

WorldCourts™

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 61/08; Case 12.435
Session:	Hundred Thirty-Second Regular Session (17 – 25 July 2008)
Title/Style of Cause:	Michael Mitchell v. Canada
Doc. Type:	Report
Decided by:	Chairman: Paolo Carozza; First Vice-Chairwoman: Luz Patricia Mejia Guerrero; Second Vice-Chairman: Felipe Gonzalez; Commissioners: Florentin Melendez, Victor E. Abramovich, Sir Clare K. Roberts, Paulo Sergio Pinheiro.
Dated:	25 July 2008
Citation:	Mitchell v. Canada, Case 12.435, Inter-Am. C.H.R., Report No. 61/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by:	APPLICANT: Hutchins Caron & Associates
Terms of Use:	Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. The petition in the present case was lodged with the Inter-American Commission on Human Rights (the "Commission") against Canada (the "State") on November 26, 2001 by Hutchins Caron & Associés, solicitors and barristers of Montreal, Canada ("the petitioners"). The petition was presented on behalf of Grand Chief Michael Mitchell ("Grand Chief Mitchell"), a citizen and resident of Canada, and a member of the Mohawk First Nations (indigenous) community.

2. The petition states that on March 22, 1988, Grand Chief Mitchell, accompanied by fellow community members, entered Canada from New York, United States of America, at the Cornwall International Bridge with a number of goods destined for the Mohawk territories of Tyendinaga and Akwesasne (in Canada). The Mohawk territory of Akwesasne encompasses portions of the Canadian provinces of Quebec and Ontario and the State of New York in the United States. Upon re-entry to Canada, Canadian customs officials imposed a custom duty of \$361.64, on Grand Chief Mitchell which he refused to pay, on the basis of aboriginal and treaty rights under Canadian law.

3. The petitioners allege that Canada has incurred international responsibility for denying Grand Chief Mitchell's right to bring goods, duty free, across the U.S./Canada border dividing the territory of the indigenous community, for the purpose of trade with other First Nations. Based upon these circumstances, the Petitioner alleges that the State is responsible for a violation of the right to culture set forth in Article XIII of the American Declaration of the Rights and Duties of Man (the "American Declaration").

4. The petitioners further allege that the “right to culture” includes an Aboriginal right to trade with other indigenous First Nations (which exist on both sides of the Canadian/United States border) without having to pay customs duties to either country. It is alleged that this Aboriginal right is based on historic practices and customs of the indigenous peoples of Canada that existed prior to the arrival of the European settlers. The petitioners contend that Grand Chief Mitchell and the other members of his community are being deprived of the right to bring goods, duty-free, across the Canadian/United States border that divides the Akwesasne territory, and that this prohibition impedes trade among the First Nations in Canada. Trade, it is alleged, is an essential distinguishing element of Mohawk culture and the Iroquois Confederacy, and has historically played a central role in the traditional culture of the Mohawk people.

5. The State denies that it has violated Grand Chief Mitchell’s right to culture under the American Declaration. The State argues that the right to take part in the cultural life of the community does not encompass trade as an aspect of culture, and that Article XIII most certainly does not protect duty-free trade.

6. In Report N° 74/03 adopted by the Commission on October 22, 2003 during its 118th regular period of sessions, the Commission decided to admit the claims in the Petitioner’s petition and to proceed with consideration of the merits of the complaint.

7. In the present report, having examined the evidence and arguments presented on behalf of the parties to the proceedings, the Commission concluded that it was not proven that the State violated Grand Chief Mitchell’s right to culture set out under Article XIII of the American Declaration, in connection with his claim to a right to bring goods, duty free, across the U.S./Canada border, for the purpose of trade with other First Nations.

II. PROCEEDINGS SUBSEQUENT TO ADMISSIBILITY REPORT N° 74/03

8. In Report N° 74/03 adopted on October 22, 2003, the Commission declared that the petition was admissible in respect of Article XIII of the American Declaration and that it would continue with its analysis of the merits of these claims. Report N° 7/03 was transmitted to the State and to the petitioners by communications dated October 29, 2003. In accordance with Article 38(1) of the Commission’s Rules of Procedure, the Commission also requested that the petitioners provide any additional observations that they may have on the merits of the case within a period of two months. Pursuant to Article 38(2) of its Rules, the Commission also placed itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter and requested that the parties inform the Commission expeditiously whether they were interested in pursuing a friendly settlement of the case.

9. By letter of November 10, 2003, the petitioners acknowledged receipt of the Commission’s letter of October 10, 2003, and by further letter of November 20, 2003, accepted the Commission’s friendly settlement offer. By communications of November 25, 2003, the Commission acknowledged receipt of the petitioners’ letter of November 20, 2003, and transmitted the pertinent parts thereof to the State, with a request that the State respond within a month.

10. By further letter of November 27, 2003, the petitioners requested an extension of two months to present additional observations on the merits of the petition. By note of December 22, 2003, the State also requested an extension of 60 days to present the observations requested by the Commission. By letter of January 06, 2004, the Commission granted the State an extension of 60 days. By letter of March 04, 2004, the State requested a further extension of 90 days to consider the Commission's friendly settlement offer, and to have an exploratory meeting with the petitioners. By letter of March 08, 2004, the Commission granted the requested extension. By letter of March 12, 2004, the petitioners indicated that the State had offered to convene an exploratory meeting with the petitioners; in the circumstances, the petitioners requested an extension until June 2004 to present their observations on the merits. By letter of March 16, 2004, the Commission granted the requested extension.

11. By letter of June 08, 2004, the State requested a further extension of six months to respond to the Commission's friendly settlement offer, with a view to negotiating a friendly settlement of the Petitioner's petition. By note of June 10, 2004, the Commission granted an extension of three months.

12. On July 01, 2004, the Commission received further observations from the petitioners on the merits of the petition, dated June 30, 2004. By note of September 14, 2004, the State advised of its decision to decline the Commission's offer to facilitate friendly settlement. By letter of October 06, 2004, the Commission acknowledged receipt of the State's note, and by letter of October 07, 2004, transmitted the pertinent parts thereof to the petitioners, with a request for response in a month. By note of January 26, 2005, the Commission transmitted the pertinent parts of the petitioners' observations of June 30, 2004, and requested the State to respond in a month. By note of February 09, 2005, the State requested an extension of six months to present its observations. By letter of March 29, 2005, the Commission granted a one-month extension to the State, and so informed the petitioners, by letter of the same date.

