing held on October 25, 2010 at their branch, there is a clear problem of representation between the beneficiary communities and its common representative, pointing at issues concerning to the handling of the request for a precautionary measure without the knowledge or consultation with members of the beneficiary communities.

c. These considerations have an important effect on the basis of the regulations governing this kind of procedure within the IACHR, and two different consequences can be distinguished:

i. The first one falls on the case load of the petitioners and the issues that the IACHR must consider, and
ii. The second one refers to the nature of the precautionary measure, in other words, the presence of requirements of extreme urgency and seriousness to avoid irreparable harm, in this case to the life and physical integrity of the members of the mentioned communities.

d. The provisions in article 25 numeral 4 of the IACHR Regulation have not been met, it reads; "The Commission will consider the seriousness and urgency of the situation, context, and the imminence of the harm in question to decide if any apply to a state to adopt precautionary measures." It also states that the IACHR will also have three considerations, namely:

a. "If you have reported the risk to the relevant authorities or reasons that could not have done."

In this case there is no complaint for any act that may be presented as a threat to life or physical integrity of the members of the communities. This is not a small matter, unless you think the IACHR took almost three years from the time of the alleged events to grant the measures.

We also have to ask ourselves why, faced with lack of international protection, why did the petitioners not used the current local resources available to face the grave and imminent dangers of suffering irreparable harm? Like legal protection and precautionary measures. If local resources were available for the petitioners –in fact they've tried it when they claimed their allegations related to the consultations of the mining project with the communities, obviously they were in no danger of suffering irreparable harm.

Although the IACHR initially issued these measures upon a lack of answers from the State the fact is that as stated by the court (6) "The lack of response from the State does not necessarily imply the grant of provisional measures, since, under the Convention and Regulations, the procedural burden of establishing a prima facie case of extreme seriousness and urgency of avoiding irreparable harm rests with the applicant who, in this case is the Commission." This must be understood, mutatis mutandi (by changing those things which need to be changed), to the petitioner in this case. After submitting both reports and a hearing being held in that regard, the IACHR has to fulfill such statement in its own regulation and consider the attitude of the petitioners internally to grant the measures.

> b. "Individual identification of potential beneficiaries of precautionary measures or grouping to which they belong."

How can they require the Government of Guatemala to fulfill a measure requested against alleged specific events that require specific measures if they don't know who the addressees of the special protection are?

At this stage in the proceedings the petitioner should provide that information, remembering with emphasis that sub-section 8º of article 25 mentions that "The Commission may require relevant information to interested parties on any matter related to the grant, enforcement and validity of measures. A material breach of the beneficiaries or their representatives to these requirements may be considered as grounds for the Commission to rescind its request to the State to take protective measures".

In this same order of ideas, the complete lack of determination of the beneficiaries and the impossibility to identify them, generated by the lack of concrete facts that may have put the life or physical integrity of any member of the community at risk, producing uncertainty for the Government as the controls to fulfill this imposed obligation turns arbitrary by the IACHR.

Its important to highlight the cases of Diodora Hernandez Cinto and Miguel Angel Bamaca Mejia, who have been individually identified for their protection, as a result of their situation being highlighted by the United Nations and alerts issued by international human rights organizations. In both cases with the knowledge of their cases the State took the necessary steps to protect their lives and physical integrity.

(6) American Court of Human Rights, Case Belfort Isturiz and others. Interim measures respect of Venezuela. Resolution American Court of Human Rights April 15, 2010, 5th conclusion.

Another matter of vital importance to the fulfillment of the measure granted is the lack of precision and individualization of the persons that allegedly are sick due to the activity of the mine and the water sources allegedly contaminated; issues that should be addresses, monitored and followed up on.

> c. "The express consent of potential beneficiaries when the application is submitted to the Commission by a third party, except in situations where lack of consent is justified."

The problems of representation acknowledged at the hearing of November 25 are quite clearly related to this prerequisite. Consequently, said consent must be obtained, since the exception provided for in the regulations does not apply, since it has been demonstrated, a situation of applicable defence cannot be found.

This invalidity of the doctrine deepens when dealing with indigenous communities, where free, prior and informed consent of any action that may affect their status must be present to ensure full protection of their rights.

In conclusion, on this point, there are several failures to the IACHR regulations by the petitioners, which consequently require review of the specific measure under analysis.

e. There is no evidence of compliance with the requirements of seriousness and urgency

> i. Its common knowledge that in the development of preventive activity of the Inter-American System bodies referred to measures that protect the right to life and physical integrity, it's been observed that they act on concrete facts like consummated crime of murder or attempted murder, stalking, threatening acts, or at least the presumption of the possibility of occurrence of events that may threaten these rights in a specific context.
> ii. In this particular case, and as argued , the lack of information about concrete cases in which seriousness and urgency are reflected, as could be the occurrence (or at least the risk) of irreparable harm to life and physical integrity of the beneficiaries, has a substantive effect in the validity of this measure.
> iii. The conditions of: i) "extreme seriousness", ii) "urgency" and iii) that try to "avoid irreparable harm to people", not only should they be coexistent, but they should also persist all the time if the order is to remain in force. As mentioned by the Inter-American Court of Human Rights, "If one of them has lapsed, for the Court to assess the relevance of continuing with the protection ordered." (7)

iv. Regarding this measure there is no evidence of compliance with the requirement of seriousness since there are no events that endanger the basic rights, as in this case are, the life and physical integrity. With the exception of Mrs. Hernandez Cinto and Miguel Angel Bamaca Mejia, previously mentioned, there are no other cases reported.
v. There is no evidence, of compliance with the requirement of urgency either, since the events date back to 2007, the IACHR brought up the precautionary measure 3 years later, without any attempt or situation that would indicate the fulfillment of the requirement for immediacy by article 25 of the IACHR Regulation.
vi. With regards to irreparable harm, there is no evidence that allows predicting this outcome. To this end, a prima facie case must demonstrate that the recipients of this measure are suffering this type of harm (8). It should bring up article 30 sub-section 4º of the IACHR Regulation that while processing the petitions cautions that "In serious or urgent cases or where it is deemed that a person's life or physical safety is in danger or imminent, the Commission asked the State to a more prompt response, using for this purpose the means it deems most expedient", which has not happened in this case.
vii. Therefore, from the IACHR procedural attitude, the extended time to process a petition and the attitude of the petitioners who despite this delay did not request any kind of internal resource (injunctions or internal precautionary measures), the State of Guatemala considers it evident the lack of seriousness and urgency to avoid irreparable harm.

Consequently, as there is no evidence of compliance with the requirements of origin for the precautionary measure and under the provisions of article 25 of the IACHR Regulation, the State of Guatemala considers that this precautionary measure must be declared null and void.

f. In the cases of Mrs. Diodora Antonia Hernandez Cinto and her family, as well as the case of Miguel Angel Bamaca Mejia:

The State considers them as the only specific set of events they have knowledge of and cannot be tried by the IACHR because the State is fulfilling its obligations diligently, and therefore is submitting these additional statements:

(7) American Court of Human Rights, Subject Haitians and Dominicans of origin Haiti in the Dominican Republic provisional measures for Dominican Republic. Resolution Inter-American Court of Human Rights July 08, 2007, 18th Conclusion.
(8) Include quote as example the resolution on subject Belfort Isturiz and other matter, interim measures respect of Venezuela. Resolution American Court of Human Rights April 15, 2010, where the seriousness and urgency where found imminent, the lack of evidence on irreparable harm was enough for the Court to dismiss the request for precautionary measures.

i. As stated by the Court, "It is responsibility of the State to adopt security measures to protect all persons subject to its jurisdiction (9)". As mentioned before, this directive is fulfilled by the State of Guatemala without the need of a precautionary measure issued.
ii. In the case of Mrs. Diodora Antonia Hernandez Cinto and her family, who where victims of a criminal offense on July 7, 2010, the State took over the coordination for their protection, as it was informed with timeliness. This is a specific case identified by the IACHR and cannot be used as a parameter for the issuance of a generic measure of this nature, as it is an isolated event of a crime under investigation, this could only be attributable to the State if it didn't comply with the obligations required within the American Convention which include prevention, investigation and penalty, which is not the case (Non-certified copy of the investigation proceedings of the Prosecutors Office is attached).
iii. On August 6, 2010 the Presidential Commission made a monitoring visit to Mrs. Hernandez Cinto, she mentioned she had problems with the Development Council of her Community who tried to force her to sell her land and in one occasion was threatened by the president of COCODE who showed her a machete, Mrs. Hernandez immediately after spoke with a junior officer in San Miguel Ixtahuancan to report the event 9see State report dated October 22, 2010 Ref. P-1770-2010/DRVC/hemj).
iv. In the case of Mr. Miguel Angel Perez Bamaca, who was being followed and stalked in 6 occasions: a) on July 14, 2010 at around 21:45 hours two unknown individuals went by his house shooting, b) on August 11, 2010 at 23:55 three unknown individuals were across his house, c) on August 12, 2010 in the evening hours he observed 7 individuals at the back of his house, one of them shot at his house, d) on August 24, 2010 at 11:00 am 2 unknown individuals were peering to watch his house when Mr. Bamaca found them they left his place in a motorcycle, e) on August 31, 2010 at 10:30 am an unknown individual came to the front of his house with a camera, he was taking pictures at his house from the second floor of the school for about 10 minutes, f) on September 09, 2010 during the night three individuals dressed in black were watching his house (Non-certified copies of the reports submitted are attached) .
v. When mentioning these cases, they cannot be the basis to keep the measure in place, it should..

(7) American Court of Human Rights, Subject Digna Ochoa y Placido et al, Provisional Measures. Resolution American Court of Human Rights of November 17, 1999, seventh conclusion; Constitutional Court Case, Provisional Measures. Resolution of the Chairman of the American Court of Human Rights of April 07, 2000, 9th conclusion; and Constitutional Court case, Provisional measures. Resolution American Court of Human Rights of August 14, 2000, 9th conclusion.

…only be done based on the considerations of the Court HR, which states that "What is decisive is whether a particular violation of human rights under the Convention has taken place with the support or acquiescence of the government or whether it has acted in a way that the violation occurred. In short, the question is whether the violation of human rights resulting from the breach by a State of its duty to respect and guarantee those rights, as required by Article 1.1 of the Convention"(10).
vi. Also keep in mind that "the State has a legal duty to prevent, reasonably, the violations of human rights, to investigate with the means at its disposal the violations that have been committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and to ensure the victim adequate compensation"(11). But this is not an obligation of results. As it has been stated by the Court HR, this legal duty of prevention "includes all those measures of legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations thereof are effectively treated as illegal and as such impose punishment and to ensure the victim adequate compensation. (…) Clearly, in turn, the obligation is to prevent the means or behaviour and not prove the failure by mere fact that a right has been violated" (12).

In brief on this subject, the State acted responsibly with the investigation regarding the criminal acts carried out, fulfilling all the pertinent obligations that arise after the crime and taking appropriate measures to protect the victim. Therefore, these isolated events that show the correct actions of the State, cannot according to the IAHRS case law, be included in the jurisdiction of the Court HR in this case (Non-certified copy of record of request for protection and reports from the Ministry of the Interior on the protection provided to the victims).

2.2 Additional Information

The State, regarding the communication dated January 21, 2011, and on the statements and pleadings expressed by Mr. Carlos Loarca in his communication dated December 24, 2010 before the IACHR Executive Secretary, reports:

That in the communication dated January 6, 2011 Ref: P-20-2011/DRDVC/HEML/rv, the Presidential Coordinating Commission of the Executive Branch Policy on Human Rights

(10) Court HR, Subject Velasquez Rodriguez vs. Honduras. Ruling of July 29, 1988 Serial C No. 4, paragraph 173
(11) Court HR, Subject Velasquez Rodriguez vs. Honduras, cit. paragraph 174
(12) Court HR, Subject Velasquez Rodriguez vs. Honduras, cit. paragraph 175

informed to the illustrious Executive Secretary of IACHR, the installation of a dialogue table with the Municipal Mayors of Sipacapa and san Miguel Ixtahuacan, both municipalities of the department of San Marcos, the representatives of the Community Development Council – COCODES- of the 18 Sipakapense and Mam communities and competent representatives of the ministries and executive departments.

It was also explained that this mechanism doesn't respond exclusively to the precautionary measure and/or the petition, but to the need to address as a whole the mining activity in the region and offer to all municipalities involved the conditions to establish benefits for their communities in such a way that it doesn't establish a friendly settlement procedure, as stated by the lawyer Lorca in his Internet blog (13). They also informed that the dialogue table has met twice on December 16, 2010 and January 24, 2011, and will continue to meet with clear objectives.

2.2.1 Comments

The State of Guatemala submits its comments to Mr Loarca's communication referred to above:

a) Mr Loarca has not respected the principles of non-disclosure, confidentiality, good faith and loyalty among the parties dealing with the processing of the precautionary measure before the Inter-American System, and refers to an allegedly campaign against him by representatives of the mining company. In that regard, the State respectfully considers that if Mr. Loarca feels his dignity and honour have been hurt, he could operate at the jurisdiction of the national justice to assign responsibilities that representatives or spokesmen of the company might have committed, this is the reason why the illustrious **Commission should not assess the arguments expressed in the precautionary measure procedure.** The State argues that the dispute of Mr Loarca does not meet the principle of good faith and non-disclosure of the procedure because he is using his blog http://pluriculturalidadjuridica.blogspot.com to talk about his arguments and information provided. Is the opinion of the State that the precautionary measure is granted to the beneficiaries and are handled in a confidential way, in order to avoid the over exposure of the beneficiaries to the protection.

