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REPORT No. 179/23
PETITION 3004-18
REPORT ON ADMISSIBILITY

SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION
CANADA

Approved electronically by the Commission on August 25, 2023.

Cite as: IACHR, Report No. 179/23 Petition 3004-18. Admissibility. Southeast Alaska
Indigenous Transboundary Commission. Canada. August 25, 2023.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Southeast Alaska Indigenous Transboundary Commission (SEITC) ¹
Alleged victims:	Fifteen tribal communities in Southeast Alaska ²
Respondent State:	Canada
Rights invoked:	Articles I (life and personal security) and XI (preservation of health and well-being) XIII (benefits of culture) and XXIII (property) of the American Declaration of the Rights and Duties of Man ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 5, 2018
Additional information received at the stage of initial review:	July 14, 2020
Notification of the petition to the State:	April 20, 2021
State's first response:	June 7, 2022
Additional observations from the petitioner:	July 25, 2022

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Declaration (ratification of the OAS Charter on January 8, 1990)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles I (life and personal security) and XI (preservation of health and well-being) XIII (benefits of culture) and XXIII (property) of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in terms of Section VI
Timeliness of the petition:	Yes, in terms of Section VI

¹ The petitioners are a consortium of fifteen tribal communities in Southeast Alaska.

² The fifteen tribal communities are: Chilkat Indian Village of Klukwan, Douglas Indian Association, Organized Village of Saxman, Craig Tribal Association, Ketchikan Indian Community, Organized Village of Kake, Metlakatla Indian Community, Wrangell Cooperative Association, Sitka Tribe of Alaska, the Klawock Cooperative Association, Petersburg Indian Association, Organized Village of Kasaan, Hydaburg Cooperative Association, Yakutat Tlingit Tribe, and Central Council of Tlingit and Haida Indian Tribes of Alaska

³ Hereinafter "the American Declaration" or "the Declaration".

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

Allegations from the petitioners

1. The petitioners allege that the actual or potential operation of six hard-rock mining sites in the Canadian province of British Columbia (hereafter “British Columbia” or “B.C.”) has placed the petitioners at risk of pollution to watersheds of rivers that flow from B.C. to Alaska, where the petitioners are situated. According to the petition, this risk of pollution will impact on certain rights, including the right to enjoy the benefits of their culture, means of subsistence, and other rights.

2. The petitioners are a consortium of fifteen tribal communities in Southeast Alaska that live close to the border of Canada (B.C). More specifically, these tribal communities live in or around the transboundary watersheds of the Taku, Stikine, and Unuk rivers. These rivers flow through from British Columbia through Alaska to the Pacific Ocean. According to the petition, these tribal communities have traditionally relied on these watersheds as a source of dozens of species of fish, many of which –particularly salmon and eulachon– have been historical staple commodities. The petition also indicates that these watersheds are also centerpieces of their cultural practices and spiritual beliefs.

3. According to the petition, there are six hard-rock mines in British Columbia, that are upstream of the Canada–US border and of where Southeast Alaska Native communities harvest fish. Two of these mines are operating, while a third has received operating permits but is in receivership. The three other mines are now in the permitting stage. The petition states that these mines⁵ (collectively the “B.C. mines”) are large-scale industrial projects that are generating and/or will generate huge quantities of acid-producing and toxic waste products. In this regard, the petitioners further state that these B.C. mines pose an imminent and foreseeable threat of polluting downstream waters with highly toxic heavy metals that could cause sustained and significant declines in the populations of the fish that Southeast Alaska Native communities rely on for their subsistence and that are central to the maintenance of their culture.

4. The petitioners assert that hard-rock mines pollute the environment principally through chronic heavy metals pollution and the catastrophic failure of mine waste containment systems. The petitioners rely on the expert opinion of a geophysicist Dr. David Chambers⁶ to substantiate their case about the impact of pollution generated by hard-rock mining.

5. Regarding chronic heavy metals pollution, the petitioners maintain that this results from a toxic mix of acidic water and dissolved heavy metals known as “acid mine damage.” The petitioners add that acid mine drainage is generated when water flowing from mine sites is acidified by contact with sulfide rock that has been exposed to oxygen. Additionally, the petitioners indicate that where acid mine drainage flows into rivers, streams, or aquifers, it can cause significant harm to aquatic life. The petitioners state that mine operators have attempted to mitigate the generation and release of acid mine drainage to the surrounding environment, using networks of liners, ditches, and ponds.

6. However, the petitioners assert that containment and treatment often do not perform as planned. In this regard, the petitioners state that infrastructure often fails to contain polluted waters, and treatment processes often fail to reduce acidity or remove metals adequately.⁷ Moreover, because the

⁵ The mines identified by the petitioners are: 1. The Tulsequah Chief Mine (gold, silver, copper, lead, and zinc) [in receivership, but has permits needed to conduct mining (if and whenever a new owner takes over] ; 2. The Red Chris Porphyry Copper-Gold Mine; 3. The Schaft Creek Mine (open pit copper, gold, molybdenum, and silver mine); 4. The Galore Creek Mine – (copper, gold, silver); 5. The Brucejack Mine –(gold and silver); 6. The KSM Mine (gold, silver, copper, and molybdenum mine).

⁶ Dr. Chambers’ opinion is attached to the petition as Annex 1.

⁷ The petitioners illustrate the difficulty of containing acid mine drainage (over decades) with reference to the old Tulsequah Chief Mine in British Columbia. The petitioners indicate that although the mine, located at the same site as one of the proposed B.C. Mines, ceased operations in 1957, toxic acid mine drainage from the mine has polluted the watershed since its closure. In this regard, the petitioners cite a 2016 study commissioned by the government of British Columbia that found that “multiple undiluted and untreated sources of historic mine waste are discharging into the Tulsequah mainstem and side channels from surface water and groundwater inputs,” posing “unacceptable risks to fish, fish eggs, and pelagic invertebrates.” The petitioners add that it is estimated that 12.8 liters of

[continues ...]

oxidization process that generates acid mine drainage persists over centuries, containment and treatment techniques must work for centuries, which is much longer than the operational life of a mine. Given these issues, the petitioners maintain that pollution from chronic acid mine drainage is a common problem where hard-rock mining occurs, as is the case with the six mines at issue.