13. By letter of March 23, 2005, the petitioners requested the Commission to grant a hearing at its regular period of sessions scheduled for October 2005. By communication of April 01, 2005, the Commission acknowledged receipt of the petitioners' letter. By note of May 03, 2005, the State requested a further extension of three months to present its observations. By letter of June 20, 2005, the Commission declined the State's request, and so advised the petitioners by letter of the same date. By note of June 29, 2005, the State advised that it would present its observations by the end of July 2005. The Commission acknowledged receipt of the State's note by letter of June 30, 2005.

14. By note of July 27, 2005, the State submitted its observations on the merits of the petition. By letter of August 15, 2005, the Commission transmitted the pertinent parts of the State's observations to the petitioners, and requested a response within a month.

15. By letter of September 13, 2005, the petitioners requested an extension until the end of November 2005 to submit its response to the State's observations of July 27, 2005. By reply of September 21, 2005, the Commission granted the petitioners a one-month extension to submit their response, and so advised the State by note of the same date. By letter of October 21, 2005,

the petitioners submitted their response to the State's observations of July 27, 2005. The Commission subsequently transmitted the pertinent parts of the petitioners' submission to the State by note of November 04, 2005, with a request for a response within a month. In response to the Commission, the State submitted further observations by note of December 07, 2005, the pertinent parts of which were transmitted to the petitioners with a request for response within a month.

16. By letter of January 17, 2006, the petitioners requested the Commission to grant a hearing during its 124th regular period of sessions, scheduled for March 2006. In a subsequent letter of January 30, 2006, the petitioners requested the Commission to schedule a hearing during its 125th regular period of sessions instead, because of the unavailability of counsel for the 124th regular period of sessions. By letter of February 09, 2006, the Commission acknowledged receipt of the petitioners' correspondence of January 17, 2006 and January 30, 2006, and suggested that the petitioners reconfirm their request at least 40 days before the commencement of the 125th regular period of sessions.

17. By letter of February 17, 2006, the petitioners requested an extension of two weeks to present their response to the State's observations of December 07, 2005, which the Commission granted by note of March 01, 2006. By note of the same date, the Commission advised the State of the extension granted to the petitioners. By letter of March 03, 2006, the petitioners submitted further observations to the Commission, the pertinent parts of which were transmitted to the State by note of March 08, 2006, with a request for a response within a month. By communication of April 06, 2006, the State submitted further observations in response to the petitioners' submissions of March 03, 2006. The Commission transmitted the pertinent parts of these observations to the petitioners, by letter of June 12, 2006, with a request for a response within a month.

18. By letter of July 07, 2006, the petitioners requested an extension until August 12, 2006, to respond to the State's further observations, which was granted by the Commission by communication of July 17, 2006. The petitioners subsequently submitted their observations by letter of August 14, 2006, the pertinent parts of which were transmitted to the State by note of August 18, 2006, with a request for a response within a month. By letter of August 15, 2006, the petitioners requested the Commission to convene a hearing during its 125th regular period of sessions. By correspondence of September 22, 2006, the Commission informed the parties of its decision to convene a hearing on October 24, 2006, during its 125th regular period of sessions. The petitioners acknowledged receipt of the Commission's communication by letter of October 06, 2006.

19. By note of October 02, 2006, the State submitted further observations to the Commission. The Commission acknowledged receipt of the State's observations by letter of October 10, 2006, and transmitted the pertinent parts thereof to the petitioners, by letter of the same date. By letter of October 13, 2006, the petitioners submitted further information regarding the hearing scheduled for October 24, 2006.

20. During its 125th period of regular sessions, the Commission convened a hearing on October 24, 2006, at which both parties were represented and made submissions on the merits of

the petition. By letter of June 01, 2007, the petitioners made further submissions with respect to certain issues arising during the hearing. The petitioners also reiterated their willingness to re-engage in a friendly settlement process with the State. By letter of June 21, 2007, the Commission transmitted the pertinent parts of the petitioners' submissions to the State, with a request for a response within a month. Up to the date of this report, the Commission has not received a response from the State.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

21. Grand Chief Michael Mitchell is a Mohawk of Akwesasne, resident in Canada, and is descendant of the polity known as the Mohawk Nation which is part of the Iroquois Confederacy. The Iroquois Confederacy includes the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora Nations. Both the Mohawk Nation and the Iroquois Confederacy pre-date the arrival of the Europeans.

22. The territory of the Akwesasne community lies partly in the Province of Quebec, partly in the Province of Ontario, Canada, and partly in the State of New York, in the United States. It is divided by the international border that divides Canada and the United States. The division caused by the existence of an international border affects the residents of the Akwesasne on a daily basis and allegedly constitutes a profound interference with their ability to live their lives, according to their traditions.

23. The Mohawks of Akwesasne have had a longstanding dispute with the Government of Canada concerning their rights across the Canadian/United States border which divides their territory. Specifically, Grand Chief Michael Mitchell and the members of his community allege that they are deprived of the right to bring duty-free goods across the United States-Canada border for the purpose of trade with other First Nations in Canada. On March 22, 1988, Grand Chief Mitchell carried a number of items into Canada from New York State to test the Aboriginal border-crossing rights. He entered Canada at the Cornwall International Bridge with the following items: one washing machine, ten blankets, twenty bibles, used clothing, one case of motor oil, ten loaves of bread, two pounds of butter, four gallons of milk, six bags of cookies, and twelve cans of soup. All of the items were destined for the Mohawk territory of Tyendinaga in Canada, except the motor oil which was destined for a store in the Mohawk territory of Akwesasne on the Canadian side of the border. Grand Chief Mitchell was charged a duty of \$361.64 by Canadian customs officials but he refused to pay. He claimed that customs officials had violated his Aboriginal and treaty rights under the Canadian Constitution, which include the right to trade freely across the international border.

24. Many of the goods brought into Canada by Grand Chief Mitchell were presented as gifts to the Mohawk community of Tyendinaga in a ceremony to signify a renewal of trade ties between the Akwesasne and Tyendinaga Nations. This practice followed the traditional custom between the two peoples who had formed a trading relationship for several generations. The remainder of the goods was brought for trade. Grand Chief Mitchell claimed in the trial division of the Federal Court of Canada the right to bring in goods, duty-free, from the United States

across the border which divides the territory of his community. The right claimed was to bring in goods for 1) personal use; 2) use by the members of his community; and 3) trade, not in the commercial mainstream but rather with other First Nations in Canada.

25. The petitioners argue that trade is an integral aspect of Mohawk culture that is protected under Article XIII of the American Declaration. As part of the right to take part in the cultural life of the community, the petitioners contend that the Mohawk people have a right to trade within their own nation and with other member nations of the Iroquois Confederacy, without the imposition of customs and tariffs. Canada's imposition of taxes and duties on goods brought over the border interferes with an activity that is central to Mohawk cultural identity and integrity.

