

ESMOAS: IACHR Moot Court Competition
2016 Hypothetical Case

1. The State of La Negación is in the Americas, with a total land area of 50,000 square miles. It was colonized by the Dutch in 1632. It provided the Dutch with cinnamon, cacao, and coffee. The colony was also popular for its year round supply of fruit. It gained political freedom from the Dutch monarchy in 1962. La Negación had 13,567,042 inhabitants at the time of the 2015 census. It is a confederal state and divided into 23 political districts.

2. Prior to Dutch colonization, there were three indigenous tribes that inhabited the territory that is now La Negación: the Chimichanagua, the Quesorital, and the Gorditana. These tribes had coexisted within the territory since the 1500s. They developed borders within the territory and each possessed distinctive traditional lands. The Quesorital were located in the hill country in the northern-most region of La Negación, where most of the coffee and cacao are grown. The Gorditana were located in the western part of La Negación, where cinnamon trees are abundant. The Chimichanagua were located in the eastern part of La Negación, which consisted of fertile plains and fruit tree groves.

3. In response to the growing demand for cinnamon, cacao, and coffee, the Dutch seized most of the native lands of the Quesorital and Gorditana in the early 1700s. The Quesorital tribe attempted to protect their native lands, but were virtually eliminated in a short war with the Dutch settlers. The Gorditana, a traditionally peaceful people, ceded their land to the Dutch settlers. The tribe took refuge in more barren central region of La Negación. While this caused some clashes with the Chimichanagua, the two tribes largely coexisted in peace.

4. In the 1880s, the advent of refrigerated ships resulted in increasing demand for fruit exports from La Negación. The Dutch colonizers forced the Chimichanagua from their native lands into the central region of La Negación. This was particularly devastating to the Chimichanagua because of the high importance they placed on the relationship between the burial location of its deceased members and the afterlife. They believe that the location of burial determines what spiritual kingdom you will enter in the afterlife. For generations, the Chimichanagua conducted traditional burial ceremonies where a trinket from the deceased was buried in a peach grove called Pessego. The trinket represented the deceased's spirit, and it was believed that all who were buried in this manner and place would be united in the afterlife. Traditionally, when a member of the tribe was exiled, they were forbidden from interment of their representational trinket in the grove at Pessego, which meant that their spirits would roam the afterlife in isolation, rather than rejoining the Chimichanagua community.

5. In an effort to maintain the continuity of the tribe in the afterlife, the Chimichanagua planted a new peach grove on the land they were forced onto. They named the grove Fersken and began burying trinkets of their deceased there. In the 1970s there was an effort by the Chimichanagua to reclaim their historic culture and property. The leaders of this movement placed a strong emphasis on their belief that tribe members buried at Fersken were not united with their ancestors, and only burial in Pessego would accomplish this. The tribe formed its own government to negotiate with the government of La Negación.

6. The Chimichanaguan government was formed by the Chimichanaguan Constitution of 1978. It consisted of a judicial branch and a legislative-executive branch. The judicial branch consists of a two tiered court system. There is a district level court that is responsible for all criminal and civil issues. Every district court judge is directly elected from a panel of three candidates selected by the legislative branch. The appellate level court consists of a panel of 5 justices selected by the legislative branch. All judges and justices serve lifetime terms. The appellate level court hears direct appeals from the district courts on civil and criminal matters and has original jurisdiction over all constitutional matters. The legislative branch consists of a High Council made of 50 members selected through direct election. They serve 10 year terms. One-fifth of the High Council is up for election every two years. Members may only serve one term. The High Council is responsible for writing and passing the laws of the Chimichanaguan tribe. They also hold the sole responsibility of negotiating treaties with La Negación. The 1978 Constitution provided that only male members of the tribe over the age of 21 could vote in elections.

7. Also in 1978, La Negacion amended its constitution (in conformity with the appropriate procedures) and recognized the right of the Chimichanaguan and Gorditanan people and their right to free determination, development, and recognized their legal capacity.

8. In 1982, the Chimichanaguan High Council began negotiating the Pessego Treaty with the La Negación Government. The treaty would restore ownership of 1000 square miles of historic Chimichanaguan land, which included the Pessego peach grove and burial site. However, the treaty called for Fersken to be transferred to the government of La Negación. As Fersken had historically belonged to the Gorditana, the La Negación government wanted to be able to offer it to the Gorditana when negotiating the return of lands to the Gorditana.