7. The petitioners also assert that toxic pollution from hard-rock mines can reach the environment through catastrophic failures of tailings containment systems. According to the petitioners, tailings are one of the main wastes produced by mining activities. The petitioner state that tailings is the leftover waste slurry following extraction of metals from rock. The petitioners explain that to remove and process the metals present in rock, ore is crushed and ground into fine particles at a mill. Subsequently, the rock particles are then suspended in water from which concentrated metals are separated using a combination of mechanical and chemical techniques. The petitioners indicate that most of the B.C. mines also use a highly risky method of storing tailings, in wet dam enclosures that have a history of failure. According to the petitioners, when these dams fail, they release massive amounts of toxic sludge into surrounding rivers and streams, catastrophically polluting downstream waters and habitats.

8. The petitioners further assert that there are several risk factors associated with these dams that predispose them to fail. One risk factor mentioned by the petitioners is that these dams are often raised incrementally over many years as tailings accumulate over the mine's operating life, making it difficult to maintain quality control. Another factor mentioned is that the tailings themselves can be used for partial, or sometimes full, support of the dam. These underlying tailings may be unstable, however, because they can remain saturated and liquefy under pressure or during an earthquake, compromising the integrity of the dam built on top of them.

9. According to the petitioners during the century or so of their use, over two hundred tailings-dam failures have been reported around the world. The petitioners indicated that a sizable proportion of these dam failures have been serious enough to cause significant harm to ecosystems. With respect to Canada, the petitioners state that there were seven tailings spills between 2007 and 2017, including a 2014 spill at the Mount Polley Mine in British Columbia. The petitioners assert that this was one of the worst tailings disasters in the world.⁸

10. In response to the Mount Polley tailing spill/dam failure, the petitioners state that the British Columbia government convened an expert panel to investigate the disaster and to recommend government actions that could ensure such failures would not occur again. The panel concluded that the dominant cause of the dam failure was that its design did not account for stresses that the dam structure would have to bear because of its geological surroundings and the dam's slope. Ultimately, the petitioners argue that the government of British Columbia has failed to commit to the expert panel's most significant recommendation: that the province systematically transition from building large tailings ponds to the safer technology of putting tailings underground, with dry/filtered tailings on the surface.

11. The petitioners also argue that regulation of mining in British Columbia is inadequate. In this regard, they state that the principal agencies responsible for regulating mining are the Ministry of Energy, Mines and Petroleum Resources (which regulates activities on mine sites), and the Ministry of Environment (which regulates a mine's potential impacts to the environment). The petitioners assert that the Mount Polley dam failure prompted the Auditor General of British Columbia in 2016 to conduct an audit of these government ministries.⁹ According to the petitioners, the Auditor General found "*a decade of neglect in compliance and enforcement activities within the Ministry of Energy and Mines, and significant deficiencies within the Ministry of*

acidic, metals-laced water escape the mine site every second – over 400 million liters per year – into the Tulsequah River, the largest tributary of the Taku River.

⁸ According to the petitioners, on August 4, 2014, a tailings-dam collapsed at Imperial Metal's Mount Polley copper and gold mine in British Columbia. The breach opened suddenly, giving the mine operator no warning and releasing approximately 254 million cubic meters of toxic tailings slurry into salmon-bearing downstream waters. The tailings and polluted water widened a downstream creek from five meters to a width of over 100 meters. The toxic tailings rushed downstream, killing fish and destroying and contaminating Indigenous peoples' lands and waters they had used for generations.

⁹ The petitioners cite: *Auditor General of British Columbia, An Audit of Compliance and Enforcement of the Mining Sector* (May 2016)

Environment's activities." In this regard the petitioners mention that the Auditor General found that the Ministry of Environment's compliance and enforcement activities do not adequately protect against "*significant environmental risk.*" As an example of poor enforcement, the petitioners state that the Auditor General pointed to the ministry's inadequate oversight of a coal mining project in the Elk River watershed (a transboundary river flowing from British Columbia into Montana). Despite knowing that the mine operator's discharges of selenium to an already polluted watershed in excess of its permit level would likely harm the environment, the ministry did not suspend the mine's operations, but instead authorized the mine's expansion.

12. The petitioners further state that the Auditor General also found that the Ministry of Energy and Mines' compliance and enforcement activities were inadequate to protect the environment, and its "*expected regulatory activity*" was "*deficient.*" In this regard, the petitioners indicate that, in connection with the Mount Polley dam failure, the Auditor General found that the ministry adopted generic dam-building standards that were "*not specific to the conditions in B.C. or specific to tailings dams [...] result[ing] in a tailings dam that was built below generally accepted standards for tailings dams*".

13. According to the petitioners, the Canadian authorities have not required the operators of the six B.C. mines to assess impacts from the mine projects on downstream water quality in areas populated by the salmon and eulachon upon which petitioners' subsistence way of life and culture depends, despite having knowledge of the threats from these mines to petitioners' rights. According to the petitioner, for five of the six mines, the operators have not assessed potential changes to water quality in these downstream watersheds. Moreover, none of the operators has assessed worst-case scenarios for downstream waters should their tailings-dams fail. The petitioners allege that the failure of the governments of British Columbia and Canada to prevent environmental damage from the B.C. mines, including from catastrophic tailings dam failures, creates a significant and imminent risk of environmental damage to the Taku, Stikine, and Unuk watersheds.