26. The petitioners base their claim regarding a violation of Article XIII on historical documentation of the general practice of Aboriginal nations in North America. They affirm that the evidence indicates that members of the same nation or same confederacy historically did not pay tolls or tribute when conducting trade with each other. Two international treaties-the Treaty of Utrecht and the Jay Treaty-are invoked as supporting evidence regarding the nature and scope of the Aboriginal right claimed by the petitioners. The Treaty of Utrecht is a peace treaty signed at the end of the Spanish War of Succession, while the Jay Treaty was signed in 1794 between Great Britain and the United States.

27. With respect to the right to trade within a larger context of the right to culture, the petitioners contend that Article XIII of the American Declaration "must be interpreted with the 'living tree' approach with respect to the interpretation of human rights instruments generally, both domestically and internationally, and in accordance with present day realities which recognize the multicultural nature of the modern state." [FN1]

[FN1] Petitioners' submissions on the merits of June 30, 2004, para.12.

28. In support of this proposition, the petitioners cite jurisprudence from the inter-American human rights system [FN2], a number of international instruments [FN3], and other international human rights jurisprudence. The petitioners contend that the right to take part in the cultural life of the community as enshrined in Article XIII of the Declaration, is also reflected in the Universal Declaration of Human Rights, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) [FN4], and Article 15 (1) (a) of the International Covenant on Social Economic and Cultural Rights (ICSECR) [FN5]. After reaffirming that "trading activities and practices are, and have historically been characteristic of Mohawk and Iroquois cultural identity", the petitioners rely on jurisprudence of the United Nation Human Rights Committee (HRC) [FN6] to advance the proposition that "an economic activity, such as fishing, hunting, and...trade, may also fall within the rubric of a protected right, where that economic activity is considered an essential element in the culture of the ethnic community." [FN7] The petitioners assert that the State has (in its observations of July 12, 2002) acknowledged that Article 27 of the ICCPR has been interpreted to extend cultural rights protection to economic activities. The petitioners add that the Commission itself has previously invoked Article 27 of the ICCPR in

evaluating the right to culture, for example, in its 1985 Report on the Situation of Human Rights of the Nicaraguan Population of Miskito Origin[FN8].

[FN2] For example, IACHR Report N° 96/03, Case 12.053, Maya Indigenous Communities of the Toledo District, Belize, October 24, 2003; IACHR Report N° 113/01. Case 11.140, Mary & Carrie Dann, United States of America, December 27, 2002; IACHR Resolution N° 12/85, Case 7615, Brazil, March 05, 1985.

[FN3] International Covenant on Civil and Political Rights (ICCPR); Universal Declaration of Human Rights; International Covenant on Social, Economic and Cultural Rights (ICSECR).

[FN4] Article 27 of the ICCPR: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

[FN5] Article 15 (1) (a) of the ICSECR: The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.

[FN6] UN Human Rights Committee, Communication No. 779/1997 (Aarela and Nakkalajarvi v Finland), views adopted 7 November 2001, UN Doc. CCPR/C/73/D/779/1997; UN Human Rights Committee, Communication No. 167/1984 (Ominayak v Canada), views adopted 10 May 1990, UN Doc. CCPR/C/38/D/167/1984.

[FN7] Petitioners' submissions on the merits of June 30, 2004, para. 20.

[FN8] OEA/Ser.L./V.II.62 doc. 10 rev. 3 29 November 1983, at pages 80, 84.

29. The petitioners further contend that the concept of “culture” has been broadly defined by the United Nations Education, Scientific and Cultural Organization (UNESCO), in its preamble to the 2001 Universal Declaration on Cultural Diversity[FN9]. The petitioners argue that this Declaration “stresses the cultural issues raised by diversity” and that culture should be defined in an all-inclusive manner.”[FN10] In further support of their contention, the petitioners contend that the fundamental nature of cultural rights is also manifested in other international instruments, such as the International Convention on the Elimination of All Forms of Discrimination, and regional instruments, such as the American Convention on Human Rights, the Protocol of San Salvador, the African Charter on Human and Peoples’ Rights and the European Framework Convention for the Protection of National Minorities.

[FN9] At paragraph 24 of their submission of June 30, 2004, the Petitioners quote the following excerpt from the preamble: Reaffirming that culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of a society or social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs:...

[FN10] Ibid.

30. The petitioners assert that “the context of the right at issue is one of an economic nature, specifically the activity of trade without the imposition of duties and taxes as carried out between

indigenous communities on their traditional lands, which are now divided by an international border.”[FN11] The petitioners emphasize that their petition “does not assert a general right to trade, or a general right to duty-free trade, outside the specific indigenous cultural context in which this case arises.”[FN12]

[FN11] Ibid. para. 28.

[FN12] Ibid.

31. In reference to the domestic litigation that preceded the petition, the petitioners contend that the Canadian courts “have all interpreted trade as a vital part of Mohawk and Iroquois culture”[FN13], and that the State has recognized that “historically trade has played a significant role in the traditional culture of the Mohawk people”[FN14].

[FN13] Ibid. para. 29, citing, for example, the Supreme Court of Canada in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, 41 which found that “There was ample evidence before McKeown J. [the trial judge] to support his finding that trade was a central, distinguishing feature of the Iroquois in general and the Mohawks in particular. This evidence indicates that the Mohawks were well situated for trade, and engaged in small-scale exchange with other First Nations.”

[FN14] Ibid. para. 32, citing para. 21 of the State’s Observations of July 12, 2002.

32. Having regard for the foregoing, the petitioners assert the right to trade across the Canada/US border, “free from the imposition of taxes and duties, both within Akewesasne Mohawk Territory and from Akewesasne Mohawk Territory with other First Nations communities which are also part of the Iroquois Confederacy and the obligation on Canada to not interfere in the exercise of that right.”[FN15] Based on this proposition, the petitioners submit that:

members of the Mohawk community of the Akewesasne have a right to trade with each other across borders free from any impediment, including the imposition of duties or taxes by the state, because it is a characteristic necessity for the preservation of their cultural identity and for the preservation of the integrity of the Akewesasne community” and that it is “also an essential element of their culture”[FN16];

“members of the Mohawk community of Akwesasne have a right to trade with members of the other Iroquois communities situated in Canada across borders free from any impediment, including the imposition of duties or taxes by the state, because it is both a characteristic necessity for the preservation of their cultural identity and an essential element of their culture”[FN17]; and this right is intimately connected to the ancestral lands of Chief Mitchell’s people and to productive organization, by Mohawk and Iroquois peoples on these lands.[FN18].