(13) http://pluriculturaljuridica.blogspot.com/2010/01/ahora-somos-3-los-representantes.html

b) Moreover the State of Guatemala considers that Mr. Loarca is not in compliance with the principle of good faith and loyalty between the parties, which provides that all parties should seek the truth, when he states that: a) there is serious pollution and diseases, in response the State considers that they have not been confirmed despite the studies carried out, by the State as well as the petitioners; b) with regards to the seizure and aggravate seizure of the Maya and Sipakapense land authorized by the Ministry of Energy and Mines, under the premise that the land where the Mine operates belongs to the municipality and the neighbours of Sipacapa, the State mentions that they could have requested any internal resource to claim their property and consequently reverse the granting of the mining license being authorized "to safeguard the rights of third parties", with this assertion Mr. Loarca again deals with the merits of the petition; c) submits arguments ad hominum against the Municipal mayor of Sipacapa, COCODES of both municipalities and the presidency of the presidential Commission (COPRODEH), in a clear attempt to discredit and disqualify them. Although the burden of proof is with the State, until this point there are no indications or elements that may confirm such seriousness and urgency, regarding the precautionary measure again he also aims to discuss issues related to the merits, in contradiction with article 25.9 of the IACHR Regulation. All of this has been widely disseminated by the attorney Carlos Loarca.

c) Mr. Loarca questions the representation and legitimacy of the Municipal Mayors considering that they cannot become representatives of the petitioners as they are part of the State. In this regard, the State of Guatemala considers that there is Inter-American jurisprudence that upholds the actions by the authorities or institutions of the State, as is the case of the Ombudsman of Guatemala or the Institute of Public Criminal Defence, who also assist the alleged victims or individuals under the guardianship of the mechanisms of protection of the Inter-American system, but above all the State of Guatemala:

i. The IACHR on ruling in respect to the other bodies involved respects the customs and traditions of the people of San Miguel Ixtahuacan and Sipacapa. The State of Guatemala, respectful of the traditions of each community, as it couldn't be otherwise, as more than 60% of its population includes native peoples, fears that on this issue the representation of Mr. Loarca and the Multicultural Centre for Democracy might not be coherent with the case law of IACHR or the Court HR.
ii. The case law has acknowledged there are other rights under the IACHR that have special characteristics when dealing with members of indigenous peoples or communities. So much so that, the land ownership, the consultation, the political rights, etc., are in one way or another, determined by the special relationship of some indigenous peoples with their ancestral lands, traditions, leaderships, etc., which some times may place community priorities before individual concerns.

iii. Taking into consideration the aforementioned leads to the subject of representation, that it has not been properly informed by the IACHR, involving a violation of the right to defence of the State of Guatemala (for delaying their answer).

iv. In order to demonstrate this element, it is worth remembering that the American Court of Human Rights in the case of Village Saramaka "deliberately omitted any specific consideration regarding who should be consulted. Stating that the consultation should be "in accordance with their customs and traditions," the Court recognized that the Saramaka, and not the State, must decide on who might represent the Saramakas in each consultation process mandated by the Court" (14).

v. The above should be applied not only to the State but to all parties in a proceeding of this characteristics; this implies that neither the IACHR, Carlos Loarca, nor any other person or organization of the civil society can tell the members of the Maya communities of San Miguel Ixtahuacan and Sipacapa who is going to represent them and how. And if according to its internal organization, such representation should fall on the mayor and his Community Development Councils, it should be respected.

vi. As the Court stated in its first ruling on Saramaka case, individuals or groups of people who do not constitute the community in the full sense, may be part of the proceeding, let it be. Let each one represent their constituents. But take into consideration the legitimacy of each one when hearing "the voice of the people". Especially, and this concerns the State of Guatemala in particular, if a friendly solution is reached in this particular case, as it would not be good for anybody that some individuals would hinder the negotiations and solutions for many, for whatever the reasons were, but particularly because their representatives are a small group within a much larger community.

d) The petitioner and representative of the Human Rights Strategic Lawsuit Office and Multicultural Centre for Democracy, state that the mining company is operating illegally and that the company and the State are violating systematically the precautionary measure granted. In regards to this comment and allegation, the State would like to indicate that Mr. Loarca is attempting to surprise the Illustrious Commission by stating that the mining company is operating illegally in the country, which is completely false, since Montana Exploradora de Guatemala has demonstrated it has fulfilled al the requirements set by national laws.

(14) Court HR, Case of Village Saramaka vs. Surinam, Judgement of August 12, 2008, Interpretation of the Judgement on Merits Reparations and Costs, Serial C 185, paragraph 18.

e) In regards to the "systematic violation" stated by the petitioner, we would like to point out that since the request for a precautionary measure, the State, in observance of the pacta sunt servanda (agreement must be kept) principle, it has designed procedures to ensure its effective implementation but at the same time has encountered attitudes from Mr Loarca similar to the ones detailed in the comments sub-sections 2.1.1.1, 2.1.2.1 and 2.1.3.1 of this report, preventing the adoption of some of the measures requested.

f) In regards to the legislation and jurisprudence base of the protecting bodies of the Inter-American Human Rights System (IAHRS) the State of Guatemala considers appropriate to highlight, first, that by complying with the objectives stated by the measures the title holding aspect that such measures requires has been covered and complied with. The State of Guatemala has been a member of the Inter-American Convention since November 22nd, 1969. This ratification means that, under the law of the Inter-American Court of Human Rights, Guatemala must fulfill, "for all persons under its jurisdiction, general obligations to respect and ensure the full enjoyment and exercise of rights that are imposed not only in relation to the state power but also against actions by third parties. From these general obligations deriving special duties, determined according to the particular needs of protection of the subject of law, either by personal status – or the specific situation in which they may find." (15). In this case, the State has accepted these obligations in a serious and effective manner (16), taking special consideration of the beneficiaries of such measures – members of the indigenous communities. They have received deserved consideration in this case, according to the IAHRS case law, examples of which can be seen throughout the information provided.

g) Regarding the protective jurisdiction of the Inter-American protection System bodies, specifically IACHR, the State has acted in the belief that:

> i. "…the international Law of Human Rights provisional measures are not only precautionary in nature, in the sense that they preserve a legal situation, but also fundamentally protective, because they protect human rights, to the extent they seek to avoid irreparable harm to people. As long as they meet the basic requirements of extreme seriousness and urgency of preventing irreparable harm to people. In this way the measures are transformed into a truly preventive security court." (17).

(15) Court HR, case Massacre of Pueblo Bello vs. Colombia. Reparation and Costs. Judgement of the Court January 31, 2006. Serial C No. 140 paragraph 111 and Court HR, case Alban Conejo and others, reparation and Costs. Judgement of the Court November 22, 2007. Serial C No. 171, paragraph 120.
(16) Court HR, case Sisters Serrano Cruz vs. El Salvador. Preliminary exceptions. Judgement of November 23, 2004. Serial C No. 118, paragraph 65; case Carpio Nicolle and others vs. Guatemala. Reparations and Costs. Judgement November 22, 2004. Serial C No. 117, paragraph 129; case Massacre plan of Sanchez. Reparations and costs. Judgement of November 19, 2004. Serial C No. 116. paragraph 98; and case Tibi. Preliminary Exceptions, Reparations and costs. Judgement of September 7, 2004. Serial C No. 114. paragraph 258.
(17) Court HR case Mendoza Penitentiary. Provisional measures. Court Resolution of march 30, 2006, fourth conclusion; case Region Capital Yare I and II Penitentiary. Provisional measures. Court resolution of March 30, 2006, fifth conclusion; and case of the Paz de Jose Apartado Community. Provisional Measures. Court Resolution of March 15, 2005, fourth conclusion.

ii. It is with this knowledge that the State of Guatemala has been working to comply with the objectives set by the precautionary measure. We should mention that "…interim measures are exceptional, and given in accordance with the needs of protection and, once ordered, must be maintained while the Court considers that the basic requirements of extreme seriousness and urgency of preventing irreparable harm to the rights of persons protected by them" (18).
iii. The criteria summarized holds great importance in the development of this report, as it seeks to demonstrate that the State of Guatemala has acted with total compliance to the standards of the Inter-American System originated from the Inter-American Court of Human Rights case law.
iv. Likewise, mentioning such parameters brings up the undeniable fact that they are not only enforceable to the State as a passive subject of the international relationship, but that it should be complied by all the parties in the proceeding, the representatives of the victims and the Court itself as grantor of the measures.

h) Again the State is grateful for the recommendation of the IACHR to continue meeting and engaging the precautionary measure with all of the petitioners. This procedure offers better support for the installation and development of the dialogue table for a comprehensive approach of the mining problems.

i) The President of this Presidential Commission on Human Rights has never acted in bad faith and will never strengthen the impunity mechanisms as pointed out in a malicious and biased way by Mr. Loarca, as the Illustrious Commission may remember in the report of December 7th, 2010 Ref. P-2037-2010/DRDVC/HEMJ/cq and later in the communication of January 6th, 2011 Ref. P-20-2010/DRDVC/HEMJ/rv, requested the IACHR to rule on the legal status of the Municipal Mayors of Sipacapa and San Miguel Ixtahuacan, on the precautionary measure as well as the petition.

j) The state of Guatemala welcomes recommendations made by other conventional and non-conventional institutions with regards to engaging in consultations with indigenous people and other universal rights and liberties. However it is important to point out:

i. The State considers that once again that the petitioner and the representative of the beneficiaries **are turning their attention to the most important issues and implicitly accept the presence of international litispendency …**

(18) The HR Court Case Ramirez Hinostroza and others. Provisional measures respect to Peru, resolution July 4, 2006, fourth conclusion.
(19) The Court has stated that treaties, conventions and declarations of Inter-American system of human rights are the main source of obligations of States in this matter and determine, in turn, the parameters of legality to the Commission to be supported. See in HR Court. Control of legality in the exercise of the powers Inter-American Commission on Human Rights. Articles 41 and 44 to 51 of the IACHR. Advisory Opinion OC-19/05 of November 28, 2005. Serial A No. 19, paragraph 22.

…situation that the State respectfully requests to be taken into account by the Illustrious Commission to determine if this case or Petition 1566-07 has been submitted before the ILO or some other body of the United Nations System. Additionally, as it has been already reported, the Government of Guatemala is in the process of preparing a mechanism that will make possible the effective application of right of consultation by the indigenous people within the ILO Convention 169. This proposal has already been reviewed by the ILO Standards Committee, the UN Reporter for indigenous peoples James Anaya, the UN Office of the High Commissioner for Human Rights in Guatemala and soon to be reviewed by the representatives of indigenous peoples of Guatemala.

ii. The measure ordered by IACHR requests "Suspend the Marlin Project I and other activities related to the concession granted to the company Goldcorp/Montana de Guatemala, SA, and implement effective measures to prevent environmental pollution, until the Human Rights Commission adopts a decision on the merits of the petition associated with this request for precautionary measures". Of all the measures, this first measure is the most broad and burdensome for the State. Next we review why it should be lifted immediately by IACHR or at least modified:

1. **The measure ordered by the IACHR is not a precautionary measure but a reparative measure, characteristic of an in depth report**, as the alleged right of which the measure aims to protect has no connection with what is being claimed in the Petition. Within the frame of this international proceeding, it can be noticed that the measure ordered by IACHR is a reparatory measure characteristic of an in-depth report, not a specific precautionary measure. As it stands, the State of Guatemala considers that the actions of IACHR are contrary to the jurisprudence of the Inter-American Court that prohibits prejudging over the merits of the dispute. In this sense the HR Court has stated that "the granting of interim relief, by its very purpose and legal nature, ban not, under any circumstances, prejudice to the merits of the case" (20).

(20) Court HR, Constitutional Court Case, Resolution of the Chairman of the American Court of Human Rights of April 7, 2000, conclusion 12.

a. We can infer, from the above quote that these types of measures should be to protect a fundamental right and would prevent its violation, but not ruling on the merits of a violation claimed by interim relief, let alone when the alleged right that the measure aims to protect has no connection with what's being claimed in the Petition. As is the case of the request to "Suspend the Marlin Project I and other activities related to the concession granted…" since by itself already prejudges on the merits of the alleged contamination, having found no signs of it.
b. Is that, in fact, in Petition 1566-07, associated to this precautionary measure, claims the violation of the Right to Consultation of Indigenous Peoples in relation to the operation of the mine, which is necessarily prior to the start of activities. Conversely, the precautionary measure issued by IACHR on May 20th, 2010 refers to events that took place after the concession granted to Montana in November 2003.
c. Therefore, the issuance of a precautionary measure makes no sense 7 years after its alleged violation, if before 2003 to May 2010 – when the precautionary measure was issued, the right allegedly threatened and worthy of such measure – the alleged violation of the right of consultation – have remained invariable. So, in addition, any arguments submitted to address the issues that may result from the concession, as stated by the HR Court in this first measure, would correspond to the associated petition, not by interpretation of the State of Guatemala, but by the rule of law that regulates the activities of the Commission (21), and of the interpretation of how the agencies of protection have dealt with them (22).

(21) Article 25, subsection 9 of the Court HR Regulation: The granting of such measures and their adoption by the State shall not constitute prejudgement on the violation of rights protected under the American Convention on Human Rights and other applicable instruments.
(22) The Court HR has stated that: "the Court can not consider the merits of any argument that is not those that relate strictly to the extreme seriousness and urgency and need to avoid irreparable harm to people. Any other matter can only be brought to the attention of the Court in a contentious case or at the request of advisory opinions (Court HR Case James & Others, Provisional Measures respect to Trinidad & Tobago, resolution August 29, 1998, Sixth Conclusion; Case Judicial Internship Capital El Rodeo I and El Rodeo II, Provisional Measures respect to Venezuela, resolution February 8, 2008, Tenth Conclusion and Case Globovision TV Station, Provisional Measures respect to Venezuela. Court HR Resolution November 21, 2007, Fourteenth Conclusion.

d. In summation of this Section, the State of Guatemala emphasizes that there is no direct connection between the suspension on mining activities and a consultation already performed, in the sense that the suspension set out will in any way prevent greater harm to the allegedly violated right, nor will it avoid the continuation of such violation, if it had been true, the violation would have already been consummated in the past.

2. **A precautionary measure cannot be a penalty nor resolve the merits in advance.**

a. Based on what is being argued, the State notes with concern that the "precautionary measure" to close the Mine seems more like an advance penalty rather than a precautionary measure, while it could be recommended by IACHR or ordered by the American Court of Human Rights in a definitive decision, it could never be subject of a provisional measure.
b. If the measure pretends to protect rights that could be violated by the alleged contamination that Marlin Mine would generate, why did the IACHR issue the suspension of "other activities related with the concession granted to the company?", if in the process, the State has shown with their own and independent studies, that the waters are not contaminated. This broad filing is puzzling to the objective observer: Is it that any activity of the Company can potentially breach the allegedly violated rights? Clearly it doesn't, and because of that, the measure is out of proportion, aimed to sanction the State in advance.
c. We should be reminded, as it has been done likewise with the case law referred to pre-trial detention as a precautionary measure, which can never be a penalty advance (23), and that this is occurring in this particular case with the order suspending mining operations indefinitely. But this suspension order is outright illegitimate because if the activities are required to stop "until the Human Rights Commission adopts a decision on the merits of the petition associated", that will imply denaturing the institute of precautionary measures, remembering also that the Petition whose merits must be decided by IACHR was submitted en 2007.