14. According to the petitioners, only the KSM Mine operator (called Seabridge), has assessed potential impacts of its mine on water quality downstream, including at the Canada-US border, from normal mining operations. The petitioners indicate that all the B.C. Mines propose to use similar pollution mitigation strategies as the KSM Mine –neutralizing and precipitating metals out of solution before releasing waters to the environment– the KSM Mine provides a general picture of threats that might be expected from the other B.C. mines.

15. The petitioners rely on the expert opinions of Dr. David Chambers¹⁰ and Dr. Kendra Zamzow¹¹ to argue that the assessment by Seabridge is flawed. The petitioners note that Seabridge has acknowledged that the KSM Mine will likely generate acid mine damage, but that it intends to capture waters in dams that naturally contain metals, combine them with mine wastewater, and treat the combination before releasing it as effluent to the Unuk watershed.

16. The petitioners indicate that Dr. Chambers and Dr. Zamzow have both indicated that the treatment methods proposed by the Seabridge are unlikely to prevent chronic or catastrophic contamination of waters downstream from the mines. The petitioners also note that according to these experts the kind of containment dams proposed or constructed, have failed in the past, and have been found by a panel of government experts to be unsafe. Ultimately, the petitioners indicate that Drs. Chambers and Zamzow have stated that no treatment process is adequate to prevent acid mine drainage pollution to surface waters in the Unuk watershed.

17. The petitioners further argue that based on the expert opinions of Dr. Zamzow and Dr. Chambers, that the actual ranges of downstream concentrations of metals are likely to increase due to discharge from the KSM Mine, and that these increases could be substantial. The petitioners add that for these reasons, Dr. Chambers concluded that, by granting KSM Mine's environmental permit, the British Columbia government has demonstrated that "*it is willing to authorize a mine project that will, as a matter of course, use downstream salmon waters –including waters in the United States– as mixing zones to dilute toxic mine wastes*

¹⁰ Dr. Chambers' opinion is contained in Annex 1 of the petition.

¹¹ Dr. Zamzow is an environmental geochemist, and her opinion is contained in Annex 2 of the petition.

[...]” The petitioners generally contend that the operation of the KSM Mine could lead to an increase in concentrations of selenium, aluminum, cadmium, copper, and zinc in waters downstream, which in turn could cause population-level harms to salmon, eulachon, and other fish (Unuk River) resulting in “*significant and sustained population decreases.*”

18. The petitioners emphasize that each of the B.C. Mines presents foreseeable, imminent, ongoing and significant threats to their subsistence, cultural practices, health and property. In this regard, the petitioners further contend that all six of the B.C. Mines feature infrastructure and pollution-mitigation strategies that could substantially increase metal concentrations downstream of the mines in the Taku, Stikine, and Unuk River watersheds, which could harm fish populations that the petitioners rely on for their cultural, spiritual, and subsistence practices. The petitioners indicate that the loss of these fish populations would negatively impact their livelihoods; and that their health would suffer from the loss of an important source of healthy traditional food. In this regard, the petitioners assert that they would have to buy less-nutritious food in place of the fish they traditionally harvest and eat, and would not be able to afford, or perhaps even find, the wild salmon and eulachon that are central to their subsistence. The petitioners contend that foreseeable harms constitute violations of their rights to culture, means of subsistence, health, and right to use and enjoy the lands and waters they have traditionally used and occupied. In addition, the petitioners contend that Canada and British Columbia have failed also to respect their right to be consulted and informed during the approval or permitting of any of the B.C. Mines, despite knowing of the foreseeable risks to them.

19. The petitioners indicate that the legal framework that governs the protection of indigenous peoples does not extend to indigenous communities outside of Canada. In this regard, the petitioners refer, for example to the 2019 Impact Assessment Act (federal legislation). The petitioners argue that while this legislation requires the consideration of impacts of mining and similar activities on indigenous peoples, this requirement applies solely to indigenous peoples of Canada. The petitioners also refer to the 2018 British Columbia Environmental Act, they state that this legislation requires consideration of impacts of projects only regarding indigenous communities in Canada and does not extend to indigenous peoples living outside of Canada.

20. With reference to inter-American and international jurisprudence,¹² the petitioners argue that exposing individuals to a risk of irreparable physical, cultural, or emotional harm by failing to take preventive measures is a cognizable human rights violation, even if that risk has not yet fully materialized. The petitioners contend that States have an obligation to guarantee that environmental harm does not violate the human rights of people, including indigenous peoples.

21. The petition also submits that the American Declaration contains no territorial limitation that would insulate Canada from responsibility for its acts or omissions that violate the human rights of the Alaska-based petitioners.¹³

22. The petitioners claim that they qualify for an exemption to the requirement to exhaust domestic remedies, pursuant to Article 31 (2) (a) of the Commission’s Rules of Procedure. They emphasize that

¹² With respect to Inter-American jurisprudence, the petitioners cite, for example the case of Maya Indigenous Communities of the Toledo District Belize (IACHR Report N° 40/04 Case 12.053 Merits, October 12, 2004). The petitioners noted that in this case the Commission underscored states’ obligation to require “*appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.*” (para. 87). The petitioners also cite I/A Court H.R., Advisory Opinion OC-23/17, Human Rights and the Environment, November 15, 2017. Series A No. 23. The petitioners indicate that the Inter-American Court identified two international environmental law principles that are particularly relevant to interpreting the American Convention (and, through it, the American Declaration) in situations related to environmental harm: the obligation of prevention and the precautionary principle. (para. 125). Regarding international jurisprudence, the petitioners cite an observation from the United Nations Human Rights Committee that states violate the right to life by exposing people to “*reasonably foreseeable threats and life-threatening situations.*” (UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35438, para. 7.