[FN15] Ibid. para 41.

[FN16] Ibid. para. 42.

[FN17] Ibid. para 43.

[FN18] Ibid. para. 44.

Application of Treaty of Utrecht and Jay Treaty

33. The petitioners submit that Article XV of the Treaty of Utrecht and Article III of the Jay Treaty are relevant to the resolution of this case. Article XV of the Treaty of Utrecht guarantees to the Five Nations of Indians and other First Nations who were their allies “the full Liberty of going and coming on account of Trade” without “any Molestation or Hindrance.” Article III of the Jay Treaty guarantees the rights of the “Indians dwelling on either side of the said boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective territories of the Two Parties on the Continent of America and freely to carry on trade and commerce with each other. No Duty of Entry shall be levied by either party on Peltries brought by Land or Inland Navigation into the said Territories respectively, nor shall the Indians passing and repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever.” Although the trial court in Canada concluded that the Jay Treaty did not create rights in favor of the Mohawk people of Akwesasne, since they were not parties to the treaty, the petitioners claim that Canada is obligated to respect these provisions under the rules of international law.

34. In response to the State’s position that the treaties are irrelevant to the resolution of this case, the petitioners maintain that they are material to the petition, because they demonstrate that “ever since the very first time that the European colonial powers imposed a border between what is now Canada and the United States, the rights of the Iroquois to bring their goods across the border, duty-free, have been specifically and explicitly recognized.”[FN19]

[FN19] Petitioners’ observations of October 21, 2005, para. 45.

Duties, tolls, taxes, tariffs

35. In response to the State’s contention about the historical imposition of tolls amongst Aboriginal groups, the petitioners argue that under Iroquois custom, tolls were not required to be paid if trading with other Iroquois nations.

36. The petitioners contend that the imposition of duties, taxes and tariffs may limit or even prevent trade. More particularly, the petitioners maintain that “the added burden caused by tariffs may have the effect of making a business non-profitable, thereby preventing the creation of businesses, and in some cases, contributing to the closure of businesses.”The petitioners refer to the trade liberalization movement (as exemplified by the establishment of the WTO) as supporting the proposition that tariffs have a limiting effect on trade. Considering the relative small size of the Iroquois population (55, 000), relative to the combined population of Ontario

and Quebec (20 million), the petitioners reject the State's assertion that goods imported duty-free by the Iroquois would pose any threat to protected industries in Canada.

37. With respect to the State's concern about border control, the petitioners state that they are open to negotiating border-control measures with the State, such as: the implementation of identification, declaration and search procedures with respect to persons bringing goods across the border, and limiting the location of border crossing where Mohawk of Akwesasne could bring in goods freely; control of goods once they are in Canada, such as the use of bonding trucks to transport goods to specific destinations; limitations as to the nature and quantity of goods that could be imported duty-free; and limitations as to the identity of people trading the goods, by means of trade licenses.

B. Position of the State

Article XIII of the American Declaration

38. The State contends that the general practice of trade, which is the essence of the petitioners' claim, is essentially an economic activity that is not protected under Article XIII of the American Declaration. In this regard, the State argues that even if some aspects of trade are cultural activities, the protection of cultural rights under Article XIII does not prejudice the ability of States to control their borders. In the State's view, taxes and tariffs do not prevent the practice of trade and are reasonable limits on the right of the individual to participate in the cultural life of the community.

39. The State argues that Article XIII protects the right of the individuals to participate in the community and to the protection of their moral and material interests in their literary, scientific, or artistic work. According to the State, Article XIII does not protect activities that are predominantly economic. The State further contends that trade in general, whether trade between cultural groups or trade internal to a culture, is an economic activity which is integral to most, if not all cultures and cannot be said to be a culturally distinctive or culturally significant activity protected under cultural rights.

40. For the State, the only bases for the petitioners' claim to a cultural right are that the Mohawk have historically been a trading culture and that they seek to trade within their culture. Neither basis, in the view of the State, is sufficient to ground a protection under Article XIII to trade in all manner of goods. In the State's view, the petitioners are not being denied the right to import goods into Canada for the purposes of trade; nor are they being denied the right to trade across the international border or to trade with other members of their culture, whether they reside in Canada or in the United States.

Definition of trade in the context of the petitioners' claim

41. In its pleadings, the State refers to the Oxford Dictionary definition of "trade" as the buying and selling of goods and services. Trade, according to the State, can occur within a country (internal trade) and across borders (international trade).[FN20] The State asserts the word "trade" is used not only to describe a single transaction, but also to describe a series of

transactions or the flow of goods, services, and in some cases, investment. The State considers that the factual matrix of the petitioners' complaint embraces both inter-cultural and intra-cultural elements, which are beyond the protection of Article XIII of the American Declaration, as elaborated below.

[FN20] State's submission on the merits, July 26, 2005, para. 15.

42. In considering the factual basis for the petitioners' claim for a right to (free) inter-cultural trade in a wide range of consumer goods, the State notes that the goods that formed the basis of the claim were first purchased in the United States, from non-Mohawk/Iroquois sources. The State asserts that the petitioners have provided no evidence that the imported goods were the product of individuals or communities belonging to the Mohawk/Iroquois culture[FN21]. Accordingly, the State argues that the first transaction point was inter-cultural, as it involved an exchange between non-Mohawk/Iroquois and Mohawk cultures. The State further contends that the act of importing the goods from the United States was not an exchange or transaction point in the trade transaction chain; the State adds that the petition is not based on a situation where members of the Akwesasne community in Canada wished to exchange goods (free of taxes, tariffs, and restrictions imposed at the border) with members of the Akwesasne community in the United States or with other Mohawk/Iroquois communities in the United States.

[FN21] Ibid. para.17.

43. The State points out that once the goods arrived in Canada, they were exchanged (apparently by gifting rather than by sale) to another Mohawk community in Canada; this constituted the second transaction in the transaction chain. According to the State, the motor oil imported by the petitioners was apparently sold to members of the Akwesasne community. The State contends that the exchange of goods with the other Mohawk community and the sale of motor oil within the Akwesasne community "can readily be seen to be intra-cultural to the extent that the two sides of these exchanges belonged to the same cultural group, the Mohawk/Iroquois." [FN22] . However, the State argues that "it is difficult to classify the trade (as a whole) as intra-cultural as the intra-cultural exchanges are but one point on a longer trade transaction chain that contains inter-cultural traders and the goods exchanged were inter-cultural goods". [FN23] The State emphasizes that the international border between Canada and the United States is not an impediment to the intra-cultural transaction within this trade transaction chain, and that the petitioners have not indicated any action on the part of the State that impedes trade within the Mohawk/Iroquois culture. [FN24]

[FN22] Ibid. para. 19.