(23) See HR Court, Case Lopez Alvarez, Ruling February 1, 2006 Serial C No. 141, paragraph 69; HR Court Case Garcia Asto y Ramirez Rojas, Ruling November 25, 2005 Serial C No. 137, paragraph 106; HR Court Case Acosta Calderon, Ruling June 24, 2005, Serial C No. 129, paragraph 75; HR Court Case Tibi, Ruling September 7, 2004, Serial C No. 114, paragraph 180; HR Court case Suarez Rosero, Ruling November 12, 1997, Serial C No. 35 paragraph 77.

d. Manuel Ventura Robles (24) judge of the HR Court said that "it is worrying that it reaches denaturation of the provisional measures, for two reasons: a. For their indefinite durations (…); (and) b. (because of the attempt) to resolve the merits of the case through provisional measures. The provisional measure must ensure status quo of a fundamental right, but not resolve the merits of (the case)".
e. It is evident that in this case the measure provided by IACHR seriously affects the legality of the procedure. The precautionary measure tries to solve the merits when the appropriate procedural instruments for that is the petition. That way, IACHR undermines the legal certainty that the State of Guatemala is entitled to.

3. **The precautionary measure issued by IACHR is disproportionate and fails to comply with the parameters of proportionality and reasonableness set out by the Inter-American Human Rights System (IAHRS).**

a. All precautionary measures, including the ones issued by IACHR, must respect the proportionality principle, as they are interventions on the scope of legitimate autonomy of an entity – person or state – by a power with the authority for surveillance and control over them. This principle that has been frequently used in the IAHRS (25), demands that, as a restrictive autonomy measure, should only be applied when it is objectively necessary, and be proportionate to its objectives as long as there are no other means less restrictive and burdensome of the fundamental rights of all parties (not only the communities) to fulfill such purposes.
b. The State of Guatemala considers that the measure granted by IACHR is disproportionate in three aspects:

(24) Ventura Robles, Manuel "The American Court of Human Rights: Permanent Court Road", The future of American Court of Human Rights", ACHR – UNHCR ACNUR, San Jose, 2003, Page 150
(25) HR Court Case Castañeda Gutman vs. Estados Unidos Mexicanos, Ruling August 6, 2008, Serial C No. 184, paragraph 149. See also HR Court Case Yatama vs. Nicaragua Ruling June 23, 2005, Serial C No. 127 paragraph 184.

i. Firstly, there is a lack of connection between the closure of the mine (purpose of the measure) and the violation of right of consultation (purpose of the petition). Therefore, the measure can not be held until the merits of the case are settled. There is nothing to prevent even in the hypothetical case that the State of Guatemala was condemned, the reparations that would correspond would be the compensation for the alleged lack of consultation. There is neither imminence to prevent nor seriousness to cease.

ii. Secondly, there is a disparity in connection with the term of the measure, because the term of the suspension of activities in Marlin I mine set by IACHR ("until it adopts a decision on the merits of the petition") has nothing in common with the reality that the time period for processing individual petitions before the Commission is usually too long in time (26). This circumstance has to be taken into account, as in real terms, what looks as a "suspension" hides – aware of the issue raised – a permanent closure. And so, it would distort the object and purpose of the precautionary measure. As the prestigious Supreme Court of Argentina recently said, in an argument that might be possible to extrapolate, should the precautionary measure remain until there is a pronouncement on the fundamental issue, it could reach a situation of imbalance. In fact, if the ruling on the fundamental issue is delayed too long, the plaintiff would be allowed to put forth an exception for the mere passage of time for implementation of the contested regime, a similar result would be achieved in the event of welcoming his fundamental complaint here (…). For this reason, we should not only consider the irreparable injury of the petitioner of this measure, but also the defendant, who could be irreversibly affected if the proactive resolution is maintained "sin die", from which it derives that the change of status in fact or by law should be addressed with restraint"(27). The term of the measure must be strictly necessary to ensure the purposes pursued by it. The questions that beg to be answered right now are: Is the term period being used for the precautionary measure by IACHR necessary or indispensable? And, are there any other more convenient alternative means to the proposed purpose and regulated right? If the answer is no, it is not indispensable, is not necessary, since there are other measures in a democratic society that respect the rights on the table and can be used to comply with the purpose, the result is that the measure is unreasonable and should be considered unconventional. This analysis has been used by IAHRS (28).

(26) It has been suggested that "the delay processing cases by the Inter-American Commission is fully recognized by the States, by civil society and by the same Commission. As an example, the resolution of cases by the Commission to the American Court in 2006 and 2007 had an average process time of 8.2 years from the submission of the petition before IACHR until it was submitted to the Court; and an average term of 4.8 years from the submission before IACHR until the issuance of the eligibility report. If we evaluate the delay of those Petitions not resolved by IACHR, the average delay to rule in a case is significantly greater. The lack of certainty on the capacity of the System to resolve all of the complaints that are subject to its jurisdiction, added to the structural delay of those resolved complaints has as a consequence a decrease in the effectiveness of the Inter-American protection". For an in depth study of this issue we can request a certified copy: Center for Justice and International Law (CEJIL), Contributions to the debate on possible reforms to the functioning of the Commission and Court of Human Rights, Buenos Aires, CEJIL, 2008 page 28. Likewise we should point out that the Petition before IACHR currently does not have the Eligibility Report; therefore we could reasonably assume that the process is in its first stages, since the petition was submitted almost 3 years ago.

ii. Thirdly, this closure is a disproportionate measure in relation to several subsequent consequences: The sudden closure of the mine will generate high compensations for the company performing the mining operations and would motivate the invocation of Free Trade Agreements, WTO arbitration, World Bank and a possible demand to the State of Guatemala before other business forums, loss of thousand of direct and indirect jobs, etc., that by virtue of the provisions of the concession agreement can be claimed against the State afterwards.

It should also be noted that if the measure and term are disproportionate, then as the process begins to unfold before IACHR, the objectives of the measure are met and ensured (with regards to heath and no contamination), it makes no sense to maintain them until the fundamental issue is resolved, because they lose the reason for their existence.

k. The State of Guatemala strongly rejects the assignment of complicity to infringe with the precautionary measure ordered, the perpetuity of water sources contamination.

a. Regarding the complicity for infringement, the State has already ruled in the matter, likewise we have to point out that although the mining law is weak for the State, it is being reviewed, the current government believes in a socially and environmentally responsible mining industry and is determined to guarantee the right of consultation with the indigenous peoples. With regards to the contamination of water sources, there is no irrefutable confirmation of contamination on the locations indicated by the petitioners after monitoring made by the Ministry of Environment and Natural Resources and the Ministry of Energy and Mines, and the resolution regarding the administrative process for the suspension of mining operations is still pending, so the arguments of Mr. Loarca lack technical and scientific basis.

b. The studies performed show that the water sources are not and were not contaminated:

i. Just as the State of Guatemala has informed the Inter-American Commission (29), MARN and MEM have been carrying out several studies on the water sources of the 18 beneficiary communities since 2005. These studies have concluded that, scientifically and technically, these water sources are not contaminated…

(27) Supreme Court of Argentina Grupo Clarin and Others Precautionary Measure 5-10-2010 Conclusion 6, available at www.csin.gov.ar.
(28) HR Court Case Kimel vs. Argentina. Merits, reparations and costs, Ruling May 2, 2008, Serial C No. 177 paragraph 58.
(29) Report from the State of Guatemala to the Illustrious Inter-American Commission of Human Rights (IACHR) regarding precautionary measure (MC 260-07) in favour of 18 communities of the Maya People (Sipakapense and Mam) of the municipalities of Sipacapa and San Miguel Ixtahuacan, department of San Marcos.

…from all the surface and underground water carried out since beginning of mining operations. It is important to point out that in addition to studies performed by the State, there are parallel studies carried out by the Mining Company and AMAC organization, all with the same conclusions. This shows that the State has controlled correctly the activity of the Company. Additionally, AMAC (an association in which each one of the communities of San Miguel Ixtahuacan and Sipacapa involved designate a representative through a community assembly, in accordance with the traditional process of decision making in those communities) has been especially involved in the monitoring of the water quality applying technical protocols and the sample analysis is done in world certified laboratories (ALS, Vancouver, Canada). Within the environmental audit procedures AMAC meets with the technical personnel and compares results in order to verify the margins of error or coincidences. All of the water quality evaluations have been consistent and have confirmed that the water complies with all standards established in the IFC Guidelines, International Code Cyanide Management and the Guatemalan Environment Guidelines; therefore there are no negative consequences to the environment or health related to mining activity.

ii. The studies of possible contamination in the waters have been carried out in internationally certified laboratories, and to date, the ones performed by agents of the State and the ones submitted by several national and international forums conclude that there is no water contamination. They also find that the quantity of minerals and metals present in the water are within the international standards approved by WHO (30) and the World Bank (31).

iii. For greater accuracy, we should focus particularly on the preventative measures of environmental impact, especially the water resources related to the use of cyanide in the Marlin Mine. The extracted minerals are leached in a cyanide solution and washed in a series of steel tanks in a closed circuit. The remaining pulp is treated to eliminate the toxicity of residual cyanide in the plant patented by INCO (32).

(30) WHO guidelines for drinking water quality. World Health Organization (WHO). Available at www.who.int/water_sanitation_health/dwg/guidelines/es/

(31)The report "Evaluation of a complaint submitted to CAO in relation to Marlin Mining Project in Guatemala, on September 7, 2005, from the Ombudsman office of the International Finance Corporation of the World Bank, which ruled on the quality and quantity of water in the area of influence of Marlin Mine concluding that regarding the quality of water and safety of the dam, "based on the current design and operative procedures of the project, the inhabitants of Sipacapa will not have significant risk of any kind of contamination to their watercourses as a result of the project. CAO concludes that the project in its present state of development has substantially improved the management and mitigated the risks of the quality of water as a result of their activities. CAO also considers that the independent review of the Tailing s Storage Facilities (TFS) requested by IFC that includes the tailing pond has adequately evaluated the risks of the dam which has led to significant improvements in the design of TFS".
This report is available at http://www.cao-ombudsman.org/cases/document-links/links-95.aspx

(32) The INCO treatment system is one of the main processes used by modern mining industries to destroy cyanide. This process is very effective in significantly reducing cyanide concentration below the required standards of the IFC in the Environmental Guidelines for Mining Health and Security ("IFC Guidelines")

iv. Additionally, water is re circulated through a treatment plant to reduce further cyanide concentrations, suspended solids and heavy metals. This plant has been designed to comply with the parameters that are stricter than required by the Guatemalan guidelines for discharge of waters and the World Bank guidelines for discharge of mining effluents. These guidelines regulate two more types of cyanide that are not regulated in Guatemala (WAD and free cyanide). It is also important to point out that tailing discharges performed by the company in 2010, had no minerals, or heavy metals above the international standards.
v. Several analyses have been made regarding water discharges, results from the laboratory show that discharged water complies with the Regulation of Discharge and Re-use of Sewage and Disposal of Sludge, Government Agreement 236-2006, with the World Bank guidelines for mining and in accordance with the provisions of the International Code Cyanide Management.
vi. From this account, this project complies with the aforementioned international standards, the Marlin Mine received Complete Certification from the Institute of the International Code Cyanide Management in 2009; this is a voluntary program for the gold mining industry, designed by a Steering Committee composed by several interested parties under the United Nations Environment Programme (UNEP) and the International Council on Metals and Environment (ICME). The Code is managed by the International Cyanide Management Institute (ICMI), a non profit organization based in Washington, D.C., United States.
vii. The Guatemalan guideline requires the evaluation of mining activities by independent experts. This is why Marlin Mine has its tailing deposits monitored every year by independent advisors from Robertson Geoconsultants. They have concluded that the tailing and dump deposits are currently being designed and operated in compliance with international standards of good engineer practices, by qualified personnel and within an appropriate management and monitoring structure (33).
viii. Likewise, the Ministry of Environment and Natural Resources and the Ministry of Energy and Mines receive periodical results from the Environmental Monitoring Programme which has taken place since 2004. This includes: (i) quarterly monitoring of controlled discharges, noise levels, air and water quality; (ii) monitoring of aquatic biological resources every six months; (iii) monitoring of terrestrial biological resources once a year; and (iv) monitoring of forest cover in the area of the project twice a year.
ix. In the aforementioned monitoring processes, the samples are collected following stringent standards and chains of custody used in the United States and Canada, and are then sent to a worldwide certified laboratory

(33) Report No. 9 Tailings pond review for marlin Project, Guatemala, performed by Robertson Geoconsultants, Inc (November 2009)

…for this type of samples (SVL, Analytical Inc, in Kellogg, Idaho).
x. The Ministry of Environment & Natural Resources requested a new hydro-geological study, - recalling that the allegations of the petitioners are from 2006 – whose samples match completely with the previous ones. **From this study, we emphasize that there are no health issues related to the use of water.** Likewise the Ministry of Energy and Mines started sampling the community water well source in Coral Saqmuj known as "los corales", as well as the sampling locations below the Tzala river (SW1), Quivichil stream (SW2), under the dam tailings (SW3), Xkus source (SW4) and above the Tzala river (SW5), locations mentioned by the beneficiary representatives in their initial petition, based on the sample reports from COPAE as well as the monitoring reports from the Ministry of Environment and Natural resources (34).
xi. Compliance of this measure by the State leads us to consider that the statement of IACHR in the sense "to adopt the necessary measures to decontaminate as much as possible the water sources of the 18 beneficiary communities" has been distorted with the elements put forward to the present precautionary measure procedure.

c. The members of the 18 communities have access to water for human consumption.

i. The State of Guatemala has already informed the Inter-American Commission (35), the Ministry of Environment and Natural Resources and the Ministry of Energy and Mines have been monitoring the water sources of the mine neighbouring communities since 2005, and have concluded following the results of numerous scientific and technical studies, that the water sources are not contaminated nor generate a decrease in its availability that would hinder its access to the communities.
ii. In addition to verifications carried out by the State of Guatemala, allowing it to state before IACHR the strict compliance of the object of the current measure regarding access of all members of the communities to water resources for human consumption, several international forums have concluded that the Marlin Mine operations comply with international standards (36) regarding access to water.