¹³ In support of this contention, the petitioners cite para. 102 of I/A Court H.R., Advisory Opinion OC-23/17, Human Rights and the Environment: “*The exercise of jurisdiction by the State of origin in cases of transboundary harm is based on the understanding that it is the State in whose territory or under whose jurisdiction these activities are carried out that has effective control over polluting activities and is in a position to prevent the cause of the transboundary harm which affects the enjoyment of human rights of individuals outside its territory.*”

Canada's Indigenous, environmental, and constitutional laws do not extend to foreign indigenous communities outside of Canada. In this regard, the petitioners assert that there is no reasonable chance of success of pursuing or obtaining relief before the Canadian judicial authorities. The petitioners submit that the Constitution of Canada does contain protections for aboriginal peoples, but that this is limited to aboriginal peoples of Canada. Consequently, the petitioners submit that they would not be protected under these provisions¹⁴. Accordingly, they conclude an exemption is warranted because the domestic legislation of the State does not afford due process of law for protection of the rights that have allegedly been violated.

23. The petitioners also note that the B.C. mines are based in Canada and are under Canada's jurisdiction and control and that the United States has no jurisdiction or control over the companies operating these mines. Accordingly, the petitioners assert that the United States cannot stop the violations; and that they therefore are not obligated to seek remedies in the United States. The petitioners affirm that even though they have no obligation to exhaust remedies in the United States, they have informed relevant United States government officials of their concerns, to no avail.

24. The petitioners argue that the petition is timely, because the acts and omissions of Canada and British Columbia are ongoing, and the individual and cumulative threat of serious pollution from the B.C. Mines present an imminent and significant risk to the petitioners' human rights. In this regard, the petitioners contend that British Columbia and Canada have failed to take effective action to prevent pollution and environmental damage from mines operating in the British Columbia-Alaska transboundary watersheds. The petitioners also submit state that it is also unlikely that these governments will adequately consider and address potential threats to petitioners from the mines that are still in the permitting phase. Further, the petitioners allege that these governments do not require the mines to assess transboundary water quality impacts and they continue to authorize mines that are using unsafe pollution containment and treatment processes.

Allegations of the State

25. The State of Canada submits that the petition is inadmissible pursuant to Article 34(a) and (b) of the Rules of Procedure of the IACHR on the basis that it does not state facts that tend to establish a violation of rights, and that it is manifestly groundless or out of order. Additionally, or in the alternative, the State submits that the petition is inadmissible pursuant to Article 31(1) of the Rules of Procedure because the petitioners have not exhausted available domestic remedies.

26. The State submits that the factual circumstances surrounding the approval of the mining projects do not establish any colorable violation of the rights of the petitioners. The State dismisses the claim of the petitioners that the mining projects involves risks of significant environmental harm. In this regard, the State alleges that (between 2002 and 2015) environmental assessments have been completed by federal and provincial authorities¹⁵ for five of the six mining projects¹⁶; and that it was determined that these environmental assessments determined that each of the projects reviewed was not likely to cause significant adverse environmental effects. The State indicates that two of the mining projects that were the subject of completed environmental assessments (Red Chris and Brucejack) are currently in operation. Further, the State

¹⁴ The petitioners also add that the Constitution does not recognize the right to property or the right to use and enjoy traditionally occupied lands; nor does it protect the right to health or the right to subsistence.

¹⁵ The State indicates that at the federal level, environmental assessments are governed by the Impact Assessment Act, while at the provincial level (in British Columbia), environmental assessments are governed by the Environmental Assessment Act. The State also indicates that the governments of Canada and British Columbia have an agreement in place that provides for a cooperative impact assessment to be conducted on projects that require an impact assessment under the legislation of both jurisdictions. Under the agreement, both jurisdictions retain responsibility for satisfying their respective impact assessment legal requirements; additionally, each government maintains authority in the areas under its jurisdiction and retains its ability to make decisions regarding a proposed project.

¹⁶ According to the State the five mines that have already been subject to environmental assessments are: Red Chris, Galore Creek, Brucejack, KSM, and Tulsequah Chief. The State indicates that in relation to the Schaft Creek mine- in 2016, the project operator withdrew the project from the federal and provincial environmental assessment processes before these assessments had been completed. According to the State while the project operator has continued work on the project, completed environmental assessments would be required if the project is to proceed to construction.

asserts that a third mining project that has received environmental approvals (KSM) is not yet in operation, but the project is active and preparations for project construction are continuing.

27. The State argues that the petitioners largely do not refer to the outcomes of environmental assessment processes carried out by Canada and British Columbia for these projects in relation to the potential environmental threats they have highlighted. On the issues of acid rock drainage and tailings dam storage failure, Canada indicates that there is only one brief reference in the petition to a finding made by authorities in British Columbia in their environmental assessment of one of the projects. The State submits that the petitioners do not otherwise discuss the conclusions reached by federal and provincial authorities on these issues. On the issue of harm to fish populations, notwithstanding the petitioners' extensive discussion of the environmental effects assessment carried out by the project proponent for the KSM mine project, there is no mention of the specific conclusions of the federal or provincial environmental assessments carried out for this project or for the other cited mining projects regarding their potential impacts on downstream fish populations.

28. The State emphasizes that the potential environmental threats raised by the petitioners –acid rock drainage, tailings dam storage failures and harm to fish populations caused by increased metal concentrations in downstream waters– were in fact considered by authorities in Canada and British Columbia during the environmental assessment processes for the five named mining projects for which environmental assessments were completed. The State contends that in relation to each of the potential concerns raised by the petitioners, federal and/or provincial environmental assessment authorities repeatedly concluded that the mining project under consideration was not likely to cause significant adverse environmental effects, including transboundary effects, taking into account the implementation of proposed mitigation measures and other commitments agreed to by the project proponents.

Environmental impact assessment process

29. The State provides information on the nature of the environmental impact assessment process conducted at both the federal level and the provincial levels (British Columbia).