[FN23] Ibid.

[FN24] Ibid. para. 20.

44. The State posits that “trade can rarely be said to be truly and only intra-cultural in nature”, and that to focus on one transaction in a longer trade transaction chain would constitute a failure to recognize the true nature of the trade in issue.”[FN25] The State argues that the trading transactions that formed the basis of the petition were not exclusively internal to the petitioner’s culture. The State further argues that the petitioners are not claiming a right of the Mohawk/Iroquois culture to trade Mohawk/Iroquois-produced goods between their communities; free from taxes and tariffs; nor have the petitioners limited their claim to ‘free’ intra-cultural trade of culturally significant Mohawk goods or even of all Mohawk-produced goods.[FN26]

[FN25] Ibid. para. 21.

[FN26] Ibid. para. 16.

45. With respect to the petitioners’ claim to protection of trade within the context of culture, the State argues that trade is a general practice of most if not every culture, and that trade is predominantly economic in nature. In and of itself, the State contends that trade has no culturally significant or culturally distinctive aspect. With respect to petition under consideration, the State argues that the petitioners have not demonstrated that the chain of transactions undertaken (between acquisition in the United States and exchange in Canada) have any aspects that are peculiar to the Mohawk/Iroquois trading practices, such as the nature or purpose of the goods traded.

46. The State takes the view that trade within a cultural group (intra-cultural trade) is too broad to merit cultural protection, arguing that “everyone would have a culturally protected right to trade free from the imposition of taxes, tariffs, or restrictions on imported goods as long as they traded within their own culture.” The State argues that the petitioners are simply claiming on behalf of their cultural group, a protection for an economic activity that is practiced by most, if not all cultures. In the absence of any culturally significant or culturally distinctive aspect of Mohawk/Iroquois trading practices, the State contends that inter-cultural trade, as a purely economic activity, is not protected by Article XIII of the American Declaration.[FN27]

[FN27] Ibid. paras. 25, 27.

47. The State submits that Article XIII protects only those aspects of trade that can be said to be culturally significant in that they reflect a distinctive aspect of a culture, such as trade in a culturally significant product or a culturally significant trading practice.[FN28]

[FN28] Ibid. para. 109.

Petitioners’ reliance on domestic litigation to support their claim

48. The State rejects the petitioners' contention that the Canadian courts recognized an aboriginal claim to duty-free trade during the domestic proceedings. The State asserts that Canada's Supreme Court overturned critical findings by the courts below in ruling that the Mohawk of Akwesasne do not have a constitutionally protected Aboriginal right to bring goods into Canada for trade without any obligation to pay taxes and tariffs generally imposed at the border[FN29]. The State further submits that it is not the role of the Commission to re-assess findings of fact made by the Supreme Court.

[FN29] The State refers to the Canada Supreme Court decision in *Mitchell v M.N.R.* [2001] 1 S.C.R. 911; para. 28 of the State's submission of July 26, 2005.

Petitioners' reliance on treaties to support their claim

49. The State contends that neither the Treaty of Utrecht (1713) nor the Jay Treaty (1794) provide any factual or legal support for the petitioners' claim. The State maintains that neither treaty is evidence that historically, the Mohawk imported goods into what is now Canada for the purpose of trade within the Mohawk/Iroquois communities in Canada free from the payment of taxes and tariffs. In this respect, the State contends that Article III of the Jay Treaty, on which the petition relies, was not intended to provide a general exemption for Aboriginal people in respect of goods brought across the border for the purpose of trade. The State argue that the Jay Treaty, while it was in force, was an exemption for all people in respect of furs brought across the international border for the fur trade. The State indicates that Article III also provides an exemption (while it was in force) for Aboriginal people in respect of personal goods brought across the international border for personal use. According to the State, the Jay Treaty is no longer in force; and that both the Treaty of Utrecht and the Jay Treaty have been superceded by intervening events, inconsistent legislation on both sides of the border and subsequent treaties between Canada and the United States in respect of their shared international border.[FN30]

[FN30] State's submission on the merits of July 26, 2005, paras.83, 84.

50. The State refers to the decision of the Supreme Court of Canada in the case of *Francis v The Queen*[FN31], to support its position. According to the State, the Supreme Court considered the question of whether Article III of the Jay Treaty applied so as to exempt an Aboriginal person resident on the St. Regis Indian Reserve (now Akwesasne) in Canada from the payment of tariffs on goods (a washing machine, a refrigerator, and an oil heater) brought into Canada from the United States. According to the State, the Supreme Court dismissed the claim, holding that there had been no legislation in force at the relevant times (1948-1951) implementing Article III of the Jay Treaty into international law.[FN32]

[FN31] *Francis v The Queen*, [1956] S.C.R.619.

[FN32] Ibid. para.85.

51. The State concludes that neither treaty can be said to have provided a general treaty right to free trade for Aboriginal people or to have been a reflection of any trade right particular to Aboriginal people, and that neither treaty made specific reference to the Mohawk/Iroquois people or their trading practices.

Taxes and border control

52. The State asserts that the imposition of taxes, tariffs, and restrictions on imported goods is an attribute of sovereignty, and that they constitute reasonable limits on trade. The State affirms that it operates a ‘trade neutral tax system’ and accordingly, the imposition of generally applicable and non-discriminatory taxes, tariffs and restrictions[FN33] at the border does not deny anyone or any cultural group the right to engage in trade, whether internal to their own culture or more generally.[FN34] The State points out that taxes and tariffs are also imposed for the purpose of regulating the movement of certain goods across its international border.[FN35] With reference to the Petitioner’s claim under Article XIII of the Declaration, the State contends that no right is absolute and this provision should be read together with Article XXVI[FN36] of the Declaration in particular, and Chapter Two of the Declaration in general. In this context, the State argues that no right can be protected to such an extent that it relieves anyone from the obligations of paying taxes or obeying generally applicable and non-discriminatory laws which are imposed for the benefit of the society in which they live.[FN37]

[FN33] The State asserts that its trade tax system is non-discriminatory; in this regard, the State explains that “Many taxes, such as the federal Goods and Services Tax and the excise tax, are levied at the border at the same rates as they levied on domestically produced goods”, and that “By imposing taxes equally on goods, regardless of the culture or other personal characteristics of their owners, the tax system is neutral in its effect on trade.” (State’s observations of July 26, 2005, para. 41)

[FN34] Ibid. para.14.