9. Before approving the final draft of the Pessego Treaty, the Chimichanaguan High Council passed the Spiritual Properties Act of 1983. This act required that all transfers of spiritual properties must be approved by a two-thirds majority of the direct popular vote of Chimichanaguan males over the age of 21. After approving the final draft of the Pessego Treaty, the Chimichanaguan High Council put the treaty to a popular vote. 89 percent of the votes were cast in favor of the Treaty. It was ratified on October 13, 1983 by both the Chimichanaguan and La Negación governments.

10. The Gorditana have a hereditary government. The patriarchs of the the eight great families form a governing council. Each patriarch is considered the final judicial authority within the family. If there is a dispute between families, the remaining patriarchs will resolve the dispute through an arbitration process that is final and binding. The governing council has the sole authority to negotiate treaties for the Gorditana.

11. In 1985 the La Negación government negotiated the Treaty of Gorditana. The Gorditana were recognized as a self-governing nation and 400 square miles of historic Gorditanan land was returned to the Gorditana tribe. The Gorditana declined to take ownership of Fersken, as they did not want to be responsible for the spirits of the Chimichanagua, and the La Negación federal government retained ownership of Fersken. The treaty was unanimously approved by the governing council and ratified by both the Gorditana and La Negación governments on September 21, 1985.

12. In 1991, the Chimichanaguan Constitution was amended to allow all Chimichanagua, male or female, age 21 or greater the right to vote.

13. Although the Chimichanagua embraced the a more modern stance to include females in their governing process, most Chimichanagua eschew aspects of modern life, choosing to lead a more traditional existence, as their ancestors had done for hundreds of years. Though a growing number of Chimichanagua embrace modern existence, including technology. The Chimichanaguan High Council has stressed many times its desire to modernize its community and make it a thriving economic community.

14. In 2006, the national assembly of La Negación passed the La Negación Domestic Energy Security Act, which made it a national priority to convert their energy production from fossil fuels to more sustainable and domestic sources of energy, stating that it was vital to the country's national security.

15. In 2007, the La Negación government negotiated with the Gorditana governing council to lease the use of 5 square miles of Gorditana land for the creation of a solar energy plant. In exchange for the use of the land for the construction of a state-run solar energy plant, the Gorditana were offered 5 square miles of fertile land adjacent to their current territory. They were reimbursed for the full cost of relocating their people from the land to be used for the solar energy plant. Additionally, the Gorditana were to be paid 10 percent of all profits from the energy plant for the life of the 99 year lease. The Gorditana governing council approved the terms of the lease in October 2007. In November 2007, the La Negación national assembly passed legislation approving of the negotiated deal and providing the funding required for relocation expenses. In March 2008, the relocation was completed and the construction of the

plant began. By July 2009, the Gorditana were receiving over \$10 million (La Negación dollars) per month in payment for the lease.

16. In early 2011, a rich source of uranium was discovered under Pessego on the Chimichanaguan land. The source was estimated to be able to supply La Negación with clean sustainable energy for 5,000 years.

17. In May 2011, the La Negación national assembly began debating the proposed funding for a Uranium mining operation in Pessego. During the debate two non-voting representatives selected by the Chimichanagua High Council were consulted. These representatives explained the special spiritual significance Pessego held in their culture. The representative raised concern about the ability to use Pessego in the future if it were mined for uranium. Members of the La Negación National assembly suggested returning Fersken to the Chimichagua in exchange for the use of Pessego. The Chimichanaguan representatives explained how the tribe believed that those buried in Fersken go to a different spiritual kingdom than those buried in Pessego. This led to the idea that Fersken could be returned to the Chimichanagua and the ancestral artifacts could be disinterred and placed in a portion of Pessego not used for mining. La Negación would fund this project in exchange for use of a portion of Pessego to mine the uranium deposit.

18. With the approval of the two representatives, the national assembly passed the Sustainable Nuclear Energy Act in November 2011. The Act approved negotiating with the Chimichanagua over the use of the Pessego to mine uranium. It outlined that the negotiation would focus on the obtaining the rights to mine on a portion of Pessego in exchange for the ownership of Fersken and the cost of transferring ancestral artifacts from Fersken to the unmined portion of Pessego. Because of pressure to maintain fiscal responsibility, the Act also contained a maximum expenditure clause that limited the funding for the transfer process to \$100 million (La Negación dollars). Finally, the act specified that the mining project must begin by May 2013.