Federal level

30. At the federal level, the State indicates that the environmental assessment process is governed by the, the Impact Assessment Act ("IAA"). The IAA entered into force on 28 August 2019.¹⁷ The State further submits that under the IAA, impact assessments are carried out on 'designated projects' such as certain mines, oil facilities, bridges, roads and dams. The State indicates that impact assessments are conducted primarily by the Impact Assessment Agency of Canada ("Agency"), or in some cases by an independent review panel appointed by the Agency. According to the State, an impact assessment is a planning and decision-making tool used to assess the potential positive and negative effects of proposed projects. In this regard, the State indicates that impact assessments assist in identifying and understanding the potential impacts of a proposed project before it starts. Their goal is to inform decision-makers about such potential impacts and ensure the protection of people and the environment.

31. According to the State there are five main stages in the impact assessment process: (1) Planning, (2) Impact Statement, (3) Impact Assessment, (4) Decision-Making, and (5) post-Decision.

Planning

32. In the Planning phase, the State indicates that the proponent for a designated project submits an initial description of the project to the Agency, and the Agency decides as to whether an impact assessment is required. If the Agency makes a positive decision, the process moves onto the Impact Statement phase.

¹⁷ The State indicates that prior to the IAA, the federal environmental assessment process was governed first by the Canadian Environmental Assessment Act 5 ("CEAA 1992") and subsequently by the Canadian Environmental Assessment Act, 2012 ("CEAA 2012"). The CEAA 1992 was in force from 19 January 1995 until 5 July 2012, while the CEAA 2012 was in force from 6 July 2012 until 27 August 2019.

Impact Statement

33. The State submits that during this second phase, the project proponent prepares an Impact Statement and submits it to the Agency for approval. This is a detailed technical document that includes information and studies relating to the project in accordance with tailored guidelines stipulated by the Agency.

Impact Assessment

34. In the Impact Assessment phase, the State indicates that the Agency considers the potential environmental, health, social and economic impacts of a designated project. In conducting the impact assessment, the Agency takes into account a series of factors stipulated in the IAA¹⁸. According to the State, the Agency then develops an Impact Assessment Report. In preparing this document, the Agency takes into consideration the information and evidence provided by the project proponent, expert federal departments, other jurisdictions, Indigenous groups and the public.

Decision-Making

35. According to the State in the Decision-Making phase, the Minister of Environment and Climate Change (or alternatively the Governor in Council) decides whether the adverse effects of a proposed project within federal jurisdiction and the adverse direct or incidental effects indicated in the Impact Assessment Report are in the public interest. The State adds that this determination is made based on the Impact Assessment Report and consideration of a number of factors listed in the IAA. According to the State, if it is determined that a project's adverse effects are in the public interest, entailing that the project may proceed, the Minister establishes enforceable conditions regarding these adverse effects that the project proponent is required to comply with when carrying out the project. These conditions must include implementation by the project proponent of appropriate mitigation measures and a follow-up program. The decision of the Minister or Governor in Council regarding the project and any conditions are set out in a Decision Statement.

Post-Decision

36. The State indicates that during the post-Decision phase, the Agency is responsible for verifying the project proponent's compliance with conditions stipulated in a Decision Statement. The Agency is authorized to take a number of actions to facilitate compliance, including issuing orders to project proponents.

37. Generally, the State observes that the federal government and the government of another jurisdiction such as a province may sometimes have separate needs for assessing the potential impacts of a project; as such, more than one assessment may sometimes be carried out by different jurisdictions in relation to the same proposed project. The State indicates that the IAA allows for cooperation and coordinated action between jurisdictions on impact assessments: for example, the Agency is authorized under the legislation to delegate the carrying out of any part of an impact assessment and the preparation of an impact assessment report to another jurisdiction.

Provincial level (British Columbia)

38. The State provides the following information regarding the environmental impact assessment process in British Columbia. Generally, impact assessments are governed by the Environmental Assessment Act ("EAA"). Under this Act, the province's Environmental Assessment Office ("EAO") manages environmental assessments. According to the State, the EAA, as well as its subordinate regulations and policies, are the product of extensive consultations with the public, stakeholders, and British Columbia's Indigenous nations. The State

¹⁸ These factors include: (a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including (i) the effects of malfunctions or accidents that may occur in connection with the designated project, (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and (iii) the result of any interaction between those effects; (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project; (n) comments received from the public; ...

indicates that the under the EAA, environmental assessments in British Columbia are conducted in eight phases. These phases are (a) Early Engagement, (b) Environmental Assessment Readiness Decision, (c) Process Planning, (d) Application Development and Review, (e) Effects Assessment, (f) Recommendation, (g) Decision, and (h) post-Certificate.

Early Engagement

39. According to the State, the Early Engagement phase begins when a proponent's initial project description and engagement plan are accepted. The State further indicates that Indigenous nations in British Columbia may identify their intention to participate, including if they wish to engage as a "participating Indigenous nation." The State also mentions that the EAO works with each participating Indigenous nation at this point to tailor its engagement approach going forward. The State further indicates that a 30-day public engagement and comment period is held on the initial project description.

Environmental Assessment Readiness Decision

40. During this phase, the State indicates that a decision is made on whether a project should proceed to an environmental assessment based on early engagement. According to the State, the responsible Minister may decide to terminate a project or exempt it from assessment. In this regard, the State mentions that a decision to terminate a project may only be considered if the project will have extraordinary adverse effects or if the project is clearly incompatible with government policy. According to the State, there is no legislated timeline for a readiness decision, and the time required may depend on the adequacy of engagement and issues identified.

Process Planning

41. According to the State, process planning phase involves (a) notice being given of a decision to proceed to environmental assessment and (b) the development of a "Process Order" during a 120-day period. The State indicates that this serves to formalize, for example, information requirements, participant roles, and future approaches to engagement in the process. The State further mentions that a 30-day public engagement and comment period is held on the draft Process Order. Further, the State indicates that Technical Advisory Committees are convened, and Community Advisory Committees may be convened to advise the EAO from this phase onward.