[FN35]The State cites the use of high tariffs to develop or protect certain domestic industries, such as its ‘supply-managed’ agricultural sectors. In this regard, the State indicates that domestic dairy, poultry, and egg products are protected by very high tariff rates (154.5%-313.5%) on products imported above certain volume levels. (State’s observations of July 26, 2005, para. 42). The State also points to licensing and quota requirements as forms of import and export restrictions placed on goods for the protection of public security or other valid purposes. For example, the State’s Export and Import Permits Act seeks to control the movement of goods such as firearms, explosive devices, and chemical, biological, or nuclear materials.

[FN36] Article XXXVI of the American Declaration provides: It is the duty of every person to pay the taxes established by law for the support of public services.

[FN37] State’s submission on the merits of July 26, 2005, para. 14.

53. With reference to the facts of the petition, the State notes that the claimed right of importation of goods into Canada, free of taxes, tariffs, and restrictions, is not confined to the particular goods that the petitioners were seeking to import. The State argues that the right contended for by the petitioners is wide enough to encompass other goods, such as restricted weapons, which would pose serious risks for public safety and security.

54. The State further argues that if a cultural minority were free to import goods (tax or tariff free) into Canada, based on a culturally protected right to engage in trade internal to their culture within Canada, this would give that cultural minority a competitive advantage not enjoyed by other trading cultures within the State. The State emphasizes that with respect to the petitioners, the transactions that formed the basis for the petition were not exclusively internal to the petitioners' culture.

55. Canada asserts that border control is a matter for the State, and that while the Mohawk of Akwesasne may have the authority to regulate matters of a purely local nature, they do not have the authority, or the capacity to control the movement of goods across the international border into or beyond its traditional territories in Canada.

56. The State submits that the imposition of applicable and non-discriminatory taxes, tariffs and restrictions does not prevent the petitioners from trading within the Mohawk/Iroquois culture within Canada, and that the petitioners have failed to demonstrate that the taxes and tariffs imposed on the goods imported would have made trading in Canada impossible or impeded it in any way.

57. In support of its position, the State refers to the UN Human Rights Committee's interpretation of Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[FN38], which the State submits ought to guide the Commission's approach to Article XIII of the American Declaration. According to the State, "the Human Rights Committee in its assessment of communications under article 27 of the ICCPR, has stated that only government measures (laws or actions) that amount to a denial of the right individuals to enjoy their minority culture are incompatible with the State obligations under article 27", and "government measures which have 'only limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of rights under article 27.'"[FN39] The State contends that the taxes and tariffs complained of by the petitioners have a similarly limited impact on the way of life and livelihood of the Mohawk of Akwesasne; accordingly, there is no violation of Article XIII, as alleged by the petitioners.

[FN38] Article 27 of the ICCPR provides: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

[FN39] Citing UNHRC, *Lansman et al v Finland* (No. 3), Communication No. 1023/2001, (15 April 2005) (U.N. Doc. CCPR/C/83/D/1023/2001, referring to *Lansman et al v Finland*, Communication No. 511/1992, (26 October 1994) U.N. Doc. CCPR/C/**/D/511/1992. The UNHRC examined the impact of government sanctioned logging on the grazing grounds of

Saami reindeer herders in Finland. The UNHRC recognized economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community, and accepted that reindeer herding of the Saami ethnic minority in question was an example. However, the HRC concluded that despite the reduction in grazing land (as a result of the logging), it did not amount to a denial of the right of the Saami to enjoy their culture (reindeer husbandry) in community with others.

58. As a matter of history, the State maintains that the history of the Mohawk demonstrates that tolls, gifts, tariffs, and restrictions at the borders of territories were part of the practice of trade amongst Aboriginal groups, including the Mohawk/Iroquois before the arrival of the Europeans, and that they continued to varying degrees, to be an aspect of Mohawk trading history to the present day. Accordingly, the State contends that the history of Mohawk trading practices does not support the petitioners' claim to a cultural right to bring trade goods across a territorial boundary free from the imposition of taxes, tariffs, or restrictions.[FN40]

[FN40] In support of this proposition, the State cites Bruce Trigger, *The Indians and the Heroic Age of New France*, The Canadian Historical Association Booklets, No. 30, Ottawa, 1977 c/o Public Archives, Ottawa, 1978; See State's submission of July 26, 2005, paras. 72, 74.

Limits on cultural rights

59. The State argues that the protection of culture in Article XIII of the American Declaration is subject to reasonable limits, given that no rights are absolute. The State contends that all human rights must be read in conjunction with other rights and are subject to reasonable limitations that take into account the rights of others and the significant interests of all.[FN41] Accordingly, the State maintains that:

even if trade is protected under Article XIII as a cultural practice (which the State denies), it is the liberty to engage in the practice of trade that is protected; a claim to intra-cultural trade free of tax or other impositions on goods imported into Canada, is an absolute right which need not yield to the rights of others or legitimate interests.[FN42]

[FN41] *Ibid.* para. 132, where the State cites Article XXVIII of the American Declaration: The rights of man are limited by the rights of others, the security of all, and by the just demands of the general welfare and the advancement of democracy.

[FN42] *Ibid.* para.133.

60. Generally applicable taxes, tariffs, and restrictions imposed on imported goods are reasonable limits that cannot be held to infringe cultural rights when they apply to all cultures without discrimination; this is particularly true where the cultural practice for which the protection is claimed (trade) is a practice of most, if not all cultures[FN43]; taxes and tariffs

benefit the general public through the collection of public revenues; in this respect, Article XIII must be read together with Chapter Two of the American Declaration as a whole, and with Article XXXVI[FN44], in particular, which recognizes the importance of public revenue for the support of public services.[FN45]

[FN43] Ibid. para. 134.

[FN44] Article XXXVI reads: It is the duty of every person to pay the taxes established by law for the support of public services.

[FN45] Ibid. para. 135.

61. In conclusion, the State submits that:

- a) the Mohawk of Akwesasne have not been denied the ability to trade and therefore no violation of Article XIII has been established; and
- b) the requirement that the petitioners and other members of the Mohawk community of Akwesasne pay generally applicable and non-discriminatory taxes and tariffs and satisfy any generally applicable and non-discriminatory restrictions imposed on the importation of goods does not violate their rights under Article XIII of the American Declaration as alleged;
- c) the protection of culture under Article XIII of the American Declaration does not obligate a member State of the OAS to exempt individuals or groups from the payment of taxes and tariffs on imported goods or to exempt them from generally imposed restriction on the importation of certain goods; and that in any event,, such taxes, tariffs, and restrictions do not deny anyone the right to participate in trade.