(34) see web page www.marn.gob.gt
(35) Report of the State of Guatemala to the Illustrious Inter-American Commission of Human Rights (IACHR) regarding the precautionary measure (MC 260-07) in favour of 18 communities of the Maya People (Sipakapense and Mam) of the municipality of Sipacapa and San Miguel Ixtahuacan, Department of San Marcos.
(36) In the report "Evaluation of a complaint submitted to CAO in relation to Marlin Mining Project in Guatemala, on September 7, 2005 from the Ombudsman office of the International Finance Corporation of the World Bank, the same that ruled about quality and quantity of water en the area of influence of Marlin Mine concluding that regarding the Amount of water "based on the current design of the project the inhabitants of Sipacapa will not have increased competition for water resources as a result of mining activities. CAO states that "based on the initial design of the project (when it was published and approved of the EIAS by the government) would have caused an impact in surface waters in Sipacapa, now this plan has been changed". Executive Summary, page iii.

iii. In fact, the use of water for company operations is minimal due to recycling, recirculation and re-usage of water procedures in order to minimize the amount of water demanded by the project.
iv. To reduce the amount of water used in the process, it is recycled from the tailing dam in the gold extraction processes. Recycling reduces the amount of fresh water being used. During 2008, 95% of water requirements of the plant were obtained from recycled water and in 2009 almost 98%. From August 2010 99% of the water being used was recycled at the processing plant. The balance of the remaining water used for the mine is sourced from an underground well that is not used by any other user, and the water comes from an aquifer separate from the sources used by the communities.
v. Based on these considerations and the results from continuous monitoring carried out by the State of Guatemala to verify the respect to the right to drinking waters from the members of the communities, we must point out to IACHR the strict compliance to these procedures in order to provide access by all members of the intervening communities to water resources for human consumption.

d. There is no factual support that proves any harm to the health of the petitioners. The IACHR can not base itself on allegations only but, by the impartiality principle, requires having adequate evidentiary basis to order a precautionary measure of such importance:

i. It should be remembered that precautionary measures and provisional measures revolve around threats (37), as much as, in such cases, violations. Depending on its purpose, the effect of the measure will be different:
In a threat the objective is to avoid infringement therefore the effect will be to maintain the existing situation – that the infringement is not produced -, while in a violation the intention is the cessation of its effects (38), and therefore the effect will be to modify the situation of things.
ii. In this case, and in relation to this measure, there is no record of concrete cases of people that may have suffered any harm on his health due to contamination of water resources (39), which puts in evidence

(37) Its been rightly stated that "the provisional measures have been ordered in practice in cases that implied an imminent threat to life or physical integrity" (Cancado Trinidade, Antonio Augusto, "Prologue to the Summary of court resolutions, provisional measures" page XIV
(38) Rey Cantor, Ernesto – Rey Anaya, Angela Margarita, cit, page 168.
(39) For example, the study Physicians for Human Rights about "Toxic Metals and populations near Marlin Mine in Western Guatemala: possible exposure and impacts to the health, refers "Biomarkers of Exposure (…) The detection limit (LLD) of each metal was calculated and those …

…the impossibility to defend prima facie the possibility of a threat to cause harm in this sense. Water is a vital resource for the communities. If there was harmful contamination or a reduction in quantity, it would reflect on the health and continuity of life of some member of the community. None of these situations have developed.
iii. To put this measure in place, IACHR has based its focus exclusively on the allegations of the petitioners, who lack any factual proof that may back their affirmations or at least, were even somewhat credible.
iv. This attitude of IACHR generates a real procedural inequity against the State: there is no way the burden of proof can be waived, as it was done to the petitioners, who assert a fact and must prove it.
v. In fact, the allegation of environmental contamination in connexion with Marlin Mine lacks reliable scientific base. As an example we can mention that after Flaviano Bianchini issued a complaint by the end of 2006 alleging that Marlin Mine had contaminated Tzala River in Sipacapa, a lawsuit was filed before the Public Prosecutor for the Environment against Montana for an alleged crime commission of Environmental Contamination. The public prosecutor carried out a comprehensive investigation which involved sampling and evaluation of the river waters. This study concluded that there was no evidence of contamination and that the Marlin Mine had no impact on the quality of the waters in the river (40).
vi. Similarly, Comision Pastoral Paz y Ecologia (COPAE) issued a report in October, 2008 alleging the water in the Marlin Mine area of influence contained levels of metals above the allowed limits by national and international regulations. The report was analyzed by the Center for Studies on Energy and Mines of the University of San Carlos, Guatemala, finding the report was not complying with the minimum scientific requirements and was not valid nor transparent, as it was not an independent and professional evaluation (41).
vii. We should also add that upon adopting the measures, IACHR did not cite any relevant studies that would normally be included in such serious matters. Any court would have provided data which supported the precautionary measure that already exceeds the mere statements of the parties.

…values were considered acceptable (…) In the case of urine, several samples were below detection limits (…) In general the majority of the metals were between the reference levels reported as normal (…) For aluminum in blood, all participants had higher levels than the reference levels although the majority of epidemiological studies use aluminum in urine as biomarkers of exposure since urine has more than 95% of the aluminum excretion (and only 6/23 individuals had detectable levels of aluminum in urine) (…) For urine, several measurements of aluminum, chromium, manganese, nickel, copper and arsenic were below detection limits (…) The blood results showed no significant changes on metal in urine with respect to occupation (…) However, arsenic was detected in all employees of the mine and these measurements were notably higher when compared with groups were many individuals had levels under the detection limits. Arsenic in urine is considered the most reliable indicator for exposure, but all indicators remained below the reference levels (…). However no indicator exceeded the reference levels. (…)", pages 10-12. Underlined by us.
(40) Available at http://www.mem.gob.gt/Portal/DesktopModules/Portal SearchResult.aspx? Cat=-18text=marlin&apppath=/Portal.
(41) University of San Carlos, Guatemala, DEQ. No. 001.01.2007. Resolution signed by Lic. Jhoni Frank Alvarez Castañeda, Chemical School Director.

viii. Based on these considerations, the State of Guatemala considers there is no factual proof that offer credibility to the allegations of the petitioners and may support this issue of the precautionary measure adopted by the Commission. On the contrary, the proofs submitted are clear and consistent in showing there is no contamination and that the water is fit for human consumption.

e. Being exceptional measures, they have to be carefully designed in order to avoid irreparable harm to the subject thereof. Otherwise they become arbitrary by the IACHR and impossible to comply for the State bound by it.

Through this measure, IACHR has imposed the State of Guatemala with two obligations: one referred to the decontamination of water sources for 18 beneficiary communities, and the other referred to security of access of such communities and their members to water for human consumption whatever the source was.

We will analyze separately each one of the aspects contained in this measure with regards to the exceptional character of the same which means that they have to be strictly circumscribed to the requirements of seriousness and urgency to avoid irreparable harm (42).

i. With regards to the imposed obligation to "decontaminate as much as possible the water sources of the 18 beneficiary communities", the extension of the measure, product of an imprecise and careless writing, puts the State at the head of an obligation that is: a) undetermined, b) impossible factual compliance and c) an arbitrary control by IACHR with regards to its compliance.
ii. In fact, the measure does not strictly define the parameters or standards of "decontamination" that the State must achieve to avoid grave and irreparable harm, only indicating that it must be done as much as "possible". This vagueness deepens the uncertainty regarding the actions of compliance that should be implemented, especially when we consider that the measure can not define water as a natural resource in a generic form, since the "harm… must not fall upon legal goods and interests that can be fixed" (43). So, the precautionary measure should be limited only to decontamination of water sources that are used for direct or indirect consumption of members of the affected communities and in strict measure to which such decontamination be necessary to return the resource to its adequacy for human consumption.

(42) HR Court, Case Befort Isturiz and others respect to Venezuela , resolution of April 14, 2010 paragraph 10.
(43) HR Court Case Four Ngobe Indigenous Communities and their members respect to Panama, paragraph 10, Case Monagas Judicial Internship ("La Pica"), Penitentiary Capital Region Yare I and Yare II (Prison of Yare). Penitentiary Midwestern Region (Prison of Uribamba), and Judicial Internship El Rodeo I and El Rodeo II. Provisional Measures respect to Venezuela. Resolution HR Court November 24, 2009, Third conclusion.

All of these conclusions are based around the assumption that the water was contaminated, which is rejected in advance. As it has been stated previously upon the issuance of the precautionary measure "to decontaminate the water sources as much as possible" is already prejudging that the waters are contaminated, without exhausting a procedure to request information, since they should have requested a study of the water sources allegedly contaminated to the State before ruling on this issue.

iii. The second obligation contained in the measure deserves the same analysis and criticism: "to assure its members access to water fit for human consumption". With careless writing it does not establish precise parameters, standards or international or national guidelines to determine when the obligation is fulfilled by the State of Guatemala. This is of significant importance because, as mentioned before, based on analysis carried out by the State of Guatemala, the water to which members of the beneficiary communities has access to, is fit for human consumption according to national legislation and international parameters. These types of measures should be modified and/or corrected to guarantee their purposes, to facilitate enforcement to the State bound by them and to maintain the objectivity and impartiality that has to be observed by IACHR actions. This control of compliance to these measures would then not become arbitrary by this institution, whose actions must be related to its character of "the auxiliary role of justice, as a prosecutor in the Inter-American System for the Protection of Human Rights" (44).

l) The IACHR must validate its actions and must act impartially in order to give legal certainty to the State of Guatemala:

a. The IACHR must validate all of its actions to date as it is an international institution similar to an Inter-American Prosecutor (45). The duty to justify its actions demonstrates impartiality as a body that acts as a mediator between the parties, neither in favour nor against them, but pursuing lawfulness.

b. In order to reach the highest standard in procedural action, the performance of IACHR has to be based on legal procedural principles of legality, opportunity, objectivity or impartiality and fairness, given its status as "from sui generis role, a purely procedural, judicial officer" (46).

c. This character of public institution of international law and the impartiality that his actions demand as mediation body between the parties, must give legal certainty and enhance the institutional quality of the IACHR.

(44) HR Court, Viviana Gallardo vs. Costa Rica 1982, vote of Piza Escalante, paragraph 4.
(45) Ditto.
(46) Ditto.

d. However, the IACHR in its written communication regarding the precautionary measure granted dated May 20th, 2010, states in its conclusions it had only considered the simple allegations of the petitioners. Its conclusions specifically state that "applicants complain that the mining concession and initial operations have been completed without prior consultation…" that "the petitioners state that the procedures for extraction of gold and silver, as well as the mine acid drainage, has generated serious consequences…" that "based on information submitted by the applicants, metals allegedly present in the waters…" and that "the applicants state that the environmental contamination generated by the mining project has produced serious impacts…", among other allegations quoted by IACHR to rule on granting the precautionary measure.
e. Even though it has been reported that the State of Guatemala did not reply on February 1st, 2008, originally, the lack of truthfulness of each one of these allegations has been addressed and commented on in many replies, submissions of information and in this report by the State of Guatemala. And then, the lack of consideration to these answers puts in evidence the lack of legality, opportunity, objectivity or impartiality and fairness of the decision to grant the challenged precautionary measure. This is one more reason among the others in this report that demonstrates the need for the Commission to review its decision and leave without effect the granting of the measures thereof or at the very least, a modification of its decision.

m. Finally, it is important for the State that it should be emphatic to point out that it does not allow or tolerate any attacks to the human rights champions, to people opposed to the mine or those who have acted nationally or internationally for this case. In this sense the State of Guatemala reiterates that the arrest warrants against some residents of the communities of San Miguel Ixtahuacan, do not correlate to their opposition or legitimate resistance, since they were issued by a competent judge against them after being accused or sued for aggravated theft, minor injuries, coercion and instigation to commit a crime by the Company Montana Exploradora S.A. through its General Manager and Legal representative Milton Estuardo Saravia Rodriguez and two individual persons (uncertified copy of the arrest warrant issued by the competent court is attached).

2.3 Final conclusions with regards to the precautionary measure MC-260-07

2.3.1 Preliminary considerations

After reviewing each one of the measures, we must proceed with the necessary conclusions concerning their general situations.

In that sense, Article 25 of the IACHR Regulation clearly states three requirements for the ruling and subsequent terms of duration of the precautionary measures: 1) seriousness; 2) urgency and 3) the possibility of causing irreparable harm. Although the HR Court has considered in the precautionary measure that these requirements "are coexistent and must be present in every situation that

…the intervention of the Court is requested".

Likewise, the three conditions described must persist so the court may keep the protection ordered. If one of them has lapsed, "the Court will have to assess the relevance of continuing with the protection ordered" (47). And as it was mentioned before, quoting the required standards of national law in regards to precautionary measures, "you should always seek its replacement (of a serious precautionary measure) by a less serious measure when the circumstances permit" (48). "Therefore, the judge should periodically review if the reasons that originally founded the custody still remain" (49). These statements have special relevance in this case and lead to conclude that the precautionary measure should be revoked, or at least, modified.

2.3.2 Lack of the requirement of seriousness of the situation

First of all this State will refer to the requirement of seriousness of the situation that, allegedly, causes the adoption of the measure. The HR Court has mentioned that "for the purpose of provisional measures the Convention requires that it (the seriousness) be extreme, i.e. who is in its most intense degree or higher" (50). Likewise the seriousness is linked with the nature of the threat looming on the individual (51), and the consequence of a real danger not purely hypothetical. (52).

In this concrete case it is clear, as details have been mentioned, the absolute lack of this requirement: the facts mentioned lack the necessary seriousness threshold required by case law and otherwise they are not proven in any way. In other words, the IACHR simply based it in an assumption to the lack of timely reply by this State, taking as certain a hypothetical risk.

Likewise, during the compliance of the measures set out by the IACHR, the State of Guatemala has realized there is no danger for the life or physical integrity of the petitioners, not present, nor in the future, so no concurrence of this requirement is observed. We reiterate that if there is a case with the same characteristics, the State would act as dictated by its obligations under of the American Convention on Human Rights (ACHR), as it was shown in the case of Mrs. Hernandez Cinto.

By virtue of the case law reviewed, this situation is sufficiently valid to warrant the lifting of the precautionary measure for lack of seriousness, notwithstanding the lack of the other requirements to keep them.

(47) HR Court, Case Haitians and Dominicans of Haitian origin in the Dominican Republic provisional measures respect to Dominican Republic. HR Court resolution July 8, 2007, conclusion 18.
(48) HR Court Case Peirano, cit., paragraph 100.
(49) Cfr. Ditto, paragraph 104.
(50) HR Court Case Four Ngobe Indigenous Communities and its Members respect to Panama, paragraph 8
(51) Hector Faundez Ledesma, System for the Protection of Human Rights: Institutional and Procedural Aspects, page 381.
(52) Hector Faundez Ledesma, System for the Protection of Human Rights: Institutional and Procedural Aspects, page 537.

2.3.3 Lack of the requirement of urgency

With regards to the requirement of urgency, the HR Court has indicated that "the urgency implies that the risk or threat involved are imminent, which requires that the answer to remedy it be immediate. The analysis of this aspect corresponds to assess the appropriateness and timing of the intervention or guardianship requested. For example, in a case where there was a request for an extension of an interim measure, the Court rejected the request because one person took a year to note that he had been threatened (53). In this regard, the Court considered that it "questions the nature of 'urgency' necessary for the adoption of measures" (54).