19. In January 2012, the government of La Negación began negotiating for the rights to mine the uranium under Pessego with the Chimichanaguan High Council. In preparation for the negotiations, the La Negación government paid an independent consulting firm to prepare an environmental impact study. The study concluded that there were two viable methods of mining the uranium. The first was heap leaching, where chemicals are mixed with mined ore to extract the uranium. The second was an open pit mine, which involves stripping the layers of topsoil above the uranium deposit and then using explosives to excavate the uranium ore. The study identified the risks associated with both. Heap leaching was more likely to pollute the water table with the hazardous chemicals used to extract the uranium; although, it required removing far less of the plant life on the surface. An open pit mine would require virtually all the plant life to be removed, but posed very little risk to the water table. An open pit mine, however, would result in fine particles of uranium ore entering the atmosphere during blasting. The study

identified two main mitigation methods. The first was to construct an extremely costly containment tent for the entire area. The second would be to maintain a constant mist of water at the site when blasting took place. The misting method was significantly cheaper. The study indicated that the misting would not contaminate the water table, however it would likely pose a danger to any remaining plant life in the mining area. The study noted that any damage to plant life would be temporary and would pose no additional harm after five years. Finally, the study concluded that there was always a risk of radiation poisoning resulting from a mining operation, but it would be limited to those who participated in the mining operation. This could be mitigated by requiring all personnel at the mine to wear radiation badges that would identify how much radiation exposure each worker had. Careful monitoring of each worker's radiation exposure would prevent the harmful doses of radiation. The study was distributed to the members of the Chimichanaguan High Council prior to formal negotiations.

20. La Negación and the High Council of the Chimichanagua came to an agreement where La Negación would lease to three-quarters of the Pessego peach grove for mining in exchange for 100 additional square miles of land where Fersken was located. La Negación would set aside funding for the exhumation of the Chimichanaguan trinkets from Fersken and reburial in Pessego. La Negación also agreed that if any ancestral trinkets were exhumed during the mining of the uranium, they would be reburied in unmined portion of Pessego.

Both sides agreed that an open pit mine would be the safest method of proceeding as both the people of Chimichanagua and La Negación would be adversely affected by the contamination of the water table. The Chimichanaguan High Council advocated for the use of a containment tent as it would have no lasting effects on the plant life of Pessego. The high cost of the tent was unpalatable to La Negación. The two sides agreed that in exchange for agreeing to the lower cost misting method, La Negación would pay for 500 members of the Chimichanagua community to undergo training which would enable them to work in the construction of the nuclear facility, or at the facility upon its completion.

In addition, the agreement between the Chimichanaguan High Council and Negación included the provision that once nuclear energy was functional, the state would provide the Chimichanagua with electrical power at for free for a period of twenty years, after which the Chimichanagua would receive electricity "at cost," for another twenty years "or at the conclusion of operation of the nuclear plant, whichever came first."

21. When presented with this proposal in March 2012, 75 percent of the Chimichanagua voted in favor of the agreement. Exit polls showed that that support was strongest from the younger Chimichanagua. 90 percent of Chimichanagua between the ages of 21 and 35 voted for the agreement. Whereas, only 43 percent of Chimichanagua over the age of 55 voted for the agreement. Polls also indicated that support was stronger among the women of the tribe. 83 percent of women voted for the agreement as compared to 63 percent of the men.

22. In January 2013, La Negación took possession of the western three-quarters of Pessego and began their mining operation. The Chimichanagua took possession of Fersken at the same time and began the process of moving the buried Chimichanaguan trinkets to Pessego.

23. In the early stages of relocating the ancestral trinkets from Fersken, the unexpected rocky composition of the caused the process to extremely expensive. Estimates by the tribe indicated that if the cost were to remain consistent for the entire process, the cap set in the Sustainable Nuclear Energy act will be reached only two-thirds of the way through the process of relocation.

24. In May 2013, the Chimichanagua High Council attempted to get reassurances from La Negación that it would commit additional funds to the relocation effort. In August 2013, La Negación maintained that it would not debate additional funding until that provided for in the Sustainable Nuclear Energy Act had been exhausted. Pressure from the Chimichanaguan elders caused the High Council to call for a referendum to reject the previously approved to deal due to La Negación's refusal to allocate additional funds towards the relocation. The referendum is scheduled for November 28, 2013.