IV. ANALYSIS

Application and Interpretation of the American Declaration of the Rights and Duties of Man

62. The petitioners claim that the State has violated Grand Chief Mitchell's right to culture under Article XIII of the American Declaration of the Rights and Duties of Man. As the Commission concluded in its admissibility report in this matter, the Commission is competent to determine these allegations as against Canada. As the Commission indicated in its admissibility report in this matter, the American Declaration constitutes a source of international legal obligation for all member states of the Organization of American States, including Canada[FN46] Moreover, the Commission is empowered under Article 20 of its Statute and Articles 49 and 50 of its Rules of Procedure to receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration in relation to OAS member states that are not parties to the American Convention[FN47].

[FN46] Canada deposited its instrument of ratification of the OAS Charter on January 08,1990.

[FN47] See also I/A Court H.R., Advisory Opinion OC-10/89 Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A N° 10 (1989) [hereinafter

“Advisory Opinion OC-10/89”], paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49; OAS Charter, Articles 3, 16, 51, 112, and 150.

63. According to the jurisprudence of the inter-American human rights system, the provisions of its governing instruments, including the American Declaration, should be interpreted and applied in the context of developments in the field of international human rights law since those instruments were first composed with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged.[FN48]

[FN48] See Advisory Opinion OC-10/89, supra, para. 37; I/A Court H.R., Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Ser. A N° 16 (1999) [hereinafter “Advisory Opinion OC-16/99”], para. 114 (endorsing an interpretation of international human rights instruments that takes into account developments in the corpus juris gentium of international human rights law over time and in present-day conditions; Report N° 52/02, Case N° 11.753, Ramón Martínez Villareal (United States), Annual Report of the IACHR 2002 [hereinafter “Martínez Villareal Case”], para. 60. See also American Convention, Article 29(b) (“No provision of this Convention shall be interpreted as: [. . .] b. 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 to which one of the said states is a party”).

64. In particular, the organs of the inter-American system have previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments.[FN49] This includes the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.[FN50]

[FN49] See Advisory Opinion OC-10/89, supra, para. 37; Advisory Opinion OC-16/99, supra, para. 115; Report

N° 52/01, Case 12.243, Juan Raul Garza (United States), Annual Report of the IACHR 2000.

[FN50] See IACHR, Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 38; Garza Case, supra, paras. 88, 89 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

65. Accordingly, in determining the present case, the Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.

66. It is in light of these principles that the Commission will consider and apply the relevant provisions of the American Declaration in the present case.

Scope of Rights under Article XIII

67. The issue to be considered by the Commission is whether the State of Canada violated Article XIII of the American Declaration when it imposed taxes, tariffs, and restrictions on goods imported by the petitioners across the United States-Canada border.

68. It is uncontested by the parties that, on March 22, 1988, Grand Chief Michael Mitchell and members of his community imported a number of items into Canada from New York State. They entered with the following items: one washing machine, ten blankets, twenty bibles, used clothing, one case of motor oil, ten loaves of bread, two pounds of butter, four gallons of milk, six bags of cookies, and twelve cans of soup. All of the items were destined for the Mohawk territory of Tyendinaga in Canada, except the motor oil which was destined for a store in the Mohawk territory of Akwesasne on the Canadian side of the border. Grand Chief Mitchell was charged a duty of \$361.64 by Canadian customs officials but he refused to pay.

69. The petitioners claim that the imposition of this duty violated the right to trade freely across the international border, in breach of Article XIII. The petitioners identify this right as part of a larger right to take part in the cultural life of their community. The State, on the other hand, argues that the right to take part in the cultural life of the community does not encompass trade as an aspect of culture, and that Article XIII does not protect duty-free trade.

70. Article XIII provides that:

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

71. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

72. In the Commission's Report on The Human Rights Situation of the Indigenous People In The Americas[FN51], the Commission identified Article XIII of the American Declaration as representing one of the provisions that are of particular relevance to indigenous peoples. However, the Commission's previous jurisprudence on the rights of indigenous peoples has tended to be grounded in other rights, such as the right to property, the right to life, liberty, and personal security, the right to residence and movement, the right to health and well-being, the right to equality before the law[FN52].

[FN51] The Human Rights Situation Of The Indigenous People In The Americas, OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000.

[FN52] See for example, IACHR Resolution N° 12/85, Case 7615, Brazil, March 05, 1985; where the Commission found that the State of Brazil violated the rights of the Yanomani aboriginal people, by, inter alia, building a highway through their territory, failing to establish a reserve to protect their cultural heritage, authorizing companies to exploit the resources of the subsoil, and failure to provide adequate health care when the Yanomani people fell ill to contagious diseases. The Commission found that the displacement of the Yanomani people from their ancestral lands had “negative consequences for their culture, traditions, and customs”, and accordingly found violations of the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI). In IACHR Report N° 113/01. Case 11.140, Mary & Carrie Dann, United States of America, December 27, 2002, the Commission considered the case of Mary and Carrie Dann, members of the Western Shoshone People of the United States. The Petitioners complained that the State had interfered with the Danns’ use and occupation of their ancestral lands by purporting to appropriate the lands as federal property through an unfair procedure, and by physically removing and threatening to remove the Danns’ livestock from the lands, and by permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory. The Petitioners contended that the State’s actions in relation to the Dann land and the Western Shoshone ancestral land more broadly violated their right to protection of cultural integrity, which they in turn claimed was affirmed in the American Declaration through Article XXII (right to property), Article III (right to religious freedom), Article VI (right to family and protection thereof) and Article XIII (right to take part in the cultural life of the community). The Commission did not expressly make any finding on the question of cultural integrity, but concluded that the State failed to ensure the Danns’ right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.

73. By way of comparison to Article XIII of the American Declaration, Article 27 of the International Covenant on Civil and Political Rights provides: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

74. The Commission notes that Article XIII of the American Declaration, unlike Article 27 of the ICCPR, is not confined to ethnic, religious or linguistic minorities, but is of more universal application to all persons. Nevertheless, the Commission considers that the jurisprudence emanating from Article 27 of the ICCPR provides a useful interpretive tool in addressing the question of whether the right to cross-border trading as alleged by the petitioners is protected under Article XIII of the American Declaration, as part of a more expansive right to enjoy the benefits of one’s culture.