The State of Guatemala considers that these precedents warrant the admissibility to lift the measures and they have to be taken into account by the IACHR. It is the same IACHR which demonstrates by its actions that the requirement of urgency does not concur. The Petition P-1566-07 was submitted by the petitioners on December 6, 2007 and the precautionary measure was ordered on May 20th, 2010. Currently from the actions of IACHR we can observe that there is no requirement of urgency from any point of view. Three years have passed since IACHR became aware of the facts and the precautionary measures were put in place. Moreover, we must take into account that the concession was granted in 2003 and the Company was in operation for more than five years at the time the reports were first requested.

There is a similar case in which the HR Court rejected a request for provisional measures, when it noted that "it would be a clear inconsistency that the urgency which is argued to apply provisional measures not involving urgent consideration regarding the review of merit of the petition" (55). In this case, it is the IACHR that has delayed processing the report. Thus, it can not pretend to adopt precautionary measures of this extent. In this sense, we must take into account that "the principle of forclusion or estoppel or doctrine of one's actions as it is called in Spanish law, is a general principle of law whose validity in international law has been generally admitted" (56). In the Inter-American Human Rights System IAHRS, the HR Court has resolved that "according to international practice where a party to a dispute has taken a position that is beneficial to it or otherwise impaired, can not then under the principle of estoppel, assuming other conduct that is inconsistent with the first. For the second approach applies the rule of non venire contra factum propium Concedit." (57).

(53) HR Court Case Children & Adolescent detained at "Complexo do Tatuape" de Febem. Provisional Measures and Request to Extend Precautionary Measures respect to Brazil HR Court resolution July 4, 2006 Conclusion 21st.
(54) HR Court Case Four Ngobe Indigenous Communities and its Members respect to Panama, paragraph 9.
(55) The HR Court has rejected a request for provisional measures in cases were the term was even shorter. As in the case of the Four Ngobe Indigenous Communities and its Members respect to Panama stating that "On the other hand, the Court notes that the March 7, 2008 the American Commission received the first petition and request for interim measures with respect to this matter. The Commission issued precautionary measures on behalf of Ngobe communities on June 17, 2009. On August 5, 2009 the Commission approved the eligibility report thereon. On January 19, 2010 the request for provisional measures was filed, almost two years after the initial interim protection application in relation to these facts. Since the application of provisional measures is based on the condition of urgency, the Court considers being paramount more rapidly in the Inter-American Commission to decide on the request. Otherwise, it would be an inconsistency that the urgency which is argued to apply provisional measures not involving urgent consideration regarding the review of merit of the petition". HR Court case Four Ngobe Indigenous Communities and its Members respect to Panama, conclusion 17.
(56) United Nations. General Assembly Third report in regards to unilateral acts of the States. No. 25 page 6 July-August 2000.

Taking into consideration that the silence or omissions are a legally relevant acts (58) to the effects of the estoppel theory, the Commission can not perform actions contrary to its previous behaviour, which induces a certain expectation of particular behaviour, without violating the principle of good faith.

2.3.4 In the case of the Guatemalan State, there was an immediate answer to the precautionary measure

We must add that the State has acted with immediacy on the provisional measures requested by IACHR. So, when the measures were ordered, the State prepared a set of provisions with the understanding that the urgency implies that the risk or threat involved might be imminent, which requires that the answer to remedy them be immediate. In other words the State's answer was immediate, respecting the principle of good faith. However, we stress that the threat is not of such character and that these conditions have been demonstrated in this and in the previous reports.

2.3.5 Lack of the Requirement of Irreparable Harm

In the third instance, the requirement of irreparable harm is analyzed. The case law criteria that provides the guideline in this issue has been given by the HR Court, which has stated that, in regard to irreparable harm "there must be a reasonable probability to materialize and should not fall on property or legal interests that can be repairable" (59). Precisely, what is required, according to article 25 is an irreparable harm.

We should stress that there are no threats to life or physical integrity that would surely be irreparable. Other rights to be protected through these measures that would allegedly be affected are not irreparable with regards to the harm caused mainly, because the infringed rights can be re-established or of not possible, be repaired by means of compensation. In a recent decision, the GR Court stated that when the harm is reparable through compensation, the measures can not be granted (60), which occurs in this case. It is possible to conclude in this respect hat there is no contamination, no lack of water fit for human consumption, no threat to life or physical integrity for the beneficiaries. And there is definitively no possibility of irreparable harm.

(57) HR Court, Case Neira Alegria & Others Preliminary exceptions, ruling December 11, 1991, Serial C No. 13 paragraphs 28 & 29.
(58) There is a case of estoppel by silence or estoppel by acquiescence. Loo on the subject, Ines Pardo de Carvallo, "The doctrine of own actions", Law Magazine from the University of Valparaiso, XIV, page 49, 65.
(59) HR Court, Case Four Ngobe Indigenous Communities and its Members respect to Panama, paragraph 10, CFR. Case Monagas (La Pica) Judicial Internship, Penitentiary Capital Yare I & Yare II (Prison of Yare), Midwestern Region Penitentiary (Prison of Urbina) and Judicial Internship Capital El Rodeo I and El Rodeo II. Provisional Measures respect to Venezuela. HR Court resolution November 24, 2009, Third conclusion.
(60) HR Court Case Belfort Isturiz and others, respect to Venezuela, Resolution April 15, 2010. Paragraph 19.

2.3.6 Lack of any proof

In relation to the quantum of proof required for the ruling of precautionary measures, it has been stated that "the standard for assessing a prima facie case and the application of presumption to the need for protection, have led the Inter-American Human Rights Court to order provisional measures on several occasions" (61).

The application of this type of extreme measure is only justified in cases with sufficient evidence to demonstrate that its beneficiaries are exposed to grave danger, which they can't face with the existing ordinary guarantees of the State in relation to what they request (62). Notwithstanding with what has occurred to date, IACHR has failed to maintain a state of evidence prima facie or substantial evidence (63) of truthfulness, at least allegedly, of the events reported. The written and oral information presented, leads the State of Guatemala to point out to the contrary. It is convinced that there is substantial evidence favouring the inadmissibility of the measures implemented.

The Court recently stated that "although the facts underlying a request for interim measures or extension thereof shall not require to be fully proven, it does require a minimum of detail and information to enable the Court to assess prima facie a situation of extreme gravity and urgency" (65).

In this argumentative order, according to the Convention and Regulation, the caseload to demonstrate prima facie in such situation falls on the applicants, which in this case are the petitioners. The information deficiencies that the Commission may have must be rectified by the petitioners on their own initiative or through information provided by third parties and by the State, along with the information enclosed in this document. Furthermore, once the information is included, based on what is being indicated, we must point out that it must have practical effects on the course of these measures.

Article 25 in its Sub-Sections 6 (66) and 8 (67) must be interpreted in the light of jurisprudence of the Inter-American Court with the knowledge that "the provisional measures are exceptional,

(61) HR Court Case Gomez Paquiyauri. Provisional Measures. Resolution of the HR Court May 7, 2004, conclusion sixteenth; Case Bamaca Velasquez, Provisional Measures. Resolution HR Court November 20, 2003, conclusion twelfth; and case Marta Colomino and Liliana Velasquez. Provisional Measures. Resolution HR Court September 8, 2003, conclusion fifth.
(62) Hector Faundez Ledesma, System for the Protection of Human Rights: Institutional and Procedural Aspects, page 537
(63) Following terminology used by HR Court when stated that:"…the Court in practice, has required the Commission for a substantial evidence that the facts are true, but rather proceeded on the basis of reasonable presumption (prima facie) that the facts are true…". Provisional Measures. Prologue of the Ex-President of the HR Court Augusto Cancado Trinidade. Volume III Serial E. Year 2000-2001. Paragraph 18.
(64) This is substantial evidence. Opinion of Judge A.A. Cancado Trinidade, in Case Acosta Calderon vs. Ecuador, Ruling June 24, 2005, Serial C, No. 129, paragraph 11.
(65) HR Court, Case Adolescent detained at "Complexo do Tatuape" de Febem. Provisional Measures and Request to Extend Precautionary Measures respect to Brazil HR Court resolution July 4, 2006 Conclusion 23.
(66) Art 25. 6: The Commission shall evaluate periodically the appropriateness of maintaining the validity of the relief granted.
(67) Art 25. 8: The Commission may require relevant information to interested parties on any matter related to the grant, enforcement and validity of measures. A material breach of the beneficiaries or their representatives to these requirements may be considered as grounds for the Commission to rescind its request to the State to take protective measures. Precautionary measures in respect to a collective nature, the Commission may establish appropriate mechanisms for monitoring and periodic review.

…and are given in accordance with the needs of protection and, once ordered, must be maintained while the Court considers that the basic requirements of extreme gravity and urgency of preventing irreparable harm the rights of persons protected by them. Likewise has stated that "the supervision of the implementation of provisional measures and the need for its maintenance requires an assessment of the persistence of extreme gravity and urgency that gave rise to them. This involves examining the events that have occurred during the period of provisional measures and the risk they pose to the effective enjoyment and exercise of rights protected under the American Convention" (69).

In this case the attitude of the State regarding the compliance of the measures and information provided by virtue of it, must definitively have bearing on the course of the measures, requiring the IACHR to lift them or, at least modify them.

The Court stated that "…if a State requests the removal or modification of the provisional measures ordered, it must submit sufficient evidence and argument to enable the Court to assess the risk or threat to determine that it no longer contains the elements of extreme gravity and urgency and to avoid irreparable damage" (70). In this case, the State of Guatemala has complied with these terms as required.

Consequently, and having complied to the requirement of the IACHR regulation, the State of Guatemala respectfully requests, based on the state of the proceedings, to arrange for the lifting of the precautionary measures adopted on May 20th, 2010, and the remaining matters should be discussed in the framework of Petition P-1566-07.

3. ABOUT PETITION 1566-07

3.1 Additional Information and Comments

The State of Guatemala provided additional information and comments related with Petition 1566-07, based on Article 30 Sections 5 and 6 of the IACHR Regulation that prescribe: "Before ruling on the admissibility of the Petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing as provided in Chapter VI of hereto." "Considerations and challenges to the admissibility of the Petition shall be submitted during the first stage of the procedure and before the Commission's decision on admissibility."

(68) HR Court Case Constitutional Court Provisional Measures respect to Peru. Court resolution March 14, 2001, conclusion 3; Case Carlos Nieto Palma and others Provisional Measures respect to Venezuela. Resolution January 26, 2009, conclusion 20; and Case Kankuamo Indigenous Peoples, supra note 3, conclusion 4. HR Court, Case Haitians and Dominicans of Haitian origin in the Dominican Republic provisional measures respect to Dominican Republic. HR Court resolution July 8, 2007, conclusion 11.
(69) HR Court Case Haitians and Dominicans of Haitian origin in the Dominican Republic provisional measures respect to Dominican Republic. HR Court resolution July 8, 2007, conclusion 17. Case Kankuamo Indigenous Peoples, provisional measures respect to Colombia. Resolution April 3, 2009. Conclusion 7.
(70) HR Court Case Haitians and Dominicans of Haitian origin in the Dominican Republic provisional measures respect to Dominican Republic. HR Court resolution July 8, 2007, conclusion 19.

3.2 Inadmissibility of the Petition

In addition to the arguments, comments and state information submitted in the report of November 12th, 2010 Ref. P-1850-2010/RDVC/HEMJ/cq, following the State includes some additional reasons why it considers that petition 1566-07 is and should be declared inadmissible:

A. Preliminary Considerations

Article 47 of the Convention requires that the Commission declare inadmissible any petition when:

a) any of the requirements indicated in Article 46 are missing; (or)
b) does not state facts that constitute a violation of the rights guaranteed by this Convention (…).

Article 46(1) (a), additionally, set as a condition of admissibility "the prior exhaustion of domestic remedies available in the State, pursuant to the generally recognized principles of International Law'.

As it is explained subsequently, the complaint of the petitioners against the State of Guatemala is inadmissible, as:

1. The victims and petitioners have not pursued and exhausted the domestic remedies applicable for the claims made; and
2. The complaint fails to present events that characterize a violation of the rights guaranteed by the Convention.

B. The internal and effective resources of Guatemala have not been exhausted

1. Approach

First, neither the petitioners nor the alleged victims have exhausted the domestic remedies available in Guatemala for an effective protection of their rights.

Article 46(1) (a) set as a condition of admissibility "the prior exhaustion of domestic remedies available in the State, pursuant to the generally recognized principles of International Law'.

The basis of this regulation is based in the principles of subsidiarity and complementarity that characterize the Inter-American system: If a violation to human rights occurs, the victims must previously exhaust all instances provided by the constitutional order of the State; …

…if the violation still exists, after exhausting them, the victims may go to the Inter-American System in defence of their human rights (71).

Inter-American jurisprudence requires that the resources must be exhausted as long as they are effective (72) and adequate (73). It is based on these elements that must be analyzed if the resources mentioned by the State are the resources which had to be pursued and exhausted. Already on its first judgement on merits, the HR Court indicated: In all national legal systems there are many remedies, but not all are applicable in all circumstances. If in a particular case the remedy is not adequate, it is obvious that we should not exhaust it. This is indicated by the principle that the rule is intended to produce an effect and can not be interpreted in the sense that it will not produce any result that is clearly absurd or unreasonable (…) (74).

Nevertheless, as it was mentioned, this requirement of admissibility is by no means fulfilled in the Petition herein. This condition is due to three reasons:

1. The ruling challenged as a violation before the Commission merely decided that the Municipality could not grant binding nature to the consultation being a matter of national but not municipal interest. Regarding all other violations to human rights alleged by the petitioners, as appropriate, the victims did not pursue effective internal remedies in a timely manner, or have been pursued and have a pending resolution or have not been pursued yet;
2. With regards to the only situation considered by the ruling of the Constitutional Court – (this is, the binding nature of the consultation) – the victims have not pursued internal remedies. In fact, the actions and remedies which led to the ruling were pursued by Montana Exploraciones de Guatemala S.A. against the Municipality, not by the victims referred to in the complaint; and, finally,
3. The compensation and indemnification being pursued by the petitioners for the alleged harm have not been pursued nationally by the victims.

In these circumstances, the petitioners cannot use the procedure before the Commission to avoid the use of the Guatemala internal remedies.

As the HR Court has indicated, “the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international process” (75), and, in this case, the complainants have not pursued to solve their problems internally.