25. By November 2013, the mining of uranium in Pessego has begun. The most expensive part of the process, the removal of topsoil and reinterment of Chimichanaguan ancestral trinkets has taken place. The blasting process has begun and water is being used to suppress airborne uranium dust. One-hundred percent containment is not achieved and it is believed by some that the excess water and uranium dust is causing the peach trees in the unmined portion of Pessego to begin to die. However, the exact cause of the death of the trees is undetermined as the reinterment process and an unusually hot summer have also been blamed by horticulturalists at the University of La Negación. Roughly 300 Chimichanaguan tribesman have been enrolled in a job training course. Almost all of them opted for the training program which would enable them to work at the facility upon its completion, as it was considered more prestigious than other job training programs including construction and environmental services.

26. On November 10, 2013, the High Council publicly published the environmental impact study for the first time. Many Chimichanagua conclude that they would not have voted for the agreement if they had known the danger to the remaining trees in Pessego.

27. When the referendum is held, 55 percent of the Chimichanagua vote in favor of the referendum to reject the previously approved deal with La Negación for mining rights on Pessego. Exit polls indicated that support for the referendum is nearly universal among the older Chimichanagua with 98 percent of voters over the age of 55 voting in favor of the referendum. Support among the younger Chimichanagua was considerably lower, with only 15 percent voting in favor of the referendum. Support among males and females was fairly even with 57 percent of males and 53 percent of males voting in favor of the referendum.

28. After the results of the referendum the Chimichanaguan High Council requested that the government of La Negación cease their mining process and formally gave notice that they intended to seek rescission of the contract on the basis that La Negación's limitation on relocation funds made breach of contract inevitable and indicated bad faith in the prior consultation process. La Negación rejected the request and some of the older Chimichanagua residents began protesting the ongoing mining at the Pessego mine. Initially, mining operations continued as normal. However, several of the Chimichanagua protesters fell ill with radiation poisoning, which caused the La Negación to shut down operations in December 2013.

29. The La Negación government takes the stance that the additional costs incurred by halting mining operations will count towards the funding cap in the Sustainable Nuclear Energy Act. All independent estimates indicate that this will ensure that the cap will be reached before the process of moving the ancestral trinkets from Fersken to Pessego will be completed.

30. In May 2014, the Supreme Judicial Court of La Negación certified a claim from the Chimichanagua High Council seeking rescission of the contract between the government of La Negación and the Chimichanagua. The Court heard argument in June 2014 and held that the spending cap established in the Sustainable Nuclear Energy Act did not constitute bad faith in the prior consultation process because the Chimichanagua had prior knowledge of the spending cap during the negotiation as their two non-voting representatives consulted in the writing of the Sustainable Nuclear Energy Act.

31. In March 2015, the Chimichanagua submitted a petition to the Inter-American Commission on Human Rights. The representatives of the Chimichanagua alleged violations Articles 1.1, 4.1, 5.1, 21, and 23 of the American Convention on Human Rights. They requested rescission of the contract and restoration of Pessego, or in the alternative reparations for the full cost of the reinterment project and the cost of preserving the remaining section of Pessego.

32. In May 2015, the state of La Negación submitted observations of the IACHR, alleging that the rights of the Chimichanagua had not been violated and that the State had acted in accordance with international provisions at all times, including those in the American Convention on Human Rights.

33. In September 2015, the Commission issued its report on admissibility and merits (Report 212/2015). The IACHR found violations of articles 1.1, 5.1, 21 and 23. It recommended that the State of La Negación implement comprehensive reparation measures to compensate the Chimichanagua.

34. Once the period for compliance with the recommendations had elapsed, pursuant to Article 35 of the Regulations of the Inter-American Court, the Inter-American Commission on Human

Rights brought the Case of the Chimichanagua v. The State of La Negación before the Inter-American Court in October 2015.

35. In November 2015, the Court admitted the Commission's report and forwarded it to the parties for them to submit their arguments. It set the hearing date for November 2016, during its Extraordinary Session in San Marcos, TX, to hear the arguments of the representatives of the victims and the State regarding the merits and reparations in the instant case.

36. With the Constitution of 1978, the State of La Negación ratified the main regional and universal instruments on the subject. A 2007 amendment on human rights included the principle that the Constitution must be interpreted in a manner consistent with constitutional norms and the international human rights treaties ratified by the State. On October 1, 1997 it accepted the contentious jurisdiction of the Inter-American Court of Human Rights. It has also participated actively in universal and regional human rights bodies since the 1997, promoting the environmental and sustainable development agenda in the region.