Application Development and Review

42. According to the State, following the issue of a Process Order, the project proponent has three years to develop an application. In this phase, the State indicates that the project proponent will conduct studies and engagement as required by the Process Order. The State also mentions that when the application is submitted, a 180-day review process begins in which the proponent is directed to revise the application based on input from the EAO and other participants.

Effects Assessment

43. According to the State, if a revised application is accepted, the EAO conducts an effects assessment for the project. The State further indicates that based on technical and community input and engagement with Indigenous Nations in British Columbia, the EAO prepares a draft assessment report and draft certificate with potential legally binding conditions.

Recommendation

44. The State indicates that during this phase, the assessment report (by the EAO) is finalized with public comments taken into consideration. According to the State this final assessment report forms part of a referral package provided to the responsible ministers. The State further indicates that the referral package

also includes a recommendation on whether the project is consistent with the promotion of sustainability by protecting the environment and fostering a sound economy and well-being of British Columbians and their communities” and supporting reasons for the recommendation.

Decision

45. According to the State, when the responsible Ministers receive the referral package, they must decide whether to issue, or refuse to issue, an environmental assessment certificate.

Post-Certificate

46. During this phase, if an environmental assessment certificate has been issued, the State indicates that, for the life of a project, the EAO'S Compliance and Enforcement Branch conducts compliance inspections and may take enforcement actions to ensure the legal requirements of an environmental assessment certificate are fulfilled.

47. Within the foregoing legal framework, the State emphasizes that both federal and provincial authorities determined that the mining projects under consideration were not likely to cause significant adverse environmental effects including transboundary effects. Given these determinations by federal and provincial environmental assessment authorities in Canada, the State submits that petitioners have no basis for asserting that the cited mining projects pose significant environmental threats. The State further argues that the petitioners have not substantiated their contention that the approval of these mining projects violates their rights. The State further submits that the petition constitutes an attempt to have the Commission review the decisions made by qualified Canadian authorities in environmental assessment processes that were properly conducted in accordance with legislative requirements; as well as an attempt to preemptively challenge the potential outcomes of environmental assessments that have not yet taken place. In this regard, the State submits that the petition is manifestly out of order.

48. The State further submits that it did not have a duty under Canadian law to consult the petitioners and seek their free, prior, and informed consent regarding the approval and permitting of the cited mining projects. The State submits that at the times when decisions were made allowing the mining projects to proceed, federal and provincial authorities had no actual or constructive knowledge of the possibility that the petitioners enjoyed rights relating to consultation that are recognized for the Aboriginal peoples of Canada under the Canadian constitution¹⁹. The State further submits that although it was not under a legal duty to consult the petitioners regarding the cited projects, it routinely provides opportunities to the public to provide input during the environmental assessments of proposed projects, and that these opportunities have been available to the petitioners and their constituent tribes in the past.

49. The State dismisses the petitioners claim that the 2017 Advisory Opinion of the Inter-American Court of Human Rights²⁰ supports the proposition that, the state should obtain the free, prior, and informed consent of Indigenous peoples outside the state's territory whose rights could be affected by the environmental harm. The State acknowledges that in the Advisory Opinion the Court declared that the scope of states' obligations under Article 1(1) of the American Convention include an obligation to avoid transboundary environmental harm that can affect the human rights of individuals outside their territory. However, the State submits firstly, that the Advisory Opinion interprets the scope of states' obligations under the American Convention, a treaty to which Canada is not a party. Secondly, the State submits that the Advisory Opinion does not clearly or directly address the issue of consultation of Indigenous groups in a transboundary context. Thirdly, the State submits that the notion of a state duty to avoid causing transboundary environmental

¹⁹ The State cites the decision of the case of *R. v. Desautel* (2021 SCC 17 [CanLII]), decided by the Supreme Court of Canada in April 2021, where the Court affirmed that Aboriginal groups outside Canada can exercise rights protected by subsection 35(1) of the Constitution Act, 1982 provided that such groups are part of the Aboriginal peoples of Canada. In this regard, the State indicates that the Court held that the State does not have a freestanding duty to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. According to the State, the Court affirmed that the State is free to act in the absence of such knowledge, and further observed that it is for the groups involved to put the State on notice of their claims.

²⁰ I/A Court H.R., Advisory Opinion OC-23/17, Human Rights and the Environment, November 15, 2017. Series A No. 23.

harm that impacts the human rights of persons outside a state's territory is conceptually distinct from that of a state duty to consult Indigenous groups outside the state's territory while conducting environmental assessments on projects with potential transboundary effects.

50. The State submits that the petitioners have failed to exhaust domestic remedies before bringing their petition to this Commission. More specifically, the State contends that the petitioners have not sought judicial review in Canadian courts of the decisions of federal and provincial authorities relating to approval of the cited mining projects. The petitioners could apply under applicable federal and provincial legislation for judicial review of any future decisions made regarding the mining projects that have not been the subject of a completed environmental assessment or that would require a new impact assessment to be conducted.

51. According to the State, the petitioners cannot at this stage seek judicial review of the past decisions of federal authorities to approve the cited mining projects, because the limitation periods for seeking judicial review of those decisions that are stipulated in the applicable federal legislation have expired. In this regard, the State explains that under the Federal Courts Act, a judicial review application with respect to a decision or order must be made within thirty days after the time the decision or order was first communicated by a federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, unless granted an exception by a judge of the Federal Court. As a result of the thirty-day limitation period, stipulated in the Federal Courts Act for seeking judicial review of a decision, the petitioners can no longer seek judicial review of the decisions previously made by federal authorities to approve the cited mining projects unless they are exceptionally permitted to do so by a judge of the Federal Court.