(71) The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international process, which is particularly true in the international jurisdiction of human rights, the latter reinforces or complements the domestic (American Convention, Preamble). Cfr. HR Court, Case Velasquez Rodriquez vs. Honduras. Merit. Ruling July 29, 1988. Serial C No. 4, paragraph 61.
(72) An effective remedy is capable of producing the result for which it was designed. Cfr. HR Court, Case Velasquez Rodriquez vs. Honduras. Merit. Ruling July 29, 1988. Serial C No. 4, paragraph 66.
(73) That are appropriate means that the function of these resources within the system of law, is suitable for protecting the judicial situation. Cfr. HR Court, Case Velasquez Rodriquez vs. Honduras. Merit. Ruling July 29, 1988. Serial C No. 4, paragraph 64.
(74) HR Court Case Velásquez Rodriquez vs. Honduras. Merit. Ruling July 29, 1988. Serial C No. 4, paragraph 64.

The Commission must preserve the nature of the subsidiary international body and reject these types of approaches.

Before explaining these arguments, we should remember that the exhaustion process must be analyzed with regards to each one of the allegations that constitute the object of the complaint. This is why the Commission has indicated that: "for the purpose of determining if the compliance with the conventional requirement of prior exhaustion of domestic remedies is verified, the merits of the complaint must be clarified and analyzed actions filed in domestic courts in relation to the situation reported" (76).

Therefore, a summary of the allegations and situations complained by the petitioners follows, to then demonstrate that none of them have been pursued internally by the petitioners or the victims.

2. The situations Claimed by the Petitioners

The petitioners argue without basis that the requirement of exhaustion for internal procedures is fulfilled in this case. In their fallacious view, the alleged infringements "are contained in judicial and administrative actions which ended with the ruling from the Constitutional Court of Guatemala".

The challenged judgement, as previously mentioned, declared the unconstitutionality of Article 27 of the Regulation for Consultation in Good Faith authorized by the City Council of Sipacapa, granting binding nature to that conclusion. The Court stated in its ruling that such decision, corresponded exclusively, pursuant to the constitutional regulation of national policy, to the State and not to the Municipality.

The ruling of the Court is final. Article 142 of the Protection Law, Habeas Corpus and Constitution of Guatemala states: "Rulings of the Constitutional Court have no appeal". The petition, however, also reports, as a violation of human rights of the victims, several events that greatly exceed the ones directly related to the ruling referred to herein. These are:

1. The granting of mining rights to Montana Exploradora de Guatemala S.A. (78);
2. The start-up of mining activities in the Marlin I Mine (79);
3. The alleged material, moral, environmental and cultural harms involved by those activities (80);
4. The misappropriation of land belonging to the victims (81); and
5. The government cover-up of alleged crimes committed by the manager and legal representative of Exploradora de Guatemala S.A. (82)

(75) HR Court, Case Fairen Garbi and Solis Corrales vs. Honduras. Ruling March 15, 1989, paragraph 85.
(76) IACHR. Report No. 44/10, petition 473-03, Inadmissibility, Manuel Tejada Ruelas vs. Mexico, March 17, 2010, par 38.
(77) Report of the Petitioners against Guatemala
(78) Cfr. Report from the Petitioners against Guatemala, p 53-54.
(79) Cfr. Report from the Petitioners against Guatemala, p 53-54.
(80) Cfr. Report from the Petitioners against Guatemala, p 53-54.
(81) Cfr. Report from the Petitioners against Guatemala, p 53-54.

None of these events were considered by the ruling of the Court. Thus, the Petition claims a wide variety of situations allegedly in violation of human rights. The exhaustion of internal appeals has to be analyzed with regards to each one of these situations.

In this regard, the IACHR has indicated that the analysis of this requirement "should be achieved case by case, taking into account its characteristics. As well the connection between the situation put forward before the Commission and the manner in which the internal appeals were pursued, in other words: In favour of whom and about which events and rights" (83).

3. Lack of exhaustion of internal appeals connected with the situations that were not considered by the ruling of the Court

In the first place, none of the situations reported that were not considered by the ruling of the Court have been minimally pursued in the internal appeals of the State of Guatemala. As it has been mentioned, the ruling of the Constitutional Court made a decision in only one of the situations reported by the petitioners: the non binding nature of the consultation carried out by the Municipality. The other situations were not considered nor debated by the parties of the proceeding. Thus, the legality of granting of mining rights to Montana Exploradora de Guatemala S.A., the start-up of mining activities in the Marlin I Mine, the misappropriation of land belonging to the victims, the damage to the environment and their health… None of these elements were considered in that ruling.

All of these allegations should be raised and pursued in the internal jurisdiction of Guatemala before they are submitted to the Commission. Otherwise it would create a void within the legality in which the Commission must act, as the compliance of the conditions of admissibility of the petitions is a guarantee of due process of the state of Guatemala before the Commission (84).

Neither the victims nor the petitioners can allege the lack of internal appeals or their ineffectiveness, since the internal legislation of Guatemala invests them with the necessary resources and effectiveness to protect against such allegations. In fact, there are proper procedures that (a) they could have raised and did not raise in a timely manner; (b) there are currently raised but have not been resolved yet; and (c) that they may still raise.

(82) Cfr. Complaint of the petitioners against Guatemala page 53-54
(83) IACHR, Report No. 39.09, Petition 717/00. Inadmissibility, Tomas Eduardo Villada against Argentina, March 27, 2009 par. 59.
(84) Cfr. HR Court, Control of Legality of the Faculties of IACHR (Arts. 41 and 44 to 51 of the American Convention on Human Rights), Advisory Opinion OC-19/05 November 28, 2005 paragraph 27.

3.1 Additional Information

The State informs that the Writ of Protection (Accion de Amparo) 1045-2010-00706 official 4th. First Court of First Instance in Civil Matters, acting in the Special Court of Protection (de Amparo) took the following steps:

1. On July 21st, 2010 the protection (amparo) was brought by Mrs. Rigoberta Menchu Tum, Alvaro Leonel Ramazzini Imeri, Fransisco Javier de Leon Lopez, Carmen Fransisca Mejia Aguilar and Maudilia Lopez Cardona against the report of the State of Guatemala to the Inter-American Commission of Human Rights regarding the report on the precautionary measure (MC-260-07), submitted on June 23rd, 2010 to the IACHR Ref. P-108-2010/RDVC/HEMJ/ad.
2. On December 22nd, 2010 granted a second hearing of the parties for a term of 48 hours to submit their opinions in this regard and was declared concluded by COPREDEH on December 28th, 2010.
3. Set and performed a public visit on January 5th, 2011 attended by COPREDEH as the defendants authority and the interested third parties, however the parties who filed the Constitutional Appeal for protection of rights did not make an appearance. Concluding the hearing by COPREDEH, Prosecutors Office, Attorney Generals Office, Ministry of Energy and Mines, Ministry of Communications, Ministry of the Interior, Infrastructure and Housing and Ministry of Environment and Natural Resources.

To date we are waiting for the ruling from the Court of Protection (Amparo).

In compliance of the caseload that involves this defence, the appeals are explained as follow (85):

a) **There are effective appeals that could have been filed but were not filed:**
With regards to the mining rights granted for Marlin I Mine, the appeal procedures that the victims could have raised promptly but did not at any time are:

1. The procedures established in Articles 46 to 48 of the Mining Law to pursue opposition for the granting of mining rights – in this case, the licence for Marlin Mine. (86);
2. The proper administrative and judicial appeals to challenge the administrative resolutions of the Ministry of Energy and Mines the granted the licences…

(85) Cfr. HR Court Report No. 32/05, petition 642/05, Admissibility, Luis Roldan Cuscul and others affected by VIH/SIDA, Guatemala, March 7, 2005, paragraphs 33-35; HR Court, Case of the Mayagna (Suno) Awas Tngni Community. Preliminary Exceptions, paragraph 53; Case Durand and Ugarte. Preliminary Exceptions. Ruling May 28, 1999. Serial C No. 50 paragraph 33; and Case Cantoral Benavides. Preliminary Exceptions. Ruling September 3, 1998. Serial C No. 40 paragraph 31.
(86) Article 46, Mining Law: "Opposition. Whoever believes harmed by the application for a mining right may oppose the granting of it, formalized its opposition to Management at any time before delivery of the order of execution". Article 47, Mining Law: "Processing of the opposition. In opposition will be hearing within ten days the other party and with his defence or not, will be resolved within thirty days, in the same set a hearing to interested parties who must appear in person and not by proxy, with their evidence, getting the corresponding minutes. The resolution, which is issued, shall be final for the resolution of the opposition in the administrative area.
Article 48, Mining Law: "Final resolution of the opposition. Sold the opposition procedure, within fifteen days the license will be granted or denied, and the State's decision may not lead to compensation".

> …for Marlin Mine, pursuant to Article 59 of the Mining Law (Decree 48/97) (87) and the Administrative Law (Decree 119/96) (88).

The mechanisms of opposition to the mining rights are regulated in the Mining Law, and the victims were fully entitled to file them, but they did not. Article 46 of the Law established specifically that:

"Whoever believes that they are harmed by the application for a mining right may oppose the granting of it, formalized its opposition to Management at any time before delivery of the order of execution".

As illustrated, they could have filed opposition to the mining right. The victims were also entitled to challenge the granting of the license administratively and judicially. At the administrative level, they could have filed an appeal of revocation and reinstatement. The appeal of revocation is sustained, according to Article 7 of the Administrative Law, "against decisions issued by administrative authority that has higher hierarchy within the same ministry or autonomous decentralized agency". The replacement appeal, according to Article 9, "against decisions issued by ministries". Both were applicable to the case. And the victims and petitioners were entitled to raise them by Article 10 of the law that entitles anyone "who has been part of the record or displayed with an interest in it".

(87) Article 59, Mining Law: "Administrative resources. Against decisions issued by the Ministry or Management may pursue appeals that are established by the Administrative Law".
(88) The Administrative Law, in fact, includes the appeals for revocation and replacement as channels of appeal against administrative actions. Likewise, it establishes the mechanism to start the administrative process for a legal review of such actions. The administrative resources are regulated from Article 7 of the law. It is important to highlight Article 7 to 10:
Article 7: Administrative Law: "APPEAL OF REVOCATION. The appeal of revocation is sustained against decisions issued by administrative authority that has higher hierarchy within the same ministry or autonomous decentralized agency. Shall be filed within five days of notification of the resolution, in a written statement directed to the administrative body that issued it.
Article 9, Administrative Law: "REPLACEMENT APPEAL. Against decisions issued by ministries and against those issued by higher administrative authorities, individual or collegiate of the decentralized or autonomous entities, may file a replacement appeal within five days of notification. The appeal will be brought directly before the appeal authority. There is no appeal against the orders of the President and Vice President of the Republic or against the resolutions passed in the request for annulment".
Article 10, Administrative Law: "LEGITIMACY. Resources for revocation and replacement may be brought by anyone who has been part of the record or displayed with an interest in it".
The legal challenge is regulated from Article 18, Administrative Law: "NATURE. The administrative proceedings will be single-instance and its approach will have no suspenssive effect, except in exceptional individual cases in which the court decides otherwise, in the same decision to allow for processing the application, whenever it deems necessary and not doing so will cause irreparable harm to the parties".
Article 19, Administrative Law: "ORIGEN. The administrative proceedings shall go ahead:
1. In case of contention for acts and decisions of the administration and the decentralized and autonomous entities of the State;
2. In cases of disputes arising from contracts and administrative concessions.
Before the administrative proceedings can be initiated it requires that the resolution that originated it has not been remedied through purely administrative resources".
Article 20, Administrative Law: "CHARACTERISTICS OF THE ADMINISTRATIVE RESOLUTION. To raise this process, the resolution that ended the administrative procedure must meet the following requirements:
a) That has caused state (a final decision). The administration resolutions that decide the matter cause state, when they are not likely to be challenged in administrative proceedings as the administrative appeals have been resolved.
b) That violates a right of the applicant recognized by a previous law, regulation or resolution
If the process is raised by the administration for its actions or decisions, it will not be subject to the satisfaction of the requirements provided that the act or resolution has been declared harmful to the interests of the State, in a Government Agreement issued by the President of the Republic in a Council of Ministers. This statement can only be made within three years from the date of the decision or act that causes it".
Article 21, Administrative Law: "INADMISSIBLENESS. The administrative litigation is inadmissible:
1st) In political, military or defence matters, without prejudice to any damages as appropriate;
2nd) In matters relating to general provisions on public health and hygiene, without prejudice to any damages as appropriate;
3rd) In matters within the jurisdiction of other courts;
4th) In cases caused by disallowance of concessions of any kind, except as otherwise provided by special laws; and,
5th) In cases where a law precludes the possibility of being raised in the administrative contentious way".

Anyone of these appeals could be effective in order to give way to guardianship claims of the victims: They could use them, if needed, to hinder the granting of the license for the Marlin I Mine. However, they were not raised and pursued by the victims. The situations related with granting of the referred licence, then, are left firm in the domestic scope of Guatemala. Therefore, the petitioners can not allege that they were not aware of such measure, since there was plenty of publicity. Thus:

1. There was publicity ordered by the State on community radio stations in the native languages, Then, the Environmental Regulation stipulated a public notice once the Social and Environmental Impact Evaluation (EIAS) had been submitted to the Ministry of Environment and Natural Resources (MARN), in order to receive comments and objections to be taken into account by MARN at decision time to approve or reject the EIAS (89).
2. Additionally, in its resolution of May 8th, 2003, MARN requested the concessionaire to frequently broadcast on local community radio station with regards to the availability of the EIAS (90). Consequently, after submitting the EIAS to the Government in June of 2003, the public was notified that the EIAS was available for public review for 20 business days, with an additional week for the submission of comments, through announcements in Spanish and Mam (91) in local newspapers and three times a day on a local radio station widely listened by the neighbouring communities;
3. During 2003, by state order, meeting including the participation of more than 5000 people were organized;
4. In response to the comments and requests received during the consultation process and disclosure of the EIAS, the concessionaire company modified its design plans for the Marlin Mine;
5. Before the approval of a mining licence, the Mining Law requires the publication of an edict and establishes procedures for the submission of any public opposition (92). The objections to a project are reviewed and a hearing takes place before the final decision to grant the mining license (93). Subsequently, the MEM posted a national newspaper notice informing the public of a 30 day period to oppose the project following the approval of the Marlin Mine EIAS from MARN. No objection was received; and
6. It was common knowledge.

The foregoing shows that although there was wide publicity in the native language of the victims, there were neither comments nor attempts to solve the alleged problems in a national venue. This omission disqualifies completely the request for any international protection.

(89) Article 33, Environmental Regulation
(90) MARN Resolution 014/2003/CRMM/lili, May 8, 2003, sub-section (d).
(91) Maya Language spoken in Sipacapa.
(92) Articles 45 and 46, Mining Law (Decree 48-97).
(93) Articles 47 and 48, Mining Law (Decree 48-97).

b) There are effective appeals that are raised without being exhausted

The State mentioned in section A of Preliminary Exceptions Numeral 2 Lack of Exhaustion of Domestic Appeals in its report of November 12th, 2010, stated such appeals which have been raised and are pending exhaustion.