75. The United Nations Human Rights Committee (UNHRC), in a series of decisions, has had the opportunity to interpret Article 27, when addressing the question of whether an economic

activity might be protected as a cultural activity (of an ethnic or other minority). In *Mahuika et al. v. New Zealand*[FN53], the UNHRC reaffirmed that economic activities (of a minority group) may come within the ambit of article 27, if they are an essential element of the culture of a community.[FN54]

[FN53] Communication No 547/1993 27 October 2000 CCPR/C/70/D/547/1993.

[FN54] In this regard, the UNHRC cited previous decision that reflected this jurisprudence: *Kitok v. Sweden*, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, paragraph 9.2. and *Länsman v Finland* and *Lansman v Finland* no. 2; cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).

76. In a series of three cases[FN55] brought by indigenous Sami reindeer herders (from Finland), the UNHRC addressed the right to cultural protection under Article 27 of the ICCPR. In the first case (*Lansman et al v Finland*), the Sami reindeer herders complained that the quarrying of stone on the flank of the Etelä-Riutusvaara mountain and its transportation through their reindeer herding territory would violate article 27 of the Covenant; in particular their right to enjoy their own culture, which had traditionally been and remains essentially based on reindeer husbandry. In the second and third cases, the Sami reindeer herders complained about logging activities authorized by the State over their traditional herding territory. The Sami reindeer herders complained that these activities interfered with their economic livelihood. While the UNHRC did not find a violation of Article 27 in any of the cases, it nevertheless observed in all of the cases that:

- a) The Sami reindeer herders are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture;
- b) economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community;
- c) that reindeer husbandry is an essential element of the culture of the Sami herders;

[FN55] *Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Lansman v Finland* no. 2; Communication No. 671/1995 30 October 1996 CCPR/C/58/D/671/1995; *Lansman v Finland*, no. 3 Communication No. 1023/2001, 15 April 2005, CCPR/C/83/D/1023/2001.

77. The UNHRC also observed that “ Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27” but that “measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.”[FN56]

[FN56] *Lansman v Finland*, no. 3 Communication No. 1023/2001, 15 April 2005, CCPR/C/83/D/1023/2001, para. 10.1.

78. In turning to Article XIII of the American Declaration, the Commission would consider that cross-border trading by indigenous peoples who are divided by a border, might, in some situations be similarly amenable to the sort of protection afforded under Article 27 of the ICCPR. These situations might include trade in specific cultural goods (for example goods manufactured by an indigenous people) or where they might be culturally distinctive practices associated with cross-border trading that are peculiar to, and integral to the cultural life of an indigenous people. Additionally, the Commission considers that Article XIII may be invoked not only in respect of culturally significant aspects of trade, but also with respect to trade restrictions that have the effect of disproportionately restricting or discriminating against a trade practice.

79. The Commission recognizes that Article XIII of the American Declaration can protect those aspects of trade that can be said to be culturally significant in that they reflect a distinctive aspect of a culture, such as trade in a significant product or a culturally significant trading practice. In this case, the Commission observes that the petitioners allege that the trade activity in question is a culturally significant practice and not that the goods themselves are culturally significant. However, the Commission need not determine if the trade undertaken by the petitioners is a culturally significant practice, because independently of this matter, it observes that the petitioners did not prove in what measure the taxes, duties, and restrictions imposed by the State constitute a disproportionate restriction, or affect in a discriminatory manner, the type of trade undertaken by the petitioners.

80. On the issue of the impact of taxes, tariffs, and restrictions, the Commission notes that the petitioners have not contended that these impositions by the State served to unfairly prevent or discriminate against the trading activity undertaken by Grand Chief Michael Mitchell. Instead, in more general terms, the petitioners contend that “tariffs certainly are an important factor in limiting trade...as evidenced by the trade liberalization movement of which Canada has been one of the main proponents.” [FN57] The petitioners further submit that tariffs not only limit trade but may “on a micro-level ...has the effect of making a business unprofitable, thereby preventing the creation of businesses and in some cases contributing to the closure of businesses.”[FN58] The petitioners also submit that considering the relatively small size of the Iroquois population (55, 000); compared to the combined population of Ontario and Quebec (20 million), goods imported duty-free by the Iroquois would not pose any threat to protected industries in Canada.

[FN57] Petitioners’ submission of October 21, 2005, para. 64.

[FN58] *Ibid.* para. 67.

81. While the petitioners’ general assertions about the nature of tariffs may be true, it is not evident in the record before the Commission that the trade undertaken by Grand Chief Michael Mitchell was adversely affected by the tax restrictions in such a manner that it establishes a violation of Article XIII of the American Declaration. In this regard, the Commission considers

the State's assertion that the imposition of applicable and non-discriminatory taxes, tariffs and restrictions does not prevent the petitioners from trading within the Mohawk/Iroquois culture within Canada, and that the petitioners have failed to demonstrate that the taxes and tariffs imposed on the goods imported would have made trading in Canada impossible or impeded it in any way.

82. In this regard, the Commission reaffirms that all human rights must be read in conjunction with other rights and are subject to reasonable limitations that take into account the rights of others and the interests of all.[FN59] The Commission further accepts that a State is entitled to exercise control over its borders through the mechanisms of taxes, tariffs and restrictions, provided that such mechanisms do not infringe on the rights of its citizens. In the Commission's view, taxes, tariffs, and restrictions imposed on imported goods, per se, are reasonable limits that cannot be held to infringe cultural rights when they apply to all persons, regardless of their ethnicity or culture, and where it has not been demonstrated that such measures have a disproportionate or discriminatory impact on a particular group.

[FN59] Article XXVIII of the American Declaration: The rights of man are limited by the rights of others, the security of all, and by the just demands of the general welfare and the advancement of democracy.

83. Based on the foregoing, the Commission concludes that there was no evidence that the State violated Article XIII of the American Declaration because it was not proven that the restrictions imposed by the State were discriminatory or disproportionately restrictive of the petitioners' cultural and trade practices.

V. CONCLUSIONS

84. On the basis of the findings of fact and law set forth above, the Commission finds that it was not proven that the State of Canada violated the rights of the petitioners as alleged under the American Declaration.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. That it was not proven that the petitioners' rights under Article XIII were violated by the State of Canada.
2. To transmit this Report to the Parties.
3. To publish this Report and include it in its Annual Report to the General Assembly of the Organization

Done and signed in the city of Washington, D.C., on the 25th day of the month of July, 2008.
(Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Chairwoman; Felipe

provided by worldcourts.com

González, Second Chairman; Florentin Meléndez, Victor E. Abramovich, Sir Clare K. Roberts, and Paulo Sérgio Pinheiro, Commissioners.