52. The State submits that with respect to applicable provincial legislation (the Judicial Review Procedure Act), the petitioners are not formally time-barred from seeking judicial review of the past decisions of authorities in British Columbia to issue environmental assessment certificates for the cited projects. As such, the State contends that the petitioners are free to seek judicial review of decisions that have previously been made by authorities in British Columbia.

53. The State emphasizes that neither the fact that the petitioners are located outside Canada, nor their status as non-Canadians would prevent them from being able to file applications for judicial review in Canadian courts. The State also submits that, since the petitioners have not pursued judicial review in relation to any of the mining projects cited in this petition, there is no issue of unwarranted delay to be raised regarding their efforts to exhaust this remedy. The State submits that none of the exceptions to the requirement to exhaust domestic remedies set out in Article 31(2) of the Commission's Rules of Procedure apply to the circumstances of this petition.

Additional allegations of the petitioner party

54. The petitioners reject the State's position, reiterating that each of the B.C. mines present foreseeable, imminent, ongoing, and significant threats to petitioners and their rights. The petitioners further argue that simply assessing these threats under domestic law does not mean that Canada has complied with its international human rights obligations towards the petitioners. The petitioners submit that none of the environment assessment laws of Canada or British Columbia require any consultation with affected indigenous persons outside of Canada or to seek their free, prior and informed consent. The petitioners further claim that without such consultation, it is impossible for the Canadian and British Colombian governments to sufficiently assess the transboundary impacts on the petitioners right to culture, subsistence and other associated rights. The petitioners insist that, Inter-American human rights law requires Canada to adequately consult with and obtain the free, prior, and informed consent of Indigenous peoples outside its territory whose rights could be affected by environmental harm within its territory. According to the petitioners, despite many efforts to engage with Canadian government officials, neither Canada nor British Columbia has adequately consulted with or sought the free, prior, and informed consent of Petitioners during the permitting or approval of any of the B.C. mines.

55. The petitioners reject the State's argument that Canada had no actual or constructive knowledge of foreseeable harms to Petitioners from the B.C. mines. In this regard, the petitioners argue that Canada's position is misguided because the requirement of actual or constructive knowledge only exists under Canadian law (and not international law). The petitioners emphasize that their claim is that Canada is violating its obligations under Inter-American human rights laws, and that they are unaware of any international human rights standard regarding the protection of Indigenous peoples that requires actual or constructive knowledge of their rights. Secondly, the petitioners argue that even if there is such a standard, it is senseless that Canada would assert it has no knowledge of the many Indigenous peoples that have lived just across its borders for millennia, long before Canada and the United States demarcated their border, or that anyone downstream of the B.C. mines would have an interest in projects that could affect the watersheds, whether they lived in Canada or the United States.

56. Contrary to the State's claims, the petitioners argue that they do not need to exhaust domestic remedies because none of them would provide adequate or effective redress for their claims. The petitioners submit that although relevant environmental assessment laws²¹ require consideration of impacts on indigenous peoples this requirement applies solely to assessing impacts on the Indigenous peoples of Canada. Accordingly, the petitioners submit that the environmental assessment laws create no obligation for federal or provincial government authorities to consider transboundary impacts on Indigenous peoples outside Canada.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

57. The parties diverge on the issue of exhaustion of domestic remedies. In essence, the State submits that the petitioners failed to pursue or exhaust domestic remedies to redress their claims. More specifically, the State contends that the petitioners have not sought judicial review of the decisions of federal and provincial authorities relating to approval of the B.C. mines. On the other hand, the petitioners allege that there is no reasonable chance of challenging the approval of the B.C. Mines under the laws of Canada, particularly, the Constitution of Canada. In this regard, the petitioners argue that the scope of protection under these laws are limited to Canadians and does not include non-Canadian nationals, such as the petitioners. The petitioners also argue that the Constitution of Canada does not provide protection of specific rights, such as the right to property, the right to health, and the right to use and enjoy traditionally occupied lands. The petitioners also submit that they are not obligated to seek remedies in the United States, given that (a) the B.C. mines are in Canada; and (b) the United States has no jurisdiction or control over these mines.

58. On this basis, the Commission recalls that a State, whenever alleges the lack of exhaustion of internal resources, not only has the burden of identifying which would be the non-exhausted resources, but that it must also demonstrate that these are adequate to repair the alleged violation, that is, that the role of these remedies within the system of internal law is appropriate to protect the legal situation infringed.²² This, since, as a rule, the only resources that must be exhausted are those whose functions, within the legal system, are adequate and effective to provide protection tending to remedy an infringement of a certain legal right.²³

59. Based on this, in the present case, the Commission emphasizes that the State of Canada has not provided such information, because although it maintains that the alleged victims should have sought judicial review of the decisions of the of federal and provincial authorities relating to approval of the B.C. mines, it does not specify which are the concrete resources that they should have used, nor does it justify why these would be adequate analyze claims referred to the protection of the rights to the environment, to prior consultation and to culture. Instead, based on the information on the record, the State's legal framework does not extend to the protection of the rights of the petitioners, particularly given that they are based outside of

²¹ The petitioners refer in particular to the Federal Impact Assessment Act 2019.

²² IACHR, Report N° 26/16, Petition 932-03 (Admissibility), Rómulo Jonás Ponce Santamaría, Perú, April 15, 2016, par. 25 and Report N° 83/17, Petition 151-08. (Admissibility), José Francisco Cid. Argentina. July 7, 2017, par. 17.

²³ IACHR, Report N° 161/17, Petition 29-07. (Admissibility). Andy Williams Garcés Suárez y familia. Perú. November 30, 2017, par. 12.

Canada. Accordingly, the Commission considers that in accordance with Article 31 (2) (a) of the Commission's Rules of Procedure, the petitioners qualify for an exemption to the requirement to exhaust domestic remedies.