Not only were the victims able to start appeals and did not, but, in addition, they have other current appeals initiated, regarding some of the rights claimed as been violated, and have not been exhausted yet in the same domestic scope of Guatemala. As we can see, there is still pending effective domestic procedures where decision can be made to modify events that are the bases for the petitioner's allegations. Therefore, the Commission intervention in this case is premature.

c) There are effective appeals that can be raised but have not been raised as yet, are:

Finally, the procedural process that the victims could raise now and have not done yet, are:

1. With regards to the commencement of mining and the harm allegedly dealt by it, they could raise the protection (amparo) constitutional process that – according to the Protection (Amparo) Law, Habeas Corpus and Constitutionality (Decree 1/86) – "protects people against threats of violations of their rights or restores the rule of those rights when the violation has occurred", and "there is no jurisdiction that is not susceptible of protection" (article 8), it may be ordered against public authorities and private individuals (article 9); and
2. In regards to land seizure, the aforementioned vindication action of the real property, by the victims that have not been pursued as yet.

Therefore, as they still are able to raise and exhaust internal appeals available to end the alleged violation, the arguments and requests of the petitioners are inadmissible before the inter-American authorities.

4. Lack of exhaustion of internal appeals aimed at granting a binding nature to the consultation: the victims were not part of the challenged judgement

What has been stated to this point is sufficient to disqualify the complaints of the petitioners. However, not only have they or the victims exhausted the internal appeals in regards to all of the situations reported that were not considered by the challenged judgement, they have not even completed procedures with regards to the judgement currently in place.

In fact, the appeals that generated the judgement of the Court have not been pursued and exhausted in their own name by the victims. The challenged judgement was issued on May 8th, 2007 at the request of the lawyers Montenegro de Garoz, Sierra Rosales, Solares Larrave and Aguirre.

It was they who requested the unconstitutional appeal against the meeting for Consultation in Good Faith, carried out by the Municipal Council of Sipacapa, declaring the unconstitutionality of the binding effect set out by Article 27 of the Regulation for Consultation in Good Faith and not in regards to the balance of the general provisions contained in the meeting that were overruled.

The alleged victims were neither part of nor submitted any appeal in the process that ended in that particular judgement. This arises from reading the first paragraph of the judgement. It is clearly explained that the persons who pursued a request of total general unconstitutionality against the Municipality were the Lawyers Montenegro de Garoz, Sierra Rosales, Solares Larrave and Aguirre. Also in the description of the findings the judgement explains that they held hearings "for fifteen days at the Prosecutors Office, the Supreme Electoral Tribunal, the Ministry of Energy and Mines, the Municipality of Sipacapa of the Department of San Marcos and the Attorney Generals Office" (94). Neither the victims nor the petitioners acted in the court and the mayor of Sipacapa did not give effect to the hearing granted.

It is the doctrine of the Commission that, in order for the appeals to be exhausted in terms of Article 46(1) (a) of the Convention, those must be pursued "in person" (en cabeza propia) by the victims. In applying this doctrine, the Commission has rejected requests from shareholders of a corporation where in this internal jurisdiction had only been this, and not the shareholders, who had exhausted its legal avenues. Here similarly, the victims mentioned by the petitioners have neither "intervened as a party" in the legal proceedings before the Constitutional Court nor have they claimed that some physical or natural person has exhausted the appeals in the internal jurisdiction, or has appeared before national authorities as a victim, or has expressed an impediment to do so" (95).

Therefore, the petitioners cannot challenge the judgement of the Constitutional Court before the Commission, since they were not the referred victims who "pursued and exhausted" the internal jurisdiction appeals which gave rise. This requirement – (i.e.), that the petitioners are the people who have to exhaust the appeals "in person" before the IACHR - , is not merely a formality, but – again a guarantee that the State has to resolve the complaints of its citizens internally, through the subsidiary of the international system.

In fact, the petitioners cannot complain about the violation of an alleged right to a "binding" consultation… because they never raised the argument internally. They were not party to the process which ended in a judgement that now they challenge as trial attorneys were the ones that filed the process. This claim must be dealt with in the internal forum before resorting to the Commission. And as the petitioners were not part of the process, we repeat, they had 30 days to appeal a court decision once issued, consequently their legal rights expired and the legal action and the lawsuit had lapsed.

Furthermore the consultation is valid with regards to its execution and the method in how it was carried out, but not the merits of the consultation because it exceeded the powers of the Municipal Council.

Therefore, they can, specifically, start the protection (amparo) constitutional process, as it was previously summarized, by the alleged violation that the Constitutional Court would commit by giving a judgement that today they are challenging. And once that appeal is exhausted, and if all other requirements are met – among them an important requirement is not to incur in the rule of the fourth instance - , only then will they be able to raise it at the inter-American level. Meanwhile its submission is inadmissible.

5. Lack of exhaustion of internal appeals aimed at obtaining compensation for alleged harms already caused

Finally the internal appeals aiming to give effect to the actual request of the petitioners have not been pursued or exhausted in order to obtain a compensation of the alleged harms caused to the victims.

a) The petitioners seek compensation of alleged harms caused

The consultation in good faith has already taken place. It seems the petitioners are attempting to reverse the judgement as compensation for alleged harms caused by the consultation itself and been declared non-binding.

This compensatory attempt is included in the petition of the challenge, where the petitioners request:

> 7.2) The constitutional court must amend its procedure recognizing the binding character of the consultations (…)
> 7.3) Montana must stop immediately all mining activities for the seizure of the Sipakapense land, and the rejection in the consultation of good faith.
> 7.4) The Government must issue an administrative resolution cancelling the licenses granted to Montana.
> 7.5) The Government must repair the serious environmental and cultural damages caused to the Sipakapense people in the Municipality.
> 7.6) The Government must compensate the material and moral harms to the Sipakapense people (96).

The petitioners, noticeably, are seeking specifically compensatory decisions: that the Court amend its procedure, that Montana Exploradora de Guatemala S.A. stop its activities, and that Guatemala cancels the licences and repair and compensate the environmental, cultural, material and moral harms allegedly caused to the victims.

(96) Complaint of the petitioners against Guatemala, page 53-54. Emphasis added.

With regards to the request for compensation, the HR Court has been conclusive as to the exhaustion of internal appeals "to obtain financial compensation" is necessary when there is a complaint for a violation of rights already consummated (97). Otherwise, the sole complaint of an alleged harm to a right will allow evading the appropriate internal appeals to remedy it injuring the sovereignty of the State of Guatemala and altering the subsidiary nature of the Commission.

b) No reparation or compensation request has been submitted in the local jurisdiction of Guatemala

However, these reparations have not been previously requested in the internal order, denying the State of Guatemala the possibility of repairing the alleged harms.

The victims may currently request the reparation and compensation of the alleged harms, but have not done so.

In fact, the Civil Code of Guatemala entitles them to obtain fair reparation. This is guaranteed generically by Article 1645, which states that:

> Any person who causes damage or injury to another, either intentionally or by carelessness or negligence, is obliged to repair it, unless he proves that the harm or injury was caused by fault or inexcusable negligence of the victim.

Article 1664 specifically mentions the civil responsibility of the legal persons in the following terms:

> Legal persons are responsible of the damages and injuries caused by their legal representatives in exercise of its functions.

With regards to the state and municipal civil responsibility, Article 1665 states:

> The State and municipalities are responsible for the damages or injuries caused by their officers or employees in exercise of their functions.

As seen, the victims through a full trial for damages and injury (98) and/or taking legal action claiming civil liability of public officers and employees in a summary trial (99) have the appropriate internal appeals to obtain reparation for damages by the State and municipalities or whoever is responsible. This process must be pursued and exhausted previously in the internal instance in Guatemala.

(97) Cfr. HR Court, Case Bayarri vs. Argentina. Preliminary Exception, Merit, Reparations and Costs, Ruling October 30, 2008, Serial C No. 187, paragraph 16.
(98) Article 96 of the Civil and Commercial Procedure Code Decree-Law 107.
(99) Articles 246 to 248 of the Civil and Commercial Procedure Code Decree-Law 107.

Not now but only after exhausting these appeals will the Commission accept this case.

Once again it is important to make reference to the dialogue table, where the Municipalities of San Miguel Ixtahuacan and Sipacapa as well as the Community Development Council of both Municipalities are submitting their complaints to the State and to the mining company.

6. Summary of this Section

From every thing stated so far, it is clear that all internal appeals have not been exhausted by the victims at all: They were not part of the challenged judgement and could and currently can pursue effective appeals to protect situations that they complain as being a violation of their human rights and to obtain the corresponding reparations.

In these circumstances, the Petition must be declared inadmissible to guarantee the due process of Guatemala before the Commission and to protect the subsidiary nature of its actions.

C. The foregone events cannot be characterized as violations to rights protected by the Convention

1. Approach

The omission of the requirement of the internal appeals exhaustion is sufficient to declare the Petition inadmissible by the ICHR.

However, in the hypothetical case that the Commission considers that in some particular violations the internal appeals were not exhausted, or that there were no appropriate or effective remedies, it is evident that it will only proceed with the analysis of that particular violation. In this sense, it must take into account that the petitioners have not even presented events that may be characterized as a violation to rights protected by the Convention.

Article 47(b) of the Convention states that the Commission will declare inadmissible any petition that "does not present events that characterize a violation of the rights guaranteed" by it. The same is stated by Article 34(a) of the Commission Regulation.

The Petition, in itself, characterizes the events relative to the challenged judgement and the lack of binding nature of the consultation in good faith as violations of the rights recognized by articles 8, 13, 23 and 24 of the Convention and by the ILO Convention 169.

As it will be explained, this framework is clearly inadmissible, since none of the events mentioned may constitute prima facie, and even admitting its total veracity - a violation of this type - which is rejected in advance.

This challenge would place the Commission into a fourth instance for judgement and review of the sentence of the Constitutional Court. Moreover, it would extend the scope of action of the Commission outside its conventional mandate, as it would be reviewing situations that are foreign to the international instruments it is based upon.

2. The event is allegedly in violation of the Convention: the lack of a binding nature of the previous consultation

Subsequently, it is important to determine which event allegedly created the violation to the right of consultation through the judgement of the Constitutional Court. Could it be the lack of consultation? No, because the consultation took place prior to the commencement of mining activities. Furthermore: the same Court ordered the consultation to take place (100). The violation, therefore, is not due to the lack of consultation.

The alleged violation is, instead, due to the lack of "binding" nature of the consultation carried out by the Municipality (101).

3. There is no human right element to the binding nature of the consultation

However, the lack of a binding nature of the consultation in good faith constitutes a prima facie violation of a right protected by the Convention; therefore, the Petition should be declared inadmissible according to Articles 47(b) of the Convention and 34(a) of the Regulations of the Commission.

The Convention does not provide the right explicitly to a binding consultation to the indigenous peoples when decisions regarding the use of sub-soil natural resources are taken. The petitioners invoke the ILO Convention 169 to base this right as included within the protected rights by Articles 8, 13, 23 & 24 of the Convention.

The Commission has no direct jurisdiction to interpret and apply the ILO Convention 169, but should use it to interpret the Convention. That is stated by Article 29(b) of the Convention, which establishes that none of its provisions should be interpreted in the sense of "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 in which one of those States is a party".

This method of indirect use of other international instruments has been adopted by the Commission in numerous occasions (102), and validated by the HR Court "as a means to better fulfill the functions that are under their mandate"

(100) Cfr. Ruling of the Constitutional Court, February 28, 2008, Records accumulated 1843-2005 and 1654-2005.
(101) Complaint of the petitioners against Guatemala Page 4.
(102) HR Court has quoted, on this regard, reports from IACHR about the situation of human rights in El Salvador (OEA/Ser.L/V/II.46, doc. 23, rev, 1, November 17, 1979) pages 37 & 38; about the situation of political prisoners in Cuba (OEA/Ser.L/V/II.48, doc. 24, December 14, 1979) page 9; about the situation of human rights in Argentina (OEA/Ser.L/V/II.49, doc. 19, April 11, 1980) pages 25 & 25; about the situation of human rights in Nicaragua (OEA/Ser.L/V/II.53, doc. 25, June 30, 1981) page 31; about the situation of human rights in Colombia (OEA/Ser.L/V/II.53, doc. 22, June 30, 1981) pages 56 & 57; about the situation of human rights in Guatemala (OEA/Ser.L/V/II.53, doc. 21, rev 2, October 13, 1981) pages 16 & 17; about the situation of human rights in Bolivia (OEA/Ser.L/V/II.53, doc. 6, rev 2, October 13, 1981) pages 20 &21; and Case 7481 Events taken place in Caracoles (Bolivia), Resolution No. 30/82 (OEA/Ser.L/V/II.55, doc 54, March 8, 1982).

Under these guidelines, the ILO Convention 169 has been applied by the Commission and the HR Court (105).

However, the ILO Convention 169 does not grant binding nature to consultations to the indigenous peoples for the use of sub-soil natural resources belonging to the State.

In fact, it is Article 15(2) states that:

> If the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, the government shall establish or maintain procedures to consult the peoples concerned, to determine if the interests would be prejudiced and to what extent, before undertaking or permitting any exploration or exploitation of the resources on their lands. The peoples concerned shall, wherever possible participate in the benefits of such activities, and receive fair compensation for any damage suffered as a result of these activities.

Note that the Convention establishes that the protected right is a non-binding consultation. If it was indeed binding, the right of the peoples would not be limited to "be consulted" about –and "participate" in – future decisions, but to accept or to veto them. If it was binding, it would not make sense to recognize the right of the peoples to "receive fair compensation", since the harmful activities could only be accomplished with their previous consent – actually, authorization -. Moreover, Article 16 provides the possibility of transfer and relocation of the indigenous peoples without their consent.

It is true that the mechanisms of participation and consultation, in this case relative to the use of mineral resources and may be specified in several ways through internal legislation, even granting them in a binding nature. In this sense, the challenged judgement, urged the Congress of the State of Guatemala to "determine with accuracy whenever a popular municipal consultation would have binding effects" (106).

It is clear now that the binding nature is not granted by the ILO Convention 169 being pursued by the petitioners.

Even the International Labour Organization has interpreted the ILO Convention 169 in the same fashion. In a Manual aimed for that purpose, the Institution has stated to the consultation in general that:

> The Convention does not give indigenous and tribal peoples the right of veto.
>
> The Convention specifies that no measures shall be taken against the wishes of indigenous and tribal peoples, but this does not mean that if they do not agree that nothing will be done (107).