60. Regarding the issue of timeliness, the Commission notes that petition was filed on December 5, 2018, but that it contains allegations that are ongoing, primarily the risk of pollution. In the circumstances, the IACHR considers that the petition is timely, pursuant to Article 32 (2) of the Commission's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

61. The petitioners allege that the approval and/or impact of the B.C. mines has placed the petitioners at risk of pollution to watersheds of rivers that flow from British Columbia to Alaska (where the petitioners are situated). According to the petition, this pollution will impact on certain rights, including the right to property, the right to health, the right to culture, and the right to use and enjoy traditionally occupied lands. More particularly, the petitioners allege, that each of the B.C. mines present foreseeable, imminent, ongoing, and significant threats to transboundary watersheds of the Taku, Stikine, and Unuk rivers, which the petitioners rely on as sources of fish (such as salmon and eulachon). The petitioners indicate that most of the B.C. mines use a highly risky method of storing tailings (waste from mining activities) that have a history of failure. The State, however, contends that the petition is inadmissible pursuant to Article 34(a) and (b) of the Rules of Procedure of the IACHR on the basis that it does not state facts that tend to establish a violation of rights, and that it is manifestly groundless or out of order. According to the State, the potential environmental threats raised by the petitioners have been considered by authorities in Canada and British Columbia (during the environmental assessment processes); and that these authorities repeatedly concluded that the B.C. mines were unlikely to cause significant adverse environmental effects (including transboundary effects).

62. First, the Commission reiterates that for purposes of admissibility, the Commission must decide whether the facts alleged could characterize a violation of rights, according to the provisions of Article 47(b) of the American Convention, or whether the petition is 'manifestly groundless' or 'obviously out of order,' pursuant to subparagraph c of that article. The criterion for evaluating these requirements is different from that used to pronounce on the merits of the petition. The Commission must conduct a *prima facie* evaluation to determine whether the petition establishes the legal grounds for a possible or potential violation of a right enshrined by the Convention, but not to establish the actual existence of a violation of rights. This determination constitutes a preliminary analysis that does not imply a prejudgment of the merits of the matter.²⁴

63. Thereby, in the present petition, the Commission recalls that in addressing complaints of violations of the American Declaration it is necessary to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law²⁵. On this basis, regarding the obligations of States with respect to business activities, like the Inter-American Court of Human Rights the Commission highlights that the Human Rights Council has adopted the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (hereinafter "Guiding Principles")²⁶, which detail that the States have a duty to prevent human rights violations by private companies, and therefore must adopt legislative and other measures to prevent such violations, and to investigate, punish and provide reparation when they occur. In the Commission's opinion, such document evidences the evolutionary interpretation that exists in relation to the obligations that States have with respect to business activities under their jurisdiction.

64. Besides, the Commission considers that the duty to prevent also applies to cases of transboundary environmental damage, while it is not limited to impacts within the territory itself. In this regard, the Commission emphasizes that, in accordance with the provisions of the International Court of Justice,

²⁴ IACHR, Report No. 69/08, Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, para. 48.

²⁵ IACHR, Report No. 75/02. Case 11.140. Mary y Carrie Dann. United States of America. December 27, 2002, par. 96.

²⁶ I/A Court H.R., Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras. Judgment of August 31, 2021. Series C No. 432, para 44.,

a State is obliged to use all the means at its disposal to prevent activities that, taking place in its territory, or in any area under its jurisdiction, cause significant damage to the environment of another State.²⁷

65. Finally, the Commission reiterates that, under certain circumstances, the exercise of its competence over acts occurring outside the territory of the state being denounced is not only consistent with but required by the norms which pertain.²⁸ On this basis, in opinion of the Commission, in the case of transboundary environmental damages, it must be examined whether the State adopted measures to prevent the activities under its jurisdiction from causing human rights violations in zones outside of its territory. Therefore, the Commission considers that the contexts of businesses' transnational operations and activities relating to human rights violations may activate the exercise of the jurisdiction of the State that oversees these activities and their corresponding international human rights obligations according to the applicable rules and facts of each case, considering the international human rights law and the standards on the duty to respect and guarantee.²⁹

66. Considering these considerations and after examining the factual and legal elements presented by the parties, the Commission considers that the petitioners' allegations are not manifestly unfounded and require a substantive study of the alleged facts. The Commission considers, *prima facie*, that the risk of pollution from the B.C. mines, if proven, could threaten the petitioners' means of subsistence, health, culture, and well-being. Notwithstanding the foregoing, the Commission will examine in more detail, at the merits stage, the arguments presented by the State, regarding the scope of the advisory opinions of the Inter-American Court and its questions regarding the obligations of the States with respect to indigenous communities.

67. There, the Commission considers that the allegations if proven, could characterize violations of the rights protected in Articles I (life and personal security) and XI (preservation of health and well-being) XIII (benefits of culture) and XXIII (property) of the American Declaration. The Commission believes that any mining activities (or other activities that impact the environment) must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be negatively affected, including indigenous communities located outside of the State where such activities are being conducted.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I (life and personal security) and XI (preservation of health and well-being) XIII (benefits of culture) and XXIII (property) of the American Declaration; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

²⁷ Cfr. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 p. 665.; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 55-56, para. 101.

²⁸ IACHR. Report No. 109/99. Case No. 10.951. Merits. Coard et al. (United States). September 29, 1999, para. 37.

²⁹ IACHR. *Business and Human Rights: Inter-American Standards*, OAS/Ser.L/V/II. CIDH/REDESCA/INF.1/19. November 1st, 2019, para. 373.

Approved by the Inter-American Commission on Human Rights on the 25th day of the month of August, 2023. (Signed:) Margarete May Macaulay, President; Roberta Clarke, Second Vice President; Julissa Mantilla Falcón and Carlos Bernal Pulido, Commissioners.

The undersigned, Jorge Meza, Assistant Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 49 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.



Jorge Meza
Assistant Executive Secretary