(103) HR Court, "Other treaties" subject to the advisory jurisdiction of the court (art 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982, paragraph 44.
(104) Cfr. HR Court, report 40/40, Case 12.053 Maya Communities from the District of Toledo vs. Belize, October 12, 2004, paragraph 87 & 118.
(105) Cfr, HR Court, Case Indigenous Community Yakye Axa vs. Paraguay. Merit, reparations and costs, Ruling of June 17, 2005, Serial C No. 125 paragraph 127; Case Indigenous Community Sawhoyamaxa vs. Paraguay. Merits, reparations and costs, Ruling of March 29, 2006, Serial C No. 146 paragraph 117; Case of the Saramaka People vs. Surinam. Preliminary exceptions, merits, reparations and costs, Ruling of November 28, 2007, Serial C No. 172, paragraph 92.
(106) Ruling of the Constitutional Court of May 8, 2007, File 1179-2005, conclusion VI, paragraph 2.

In the same sense, regarding Article 15(2) previously mentioned, the Manual explains that:

> (…) the indigenous and tribal peoples do not have the right under the Convention to veto exploitation (…) (108).

As it is obvious, without prejudice to the local legislation establishing it thereof, there are no human right granted by international forums with relevance to the binding nature of the consultation in regards to the use of sub-soil natural resources.

Therefore, the events mentioned by the petitioners – that is, that a previous non-binding consultation took place -, even if they were considered to be true, and would not configure a violation to human rights that should be protected in this international instance.

In this sense, it is important to highlight the declarations of the Special Rapporteur on Human Rights and Fundamental Freedoms of the indigenous peoples, James Anaya, which is based on the ILO Convention 169 on indigenous and tribal peoples in independent countries, the American Convention on Human Rights (as it has been interpreted by the Inter-American Court of Human Rights), and the Declaration of the United nations on human rights of indigenous peoples among other international instruments, namely:

"1. When the Special Rapporteur states that indigenous peoples do not enjoy a right of veto in the context of the consultation process, he refers to this approach which in his view is untenable, and represents an absolute power to decide unilaterally ban or prevent, with justification or not, any proposal or decision made by the State which could affect them. A right of veto in this regard, when it comes to matters that may be of legitimate interest by the party (not only indigenous peoples) but also for society in general, and is not consistent with the standard of participatory consultation that is incorporated into international standards." (109).

As the events can not be characterized as violations of a human rights protected by the Convention or the Declaration, the Commission should declare the complaint inadmissible.

(107) OIT, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual, Geneva, International Labour Office, 2003, page 16. The translation is in-house. The original text is as follows: "The Convention does not give indigenous and tribal peoples the right of veto. The Convention specifies that no measures should be taken against wishes of indigenous and tribal peoples, but this does not mean that if they do not agree it nothing will be done".
(108) OIT, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual, Geneva, International labour Office, 2003, page 40. The translation is in-house. The original text is as follows: "(…) indigenous and tribal peoples do not have the right under the Convention to veto exploitation (…)".
(109) Public statement of the Special Rapporteur on human rights and fundamental freedom of the indigenous peoples, James Anaya, on the Law of the right to prior consultation with indigenous or native peoples recognized in the Convention No. 169 of the International Labour Organization "approved by Congress of the Republic of Peru. July 7, 2010.

4. The petitioners seek the Commission to act as a fourth instance and review the interpretation of the challenged judgement regarding the internal legislation of Guatemala

The petitioners have not only failed to characterize the events as a violation of a human right, but, In reality, pretend to use the Inter-American System in order to review an interpretation of the internal legislation issued by the Constitutional Court. In fact, they attempt to turn the Commission and, eventually, the Court, into a fourth instance of judgement, similar to an international appellate body in order to review errors in legal interpretation (110).

But the Commission does not have the jurisdiction to replace its judgement for the national courts in matters that involve interpretation and application of internal law, or the legal assessment of the events (111). The mere discontent with the result of the justice administration is not enough to strike the sentence as arbitrary, and, therefore, is in violation of the judicial guarantees provided in Articles 8 and 25 of the Convention.

As the Commission has stated:

> The petitioners disagreement with the judicial decisions that have been issued within the jurisdiction of the natural judges does not support the Commission for the review such decisions. The Commission is not an appellate court and is not responsible for overturning court decisions, but moreover to ensure that States provide their citizens with judicial activity which adheres to due process (112).

That is why, even though the Commission "is empowered to declare a petition admissible and rule on its merits when it concerns a national court decision was handed down without due process, or in violation of any other right guaranteed by the Convention", when the petition "merely asserts that the decision was wrong or unjust in itself", it should be dismissed (113).

The European Commission of Human Rights has stated the same principle:

> "To the extent that the petitioners complain of errors of fact and law (…), the Commission recalls that (…) its only function is to ensure compliance with the obligations assumed by the Parties to the Convention. In particular, it is not competent to deal with an application which alleges that errors of law or fact have been committed by domestic courts" (114).

(110) Cfr. IACHR, Resolution No. 29/88, Case 9260, JAMAICA, September 14, 1988, IACHR, Report No. 39/96, Case 11.673, ARGENTINA, October 15, 1996.
(111) Cfr. IACHR, Report No. 39/96, Case 11.673, ARGENTINA, October 15, 1996, paragraph 50-51.
(112) IACHR, Report No. 87/98, Case 11.216, Report of admissibility, Oscar Vila-Masot vs. Venezuela, October 12, 1998. Cfr. Also IACHR, report No. 39/96, Case 11.673, Santiago Marzioni vs. Argentina, October 15, 1996, paragraph 50; and report No. 98/06, Petition 45-99, Inadmissibility, Rita Ortiz vs. Argentina, October 21, 2006.
(113) Cfr. IACHR, report No. 39/96, Case 11.673,ARGENTINA, October 15, 1996, paragraph 50-51.
(114) ECHR, Application No. 10785-84, (1986), D.R., 48, 150.

The judicial doctrine has explained this principle, stating that the right of litigation of the parties is a right to be heard, and not to obtain a favourable result: otherwise, and that each sentence, to the extent that it rejects the complaint of a party, would lead to a violation of their human rights (115).

That is why, the petition shows that the core of its criticism of the sentence is not in itself the violation of a human right to binding popular consultation, but "to have erroneously interpreted the Constitution of Guatemala and the Municipal Code" with regards to its jurisdiction to consult with neighbours. Its challenge seeks to demonstrate that Articles 125, 152 and 154 of the Constitution cannot be interpreted as forbidding guidelines similar to the one in Article 27 of the Regulation of Consultation in Good Faith (116), since according to the petitioners the municipal agreements to carry out the consultation are based in Articles 3, 17, 35 and 65 of the Municipal Code.

This last conclusion was in fact found in the judgement of the Constitutional Court: municipalities, which are not constitutionally entitled to regulate in the mining field, and therefore they cannot establish binding consultations regarding mining undertakings:

> (…) the nature of an advisory procedure of this type should be merely indicative; in order to investigate the opinion of a specific matter (…), but its effect cannot have a regulatory nature over matters that fall under the jurisdiction of a state organization different from the one bringing up those issues, otherwise the legitimate interests acquired by third parties through appropriate legal channels for surveying, exploration and exploitation of minerals may be affected. Although Articles 64 and 66 of the Municipal Code establish that when the results of a popular municipal consultation are binding, it should be understood that such effects shall occur only on issues within the competence of the municipalities (117).

The challenged judgement, as it can be seen, interpreted the internal legislation, concluding that the Municipality was not entitled to carry out a consultation with such characteristics.

This interpretive reasoning is being challenged by the Petition. As examples, consider the following excerpts:

(115) Victor Fairen Guillen, General Theory of Procedural Law, p. 80 and ss., prologue of Sergio Garcia Ramirez, Mexico DF, UNAM, available in http://www.bibliojuridica.org/libros/2/965/6.pdf.
(116) Article 125: "Exploitation of non-renewable natural resources. It is declared public necessity, technical and rational exploitation of hydrocarbons, minerals and other non-renewable natural resources. The State shall establish and facilitate the appropriate conditions for exploration, exploitation and marketing".
Article 152, Constitution: "Public Power. The power comes from the people. Their exercise is subject to the limitations stated in this Constitution and law".
Article 154, Constitution: "Civil Service; subject to the law. Officials are custodians of authority, legally responsible for their official conduct under the law and never above".
Article 17 Municipal Code. "Rights and obligations of the neighbours. The rights and responsibilities of neighbours:…j) Participate in consultations with residents in accordance with the law. K) Ask the municipal referendum on matters of great importance for the municipality, as provided by this Code…"
Article 35 Municipal Code. "General powers of the City Council. It is incumbent to City Council:… y) The promotion and protection of renewable and non-renewable resources of the municipality…"
Article 65 Municipal Code. "Consultations with indigenous communities or authorities of the municipality. When the nature of a matter affecting in particular the rights and interests of indigenous communities in the municipality or of its own authorities, the City council will hold consultations at the request of indigenous communities or authorities, including applying criteria of the customs and traditions of the indigenous communities."
(117) Ruling of the Constitutional Court of May 8, 2007, File 1179-2005, conclusion V, paragraph 4.

> "The Court considers that the consultation in good faith intends to give a mandatory nature within Sipacapa when it affects national interests. Of course it affects national interests, hence the strong interest of the communities and Municipal Council to preserve non-renewable natural resources, ensuring that the exploration and exploitation strictly complies with the Constitution and laws of the country, that is, to be rational".
>
> "The rationale of Article 125 above, should be understood in the context of its spatial and temporal dimension, but also for the damages to the fundamental right of health of communities and peoples affected" (118).
>
> "As the Inter-American Commission noted from the constitutional Article 125; the guidelines refer to the State, not the central government or the municipal government" (119).
>
> "Upon reading the ILO Convention 169, relevant parts of the constitution, the urban and rural development councils act, and the municipal code, it is clear that the purpose of the consultations in good faith is to pursue the acceptance or consent regarding the measures affecting indigenous peoples" (120).
>
> "When constitutional Article 121 states that, the State is the owner of the sub-soil, the mineral and hydrocarbon deposits, as well as any other organic or inorganic substances of the sub-soil. In other words, renewable and non-renewable natural resources, belong to the indigenous peoples who are the legitimate owners of their natural resources" (121).

The criticism of the challenged judgement, as can be seen, does not deal with the violation of a human rights protected by the Convention, but aims at the erroneous interpretation of the applicable internal law guidelines (122).

In these circumstances, "an analysis of this petition by the Commission, and a further decision on the merits of the case, would require that it act as a quasi-judicial or appellate court of law, with respect to the final decision issued by the judicial authorities" of Guatemala (123).

Therefore, according to the provisions in Article 47(b) of the Convention, the challenge should be rejected, since it does not show events that characterize a violation of human rights which it guarantees.

(118) Complaint of the petitioners against Guatemala, page 48. Emphasis added.
(119) Complaint of the petitioners against Guatemala, page 50. Emphasis added.
(120) Complaint of the petitioners against Guatemala, page 51. Emphasis added.
(121) Complaint of the petitioners against Guatemala, page 51. Emphasis added.
(122) The criteria mentioned by the Inter-American Commission should be recalled in the Marzioni Case previously mentioned, referring to the jurisprudence of the European Court of Human Rights Commission in the case of Alvaro Baragiola vs. Siwtzerland – and used in the report to sustain its position-, highlighting that "The Commission recalls that it is in the first instance, national authorities and in particular the courts, interpreting and applying the law. The Commission recalls that what is decisive is not the subjective fear of the person concerned about impartiality required of the court that deals with the trial, understandable, but the fact that in the circumstances indicated that their fears are justified objectively".
(123) IACHR, Report No. 39/96, case 11.673, Santiago Marzioni vs. Argentina, October 15, 1996, paragraph 71.

5. Conclusions

- Everything stated, the conclusion is clear that: the complaint filed by the petitioners is clearly inadmissible.

- The challenged judgement merely addressed a specific matter of internal law if: the Municipal Council indeed had constitutional powers to grant a binding nature to a consultation in good faith in issues related to mining activities.

- The alleged victims have not exhausted every internal instance. They were not exhausted in regard to allegations related to violations to rights of life and health, to the property and to a healthy environment. They did not exhaust them also in the case of an alleged violation to the right of consultation: the ruling of the Constitutional Court was issued at the instance of Montana Exploradora de Guatemala S.A., and not all victims were part of that process, nor did they pursue any appeal of its context.

- Therefore, the victims need to exhaust all internal appeals, either to question the binding nature of the consultation, to request restitution of their land, to request reparation for the alleged environmental damage caused, or to obtain compensation for damages suffered.

- This complaint, finally, aims at avoiding the internal jurisdiction of Guatemala and to request a statement from the Commission with regards to internal law issues: they are requesting the review of the constitutionality criteria utilized by the Constitutional Court declaring Article 27 of the Regulation of Consultation in Good Faith unconstitutional. Thus, there is no characterization of events submitted as a violation of human rights: there is merely a characterization of events that, according to the petitioners, demonstrates an erroneous interpretation of the Constitution and laws of Guatemala.

- The inadmissibility of such an argument or approach is evident. Articles 46(1)(a) and 47(a) and (b), of the Inter-American Convention on Human Rights and its sense according to the interpretation given by the Commission and the Court, are sufficiently clear to deliver such conclusion as related to the admissibility of the Petition.

- In order to protect its subsidiary nature as an international body, the Commission should reject the complaint of the petitioners for a lack of elements substantiating its admissibility.

4. PETITIONS:

With the considerations of fact and law set out in this document, the State of Guatemala respectfully requests the following:

a) Add this report and attached documents to the records of the State;

b) Consideration of the additional allegations and comments related to the communications noted to the State with regards to the Precautionary Measures MC-260-07 and the Petition P-1566-07 as submitted;

c) The State of Guatemala reiterates again the invitation to the Illustrious Commission turned with regard to Articles 43 and 48 Sub Section d) of the Inter-American Commission on Human Rights, to carry out a site visit, and to follow up on this collective precautionary measure, pursuant to Article 28.5 of the IACHR Regulation.

d) Consideration of the Precautionary Measures presented by virtue of the associated Petition P-1566-07, under registration MC-260-07;

e) The case be fully processed in accordance with Article 25 subsection 7th of the Illustrious Inter-American Commission of Human Rights Regulations;

f) Provides for the lifting of the measures contained in this case, or otherwise modify them, as outlined in the second Sub Section;

g) Declare the grounds for inadmissibility of the Petition 1566-07, as explained in this document because there are no grounds for the Petition and file it in accordance with Articles 46 (1)(a) and 47 (a) and (b), of the American Convention on Human Rights and Article 42 (1) (a) of the Inter-American Commission of Human Rights Regulations.

Sincerely yours,

"SIGNATURE"
Dora Ruth del Valle Cobar
President